Case Law Update 2016-2020 Cumulative Edition

(Contains all 2016-2020 Case Law Update Cases)

Prepared by:

Greg Mermelstein
Deputy Director & General Counsel
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

Editor's Note

Dear Readers:

This cumulative edition of *Case Law Update* contains the 2016-2020 Case Law Updates combined into this single volume. It contains all Missouri appellate opinions from January 1, 2016 to December 31, 2020, which resulted in reversals, or in my opinion, were otherwise "noteworthy." Some federal and foreign state cases are also included from the Bloomberg Law's *Criminal Law Reporter* and West's *Criminal Law News* (WL).

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

This edition does not track subsequent history on any cases. Some cases have been overruled, but are left in this edition for historical purposes. That's particularly true of Missouri Court of Appeals' opinions, which were subsequently transferred to the Supreme Court, and thus, no longer good law. **Before citing a case, be sure to Instacite it to be sure it remains good law.**

Sincerely,

Greg Mermelstein
Deputy Director / General Counsel

Abandonment (Rule 24.035 and 29.15)

Milner v. State, 551 S.W.3d 476 (Mo. banc July 17, 2018):
Where 24.035 counsel filed an amended motion late because counsel stated that she had been trying to obtain certain records, the motion court clearly erred in dismissing the case rather than conducting an abandonment inquiry.
Facts: Movant timely filed a *pro se* 24.035 motion. Counsel was appointed but filed an amended motion late because counsel said she had been trying to obtain certain records. The State filed a motion to dismiss, which the motion court granted.
Holding: Counsel's filing of the late amended motion creates a presumption of abandonment, which required the motion court to conduct an abandonment hearing, rather dismiss the case. If the late filing was the fault of Movant, the court should rule only on the timely *pro se* claims. But if the late filing was the fault of counsel, the court may accept the untimely amended motion and rule on those claims.

Latham v. State, 2018 WL 4326406 (Mo. banc Sept. 11, 2018):
(1) A statement in lieu of amended motion must be filed within the time limit for filing an amended motion to avoid a presumption of abandonment; (2) if postconviction counsel failed to act on Movant's behalf by failing to file any amended motion or statement in lieu, a motion court should appoint new counsel and allow new counsel time to file an amended or statement; (3) if postconviction counsel acted on Movant's behalf but did so untimely, the court should treat the late statement as timely filed; but (4) where Movant timely filed a "reply" to the late statement, the motion court must determine whether Movant's initial pro se motion could have been made legally sufficient by amendment and whether there were other grounds for relief that could have been pleaded, and if so, the court must direct postconviction counsel to file an amended motion.
Facts: Movant timely filed a *pro se* 24.035 motion. Counsel then filed a late statement in lieu of amended motion. Three days later, Movant filed a "reply," although he did not name it as such. After the motion court denied relief on the merits, Movant appealed.
Holding: The filing of the statement in lieu of amended motion late creates a presumption of abandonment. Cases to the contrary should no longer be followed. A statement in lieu of amended motion must be filed within the time for filing an amended motion in order to ensure that counsel has fulfilled their responsibilities under the Rule, and to allow Movant to file a timely reply to a statement in lieu. Rule 24.035(e) gives movants 10 days after a statement in lieu to file a reply. Here, Movant filed a reply within three days of the statement in lieu. Although Movant did not denominate his motion a "reply" – he called it a pro se amended motion -- the Court will treat it as a "reply." The reply listed various new claims of ineffective assistance of plea counsel. Here, the case must be remanded for an abandonment inquiry because of the late statement in lieu. The question then becomes remedy. Several possibilities may arise in these situations. If postconviction counsel fails to act on a movant's behalf by failing to file any amended motion or statement in lieu, a motion court should appoint new counsel and allow new counsel time to file an amended or statement. If postconviction counsel acted on a movant's behalf but did so untimely, the court should treat the late statement (or amended) as timely filed. But where a movant timely files a "reply" to the statement in lieu, the motion court must determine whether the movant's initial *pro se* motion could

have been made legally sufficient by amendment and whether there were other grounds for relief that could have been pleaded, and if so, the court must direct postconviction counsel to file an amended motion.

Watson v. State, 2018 WL 415049 (Mo. banc Jan. 16, 2018):
Holding: Where counsel in 29.15 case requested a 45-day extension of time "from the date of filing" of the extension request, which the motion court granted, this was not an implicit granting of an "additional" 30 days authorized under 29.15, but operated only as granting 45 days from the "date of filing" of the extension motion (which was less than the "additional" 30 days that could have been requested). Amended motion filed later than 45 days was untimely and case remanded for abandonment hearing.

Bearden v. State, 530 S.W.3d 504 (Mo. banc Oct. 31, 2017):
Holding: Time for filing an amended 24.035 motion begins when a "complete transcript consisting of the guilty plea and sentencing," Rule 24.035(g), is filed, not when a later probation revocation transcript is filed; amended motion was untimely and case must be remanded for abandonment hearing.
Discussion: Movant (who had received an SES and probation, which was later revoked) contends that the probation revocation transcript is part of his sentencing, so the time for the amended motion did not begin until it was filed later. Because the judgment in Movant's criminal case was final when the sentence was entered, the subsequent civil action to revoke probation is not part of the previous sentencing hearing. Rule 24.035(g) expressly defines "complete transcript" as the "guilty plea and sentencing hearing."

Gittemeier v. State, 527 S.W.3d 64 (Mo. banc Sept. 12, 2017):
(1) The "abandonment doctrine" does not apply to privately retained counsel; thus, where privately retained counsel filed Movant's amended motion more than 90 days after the Public Defender had originally been appointed, only the pro se motion could be considered; and (2) motion court could not vacate appointment of the Public Defender and restart the clock for private counsel to file an amended motion.
Facts: Movant filed a pro se 29.15 motion. The court appointed the Public Defender. Eight days before an amended motion was due, the Public Defender filed a motion to withdraw and rescind appointment because Movant had hired private counsel. The motion court granted this, and private counsel entered the next day. The motion court granted private counsel 60 days to file an amended motion, which private counsel did.
Holding: Rule 29.15's time limits cannot be extended by the motion court beyond what the Rule allows. The withdrawal of the Public Defender and appointment of a new attorney does not affect the time limit for filing an amended motion. The time limit began when the Public Defender was first appointed. The origins of the abandonment doctrine show that it was intended to provide a remedy only for lack of action by *appointed* counsel. The doctrine represents a balancing between Missouri's refusal to recognize claims of ineffective assistance of postconviction counsel and the problem of *appointed* counsel failing to act under Rule 29.15(e). The abandonment doctrine does not apply to privately retained counsel.

Creighton v. State, 520 S.W.3d 416 (Mo. banc April 25, 2017):
Holding: (1) Where 29.15 court "notified" the Public Defender that a pro se postconviction had been filed, this was not an "appointment" triggering Rule 29.15(g)'s time limit for filing an amended motion; the time limit was triggered by counsel's later entry of appearance; and (2) where motion court denied relief on pro se claims on grounds they were "illegible," judgment is reversed because record shows they are legible.

Hopkins v. State, 519 S.W.3d 433 (Mo. banc April 25, 2017):
Holding: Where 29.15 court "notified" Public Defender that a pro se 29.15 motion had been filed and counsel later entered an appearance, the "notification" was not an "appointment," so counsel's amended motion was due 90 days from the later entry date.

Williams v. State, 2020 WL 2529532 (Mo. App. E.D. May 19, 2020):
(1) Even though Public Defender began representation in Rule 29.15 case and had not yet been granted leave to withdraw, where Private Counsel entered the case and failed to file an amended motion on time, there is no abandonment because the abandonment doctrine does not apply to private counsel; (2) even though Private Counsel later withdrew from case and case returned to Public Defender, Public Defender could not file an amended motion because there had been no abandonment; but (3) where Public Defender failed to appear at evidentiary hearing, court clearly erred in dismissing case for failure to prosecute, because Rule 29.15(j) requires court issue Findings.
Facts: Movant was originally represented by Public Defender, who requested an extension of time to file an amended motion. However, before any amended motion was filed, Movant retained Private Counsel. Private Counsel entered the case but never filed an amended motion. Then, after the time expired for filing an amended, Private Counsel withdrew from case. The court then reappointed the Public Defender and granted time to file an amended motion. Public Defender then filed an amended motion. When an evidentiary hearing was set, Public Defender failed to appear. Court dismissed case for failure to prosecute.
Holding: (1) The amended motion filed in this case wasn't timely, and there was no abandonment that can deem it timely. The Supreme Court has previously held that the abandonment doctrine does not apply to private counsel. Thus, even though Public Defender had not yet been granted leave to withdraw at the time Private Counsel failed to file an amended motion, Movant was being represented by Private Counsel at that time, and cannot claim abandonment. Movant chose to hire Private Counsel and – like all civil litigants – thereby assumed the risk of Private Counsel's actions. (2) Even though Private Counsel later withdrew and the case returned to Public Defender, the time for filing a timely amended motion had already passed. Movant cannot use abandonment to remedy this. But (3) where Public Defender failed to appear for the evidentiary hearing, court erred in dismissing the case. Rule 29.15(j) requires the court to issue Findings.

Brown v. State, 2020 WL 2844231 (Mo. App. E.D. June 2, 2020):
Holding: Even though postconviction counsel filed a motion stating that the late filing of the amended 29.15 motion was counsel's fault, where the motion court failed to conduct an independent abandonment hearing and merely acknowledged in its Findings

that the amended motion was filed out of time, case must be remanded for an abandonment inquiry, at which a record sufficient to conduct appellate review of the abandonment issue must be made.

Mitchell v. State, 2020 WL 3422154 (Mo. App. E.D. June 23, 2020):
Holding: (1) Where 24.035 Movant did not plead his legal excuse (third-party interference) for the untimeliness of his *pro se* motion in his amended motion, the issue was waived; (2) the failure to plead the legal excuse was not "abandonment" by postconviction counsel; abandonment occurs only where counsel takes no action on Movant's case, is aware of the need to file an amended motion but fails to file one timely, or prevents Movant from timely filing an original *pro se* motion.

State v. Martin, No. ED107773 (Mo. App. E.D. Aug. 18, 2020):
Holding: Even though 24.035 Movant's counsel requested an extension of time to file an amended motion, where the record does not reflect that the extension motion was ever ruled on, the amended motion was untimely and case must be remanded for an abandonment hearing.

Showalter v. State, 2020 WL 5523780 (Mo. App. E.D. Sept. 15, 2020):
Holding: Where appointed counsel filed Movant's amended 24.035 motion late, case must be remanded for abandonment hearing.

Johnson v. State, 2020 WL 7038593 (Mo. App. E.D. Dec. 1, 2020):
Holding: (1) Where 29.15 counsel filed an amended motion late but claimed it was not due to the fault of Movant and the State did not reply (object), the motion court's finding of "no abandonment," without conducting a hearing, did not provide a sufficient enough record for the appellate court to determine if the finding of "no abandonment" was clearly erroneous; case remanded for abandonment inquiry; and (2) even though motion court ruled on both the pro se and amended motions, case must be remanded for abandonment inquiry because the outcome of that determines which motion controls; if there was "no abandonment," the amended motion claims should not be adjudiciated.

Johnson v. State, 2020 WL 7034419 (Mo. App. E.D. Dec. 1, 2020):
Holding: Even though Movant's direct appeal was decided in 2018 and one count was dismissed by the trial court on remand from direct appeal (resulting in a new written sentence and judgment), Movant's Rule 29.15 case was governed by the 2017 version of Rule 29.15, because that was when he was originally sentenced on the counts at issue; the 2017 version of the Rule provided for only one extension of time to file an amended motion; thus, where counsel was granted two extensions of time in 2018-19, the amended motion was filed late and case must be remanded for abandonment hearing.
Discussion: Rule 29.15(m)(2018) states that the 2018 version of the Rule shall apply to cases where sentence is pronounced on or after January 1, 2018. Sentences pronounced before January 1, 2018, remain governed by the 2017 version of Rule 29.15. Here, Movant was originally sentenced in 2017, so that version of the Rule applies to him. That version allowed only one extension of time to file an amended motion. And even though Movant had one count dismissed on remand in 2018 (resulting in a new sentence

and judgment), this did not mean that the 2018 version of the Rule applied, because Movant merely had his conviction on one count vacated. His sentences on the other counts remained the same.

Brunnworth v. State, 2019 WL 4263597 (Mo. App. E.D. Sept. 10, 2019):
Holding: Where appointed counsel filed 24.035 amended motion late (counting both from when counsel entered an appearance and when counsel was appointed) and the motion court made no inquiry into abandonment, case is remanded for determination if Movant was abandoned by counsel.

Barber v. State, 2019 WL 925505 (Mo. App. E.D. Feb. 26, 2019):
Holding: Even though (1) Rule 29.15 counsel submitted a "timeliness motion" which asked the motion court to treat counsel's untimely amended motion as timely filed due to abandonment and (2) the court the granted the motion without comment, the record is insufficient for appellate court to independently determine if counsel abandoned Movant or if Movant was himself at fault for the untimely filing. Case remanded for abandonment hearing.
Discussion: A sufficient record must be made in the motion court for an appellate court to determine that a finding of abandonment is not clearly erroneous. Here, the motion court merely rubber-stamped counsel's abandonment motion without testimony from counsel or Movant as to who was at fault for the late filing. The Southern District has approved granting a "timeliness motion" but only where it is verified by counsel, so that the court can credit counsel's statements in the motion. But here the "timeliness motion" was not verified.

Baker v. State, 2018 WL 6613430 (Mo. App. E.D. Dec. 18, 2018):
Holding: Where nothing in the record shows that the motion court ever granted counsel's motion requesting a 30-day extension to file an amended 24.035 motion, counsel's motion was late and case must be remanded for abandonment hearing.

White v. State, 2018 WL 3733577 (Mo. App. E.D. Aug. 7, 2018):
Holding: Even though 29.15 counsel filed the amended motion only one day late and the motion court held an evidentiary hearing and denied relief, the untimely filing requires that the case be remanded for an abandonment inquiry to determine if the amended motion can be adjudicated.

Lampkin v. State, 2018 WL 441136 (Mo. App. E.D. Sept. 18, 2018):
Holding: Even though 24.035 counsel (1) filed a motion to deem the amended motion timely filed on grounds that counsel was at fault for the late filing, and (2) the motion court granted counsel's motion without a hearing, case must be remanded for an abandonment hearing because counsel's motion was not under oath and Movant was not informed of counsel's motion or given an opportunity to reply.
Discussion: When an amended motion is filed late, the motion court must conduct an independent abandonment inquiry. The court should inquire not only of counsel, but also ensure Movant is informed of counsel's action and given an opportunity to reply. Here, the motion court simply "rubber stamped" counsel's motion by granting it without a

hearing. This was not an independent inquiry establishing an adequate record for appellate review of the abandonment issue. Although the Southern District has approved the procedure used here in one case, the motion filed by counsel in that case was *under oath*, thus allowing that motion court to implicitly credit counsel's averment that the late filing was the fault of counsel.

Guerra-Hernandez v. State, 2018 WL 1385713 (Mo. App. E.D. March 20, 2018):
(1) Even though the motion court – after notice of appeal had been filed – ruled that 24.035 counsel's amended motion was timely-filed, the motion court had no jurisdiction to determine that after the notice of appeal had been filed, and case must be remanded for abandonment hearing; and (2) an independent abandonment inquiry by a motion court should include testimony from appointed counsel and Movant, in order to create a sufficient record to demonstrate that the motion court's abandonment finding is not clearly erroneous.
Facts: 24.035 counsel filed a motion for extension of time to file an amended motion, which was never ruled on. Later, the motion court entered Findings denying the amended motion without discussing whether the amended motion was timely. Counsel then filed a notice of appeal. After that, counsel filed a motion in the motion court to consider the amended motion to be timely filed; counsel acknowledged the amended motion was untimely but said Movant was not to blame for the untimeliness. The motion court then deemed the amended motion to be timely-filed.
Holding: The motion court lost jurisdiction of the case once notice of appeal was filed. The motion court was required to have jurisdiction in order to conduct an abandonment inquiry. Even if it had jurisdiction, the motion court did not conduct the abandonment inquiry in a manner to create a sufficient record on appeal for appellate review. The independent abandonment inquiry required the motion court to hear not only from appointed counsel but also from Movant. Rubber-stamping appointed counsel's motion is not a sufficient inquiry and does not provide a sufficient record to demonstrate on appeal that the motions court's abandonment determination is not clearly erroneous. Case remanded for abandonment hearing.

Maguire v. State, 2017 WL 4364474 (Mo. App. E.D. Oct. 3, 2017):
Holding: (1) Time for filing amended 29.15 motion began when counsel was first appointed, and even though Movant later hired private counsel, motion court had no authority to "rescind" appointment of appointed counsel (Public Defender) and grant private counsel additional time to file amended motion beyond original time limit when Public Defender was first appointed; (2) private counsel's amended motion filed beyond original time limit was untimely and cannot be considered; (3) Movant cannot use "abandonment doctrine" to have amended motion be deemed timely because "abandonment doctrine" does not apply to privately-retained counsel under *Gittemeier*; and (4) motion court can consider timely-filed *pro se* motion, but because motion court did not issue Findings on all *pro se* claims, the judgment is not final and appeal must be dismissed.

Milner v. State, 2017 WL 5580219 (Mo. App. E.D. Nov. 21, 2017):
Holding: Where Movant's 24.035 counsel filed a motion stating that the late filing of the amended motion was the fault of counsel, motion court clearly erred in denying the late filing on grounds that Movant "fail[ed] to act" and "dither[ed] about" without granting Movant an evidentiary hearing on the abandonment issue; case remanded for hearing on abandonment.

Jones v. State, 519 S.W.3d 879 (Mo. App. E.D. May 9, 2017):
Holding: Where (1) Movant timely filed a pro se 29.15 motion; (2) later, public defender entered an appearance (without an "appointment"), requested a 30-day extension of time, and filed an amended motion within that time, the amended motion is timely because *Creighton* (Mo. banc April 25, 2017) holds that the time for filing an amended motion for a public defender who has not been appointed but who enters an appearance runs from the time of entry.

Norman v. State, 509 S.W.3d 846 (Mo. App. E.D. Jan. 24, 2017):
Holding: (1) Where 29.15 motion court never ruled on counsel's request for an extension of time to file amended motion, the amended motion was untimely and case must be remanded for abandonment hearing; and (2) even though counsel requested more than one extension of time to file amended motion, a motion court can grant only *one* extension of time under Rule 29.15(g).

Ford v. State, 2017 WL 410236 (Mo. App. E.D. Jan. 31, 2017):
Holding: Even though counsel filed an amended motion 90 days after entry of appearance, and even though the motion court's findings stated the amended motion was "timely filed," where counsel was appointed and the record did not show the appointment date, appellate court cannot determine if amended motion is timely (because timeliness may be controlled by an earlier appointment date); case remanded for "completion of the record."

Miller v. State, 2017 WL 1056215 (Mo. App. E.D. Feb. 7, 2017):
Holding: Even though counsel filed Movant's amended 24.035 motion late, where (1) counsel explained at the evidentiary hearing that the motion was filed untimely because of problems he encountered with e-filing and fax filing, and (2) the motion court granted leave to file the amended motion late, this sufficed in substance as an abandonment hearing, and case need not be remanded for an abandonment hearing.

Stafford v. State, 2017 WL 676811 (Mo. App. E.D. Feb. 21, 2017):
Holding: Even though counsel filed an amended 29.15 motion 90 days after entering an appearance, where counsel stated she was "appointed" but the record did not indicate when, it is possible that the amended motion is untimely if counsel was "appointed" earlier than her entry of appearance; thus, case must be remanded for abandonment hearing.

Alexander v. State, 2017 WL 678643 (Mo. App. E.D. Feb. 21, 2017):
Holding: (1) Even though counsel filed an amended 29.15 motion 90 days after entering an appearance, where counsel stated he was "appointed" but the record did not indicate when, it is possible that the amended motion is untimely if counsel was "appointed" earlier than his entry of appearance; thus, case must be remanded for abandonment hearing; (2) remand for abandonment hearing is required even though motion court's findings stated that the amended motion was "timely filed," because timeliness is not supported by any date of appointment in the record.

Craigg v. State, 2017 WL 676788 (Mo. App. E.D. Feb. 21, 2017):
Holding: Where the record in 24.035 appeal did not reflect when the transcript of the guilty plea was filed and such date controlled whether the amended motion was timely, case must be remanded for abandonment hearing.

Rhodes v. State, 2017 WL 900000 (Mo. App. E.D. March 7, 2017):
Holding: Where the record on appeal did not show the date that the guilty plea transcript was filed, and also did not show whether a 30-day extension of time had been granted, appellate court was unable to determine if 24.035 amended motion is timely; case remanded for findings on whether amended motion is timely and possible abandonment hearing.

Rice v. State, 2017 WL 895957 (Mo. App. E.D. March 7, 2017):
Holding: Where the record on appeal did not show the date of appointment for 29.15 counsel, appellate court could not determine if amended motions was timely, and case is remanded for "completion of the record" and possible abandonment hearing.

Politte v. State, 2017 WL 977260 (Mo. App. E.D. March 14, 2017):
Holding: Where the record on 24.035 appeal was unclear as to when the guilty plea transcript had been filed, with the record indicating two possible dates, and the date of filing controlled whether the amended motion was timely, case must be remanded for abandonment hearing.

Edwards v. State, 2017 WL 1056215 (Mo. App. E.D. March 21, 2017):
Holding: Where 29.15 counsel filed amended motion out of time, case must be remanded for abandonment hearing.

Coleman v. State, 2017 WL 1056214 (Mo. App. E.D. March 21, 2017):
Holding: Even though motion court granted an extension of time to file amended 29.15 motion and counsel filed the motion within 90 days of entry of appearance, where the record on appeal does not reflect the date counsel was appointed, case must be remanded for completion of record and possible abandonment hearing because the 90-day time limit ran from date of appointment (not entry).

White v. State, 2016 WL 7321750 (Mo. App. E.D. Dec. 13, 2016):
Holding: Even though counsel requested a 30-day extension of time to file amended 29.15 motion, where nothing in the record reflected that the extension was ever granted,

appellate court cannot presume the extension was granted, and case must be remanded for an abandonment hearing.

Thomas v. State, 2016 WL 7388624 (Mo. App. E.D. Dec. 20, 2016):
Even though 24.035 court purported to "vacate and reappoint" the public defender due to a conflict of interest, the court had no authority to do this; the time for filing an amended motion ran from the prior date that counsel was appointed and a transcript filed.
Facts: Movant timely filed a pro se 24.035 motion. Counsel was appointed on May 12, 2015. On July 7, transcripts were filed, making an amended motion due October 5. In late September, the motion court vacated and reappointed the public defender due to a conflict of interest, and granted another 30-day extension. New counsel filed an amended on Dec. 28.
Holding: Contrary to the impression the court and public defender appear to have been under, the transfer of a PCR case from one public defender to another due to conflict of interest does not affect the time limits for filing an amended motion. Nor did the rescission of an original appointment order and a new order of appointment restart the time periods or otherwise relieve the public defender of its duties. The grant of another extension of time was clearly prohibited by the Rule. The amended motion remained due Oct. 5. Case remanded for abandonment hearing.

Conaway v. State, 2016 WL 7388595 (Mo. App. E.D. Dec. 20, 2016):
Even though 29.15 motion court purported to "re-appoint" the Public Defender due to a conflict of interest and granted another 30 days to file an amended motion, the court had no authority to do this; the time for filing the amended motion ran from the earlier valid appointment date.
Facts: In 2014, Movant filed a premature Rule 29.15 motion. The court appointed counsel in 2014. Movant subsequently filed a late notice of appeal and had a direct appeal. The mandate issued on June 19, 2015. On August 19, the court "re-appointed" the public defender due to a conflict of interest and granted an additional 30 days for an amended motion. Replacement counsel entered on September 1, and filed an amended on November 16.
Holding: The 90-day clock for filing an amended began when the mandate issued on direct appeal. Thus, the deadline for filing was September 17. A motion court can grant only one extension of time. We acknowledge the hardship of today's ruling given the Public Defender's crushing caseload and resultant emergencies assailing its lawyers on a daily basis. Replacement counsel here had just two weeks to prepare an amended motion in addition to her existing workload. The motion court's extension was well-intended, but as a matter of law, the extension was beyond the court's authority to grant. Case remanded for an abandonment hearing.

Huffman v. State, 2016 WL 3731454 (Mo. App. E.D. July 12, 2016):
Holding: Even though (1) 29.15 counsel filed a motion for a 30-day extension of time, and (2) the motion court's Findings deemed the amended motion to be "timely," appellate court remands for an abandonment hearing because there was no indication that the motion court had ever actually granted the extension motion, and the motion court cannot

retrospectively grant it; thus, the amended motion was untimely, and an abandonment inquiry is necessary.

Wilson v. State, 2016 WL 4362129 (Mo. App. E.D. Aug. 16, 2016):
Holding: Even though first public defender withdrew from case and 29.15 court granted second public defender a second extension of time to file an amended motion, Rule 29.15(g) authorizes only one extension of time for a total time of not more than 90 days from appointment of the original (first) public defender; the amended motion was untimely, and case must be remanded for abandonment hearing.

Usry v. State, 2016 WL 5030350 (Mo. App. E.D. Sept. 20, 2016):
Holding: Even though the docket sheets reflected a later appointment of counsel than the file-stamped written order appointing counsel, the date of the written order and file-stamp control; amended motion was untimely and case remanded for abandonment hearing.

Propst v. State, 2016 WL 5030353 (Mo. App. E.D. Sept. 20, 2016):
Where Public Defender told 24.035 Movant that Public Defender would file his Form 40 for him and Movant signed a Form 40 for Public Defender to file, but Public Defender then filed it late, motion should be deemed timely filed under third-party active interference doctrine; Movant had done all he could by giving Form 40 to Public Defender within time for filing it.
Facts: After Movant's probation was revoked, a Public Defender met with Movant, told him he had claims for postconviction relief, and provided Movant a completed Form 40 for him to sign. Movant signed it and gave it to Public Defender, who said he would file it. However, Public Defender then filed it late. The motion court dismissed the case as untimely.
Holding: The "abandonment doctrine" does not apply here because it applies to late-filed *amended* motions only. Instead, the "active interference doctrine" applies. Where an inmate prepares his initial Form 40 and does all he can reasonably do to ensure it is filed on time, the late filing can be excused if caused solely from the active interference of a third party beyond inmate's control. Here, inmate singed a Form 40 prepared by the Public Defender and relied on the Public Defender to timely file it, but Public Defender failed to do so. Court cautions that while it is applying the active interference doctrine here, it may not do so every time the Public Defender voluntarily injects itself into a postconviction case and agrees to file a Form 40 for a movant.

Wallace v. State, 2016 WL 1435383 (Mo. App. E.D. April 12, 2016):
Holding: Where the motion court never ruled on Movant's motion for extension of time of 30 days to file amended motion, the motion was due within the initial 60 days under Rule 29.15(g), and case must be remanded for an abandonment hearing, where the motion was filed beyond the initial 60 days.

Richard v. State, 2016 WL 1579009 (Mo. App. E.D. April 19, 2016):
Holding: Even though the motion court's findings stated that the amended 24.035 motion was "timely," where there was nothing in the record indicating that the motion court had actually ruled on the 30-day extension request and the amended motion was

filed outside the initial 60 days, extensions will not be presumed to have been granted without a record thereof; case is remanded for an abandonment hearing.

Johnson v. State, 2016 WL 1643271 (Mo. App. E.D. April 26, 2016):
Holding: Date for filing an amended 29.15 motion began on date the motion court "notified" the public defender of the filing of the pro se motion, not the later date on which counsel entered an appearance; case remanded for abandonment hearing where counsel filed amended motion 60 days beyond notification date.

Mahone v. State, 2016 WL 2895086 (Mo. App. E.D. May 17, 2016):
Holding: Even though (1) the docket sheets reflect two times when the guilty plea and sentencing transcript was filed (one "May 2" and the other "June 3"), and (2) whether the amended 24.035 motion was timely depended on which date was the actual filing date, appellate court determines the earlier date controls where the file-stamped date on the transcripts stated "May 2" and Movant's brief does not explain why the "June 3" date should control; case remanded for abandonment hearing.

Austin v. State, 2016 WL 514233 (Mo. App. E.D. Feb. 9, 2016):
Holding: Where the record on appeal was unclear as to when a guilty plea transcript was "filed" and when counsel was "appointed" under Rule 24.035, appellate court cannot determine if amended motion was timely; case must be remanded for motion court to determine if amended motion was timely, and if not, whether Movant was abandoned.

Patton v. State, 2016 WL 513655 (Mo. App. E.D. Feb. 9, 2016) & Hendricks v. State, 2016 WL 513497 (Mo. App. E.D. Feb. 9, 2016):
Holding: Even though 29.15 counsel requested a 30-day extension of time to file an amended motion (for a total of 90 days), where motion court never ruled on the extension motion, the amended motion filed after the initial 60-day deadline was untimely; case must be remanded for abandonment hearing.

Adams v. State, 2016 WL 1086487 (Mo. App. E.D. March 15, 2016):
Holding: Even though Rule 24.035 counsel filed a 30-day request for an extension of time to file amended motion pursuant to Rule 24.035(g), where the motion court never ruled on the extension motion, counsel's amended motion filed after the initial 60 days was untimely, and appellate court must remand for an abandonment hearing.

Pulliam v. State, 2016 WL 1117144 (Mo. App. E.D. March 22, 2016):
Holding: (1) Even though the Rule 24.035 court granted a motion to allow postconviction counsel to file an amended motion "out of time," motion courts are not authorized to extend the time for filing an amended motion beyond 30 days; (2) case is remanded for an abandonment hearing on whether counsel abandoned Movant by filing an untimely amended motion.

Robinson v. State, 2020 WL 372736 (Mo. App. S.D. Jan. 23, 2020):
Holding: Even though 24.035 motion court's judgment stated that "if the Court has erroneously found the amended PCR motion to be timely, then the Court finds that any

delay is not attributable to Movant," where the motion was in fact untimely, this did not satisfy the requirements of a record on abandonment sufficient for the appellate court to conduct its independent review as to the reason why postconviction counsel filed the amended motion late; remanded for abandonment inquiry.

Borschnack v. State, 2020 WL 6336061 (Mo. App. S.D. Oct. 29, 2020):
Holding: (1) Even though motion court appointed the Public Defender to Movant's Rule 29.15 case, where Public Defender never received the notice because the Clerk failed to mail it, the appointment was "not effective" so there could be no "abandonment" by the Public Defender's failure to file an amended motion; and (2) Where Movant later retained private counsel who filed an amended motion 169 days after his entry of appearance, the amended motion was untimely because was due within 90 days after retained counsel's entry, and the "abandonment doctrine" does not apply to privately retained counsel.

Harris v. State, 2019 WL 4292669 (Mo. App. S.D. Sept. 11, 2019):
Holding: Where appointed counsel filed 24.035 amended motion one day late and the record does not show that motion court conducted an abandonment inquiry, case is remanded to determine if Movant was abandoned by counsel.

Slavens v. State, 2019 WL 475828 (Mo. App. S.D. Feb. 7, 2019):
Holding: (1) The time for filing an amended 24.035 motion runs from the time the Public Defender is first appointed; thus (2) even though the motion court purported to vacate its original appointment of the Public Defender due to conflict of interest and purported to grant second counsel a full 90 days to file an amended motion, the amended motion filed by second counsel was untimely because the motion was required to be filed within the time originally allowed to the first Public Defender. Case remanded for abandonment hearing.

Borschnack v. State, 2019 WL 718878 (Mo. App. S.D. Feb. 20, 2019):
Even though (1) counsel entered 29.15 case and filed a motion claiming that prior counsel had abandoned Movant by not filing an amended motion, and (2) the motion court by docket entry wrote "hearing held" and granted new counsel a total of 90 days to file an amended motion, where there was no transcript of the abandonment hearing, case must be remanded to make a sufficient record for appellate court to determine that the abandonment finding was not clearly erroneous.
Facts: In 2016, Movant timely filed a *pro se* 29.15 motion, and the Public Defender was appointed. However, the Public Defender never entered an appearance or took any action in the case. In 2017, retained counsel filed an entry, a motion to find that the Public Defender had abandoned Movant, and a motion for a full 90 days from entry to file an amended motion. The motion court, by docket entry, wrote "hearing held" and granted retained counsel 90 days to file an amended motion.
Holding: The record is insufficient for the appellate court to carry out its duty to enforce the time limits of 29.15. A sufficient record must be made to demonstrate on appeal that the motion court's determination of abandonment is not clearly erroneous. Here, a presumption of abandonment arose because the Public Defender failed to file an amended

motion or statement in lieu. But there is no transcript of the abandonment hearing for the appellate court to review. The absence of a record prevents appellate court from exercising its duty to enforce the time limits. Case must be remanded to motion court to make a sufficient record of abandonment.

Oliphant v. State, 557 S.W.3d 541 (Mo. App. S.D. Oct. 15, 2018):
Holding: Where counsel filed amended 24.035 motion late, case must be remanded for abandonment hearing.

Steele v. State, 2018 WL 3802025 (Mo. App. S.D. Aug. 10, 2018):
Holding: Where a retained private counsel filed Movant's amended 29.15 motion late, the abandonment doctrine cannot be used to deem the motion timely because abandonment does not apply to privately retained counsel; thus, the only motion before the court was a timely filed pro se amended motion, and since the motion court did not adjudicate all claims in that motion, the judgment is not final and the appeal is dismissed.

Hewitt v. State, 2018 WL 2213653 (Mo. App. S.D. May 15, 2018):
(1) Where a motion court finds that counsel abandoned a Movant, the court must appoint new counsel and grant new counsel time allowed by Rules 24.035 and 29.15 to file a new amended motion or statement in lieu; (2) the motion court cannot find abandonment and then deem an untimely amended timely-filed.
Facts: In *Hewitt I*, the appellate court found that the amended motion filed by postconviction counsel was untimely, and remanded for an abandonment hearing. On remand, the motion court found that counsel had abandoned Movant, but apparently then deemed the amended motion timely filed, and re-issued its original Findings denying relief on the merits. Movant appealed.
Holding: The motion court failed to follow the mandate of *Hewitt I*, which held that the court was to conduct an abandonment hearing than then take further action "consistent with [that] outcome." This meant that if the motion court found abandonment, it was required to (1) appoint new counsel for Movant, for purposes of filing a new amended 24.035 motion or statement in lieu, and (2) order that newly appointed counsel have 60 days from the time of counsel's appointment to file the amended motion or statement in lieu.

Corwin v. State, 525 S.W.3d 614 (Mo. App. S.D. Sept. 11, 2017):
Holding: Where 29.15 amended motion was filed late, case must be remanded for abandonment hearing.

Prine v. State, 527 S.W.3d 930 (Mo. App. S.D. Sept. 25, 2017):
Holding: (1) Where Public Defender counsel who had entered appearance in 29.15 case moved to withdraw one day before amended motion was due on grounds of conflict of interest; and (2) motion court granted the motion and purported to allow an additional 90 days for new Public Defender counsel to file an amended motion, the amended motion filed by new counsel was untimely, and case must be remanded for abandonment hearing. The motion court's appointment of second postconviction counsel did not "restart" the amended motion clock; the date of the first appointment controls.

Mitchell v. State, 2017 WL 3765822 (Mo. App. S.D. Aug. 31, 2017):
Holding: Where 29.15 Movant's amended motion was filed one day late and it did not appear that the motion court issued Findings on all the pro se and amended motion claims (so as to make remand for abandonment hearing unnecessary), case must be remanded for an abandonment hearing.

Greer v. State, 515 S.W.3d 831 (Mo. App. S.D. April 10, 2017):
Holding: Where the appellate record reflected when counsel was appointed to 24.035 case, but not when plea transcript was filed, appellate court cannot determine if amended motion was timely filed; case remanded.

Southern v. State, 2017 WL 2570727 (Mo. App. S.D. June 14, 2017):
Holding: Even though 29.15 Movant's counsel filed a "Motion to Consider Amended Motion Under Rule 29.15 as Timely Filed" and the motion court stated in its Findings that amended motion was "timely filed," where the record on appeal did not contain the "Motion to Consider …" and the record did not show any specific ruling on that motion, case must be remanded for an abandonment hearing; without some evidence in the record as to the *reason* for the untimely filing of the amended motion, appellate court cannot infer the motion court made an abandonment finding.

Hewitt v. State, 2017 WL 587292 (Mo. App. S.D. Feb. 14, 2017):
Where counsel had been appointed, time limit for filing amended 24.035 motion began to run when guilty plea and sentencing transcript was filed, not when the probation revocation hearing transcript was filed later; amended motion was untimely and case remanded for abandonment hearing.
Facts: Movant pleaded guilty and received an SES. Later, his probation was revoked and he was sent to DOC. He filed a 24.035 motion. In July 2013, counsel was appointed. In April 2014, the guilty plea and sentencing hearing were filed. In April 2015, the probation revocation hearing transcript was filed. Counsel filed an amended motion within 90 days of the filing of the probation revocation transcript.
Holding: The date for filing an amended motion began to run when the transcript of the plea and sentencing was filed, not when the probation revocation transcript was filed. Movant contends that he did not have a "complete" transcript until the probation revocation transcript was filed. However, Movant's sentencing was complete when he received his SES. Even though the Rule 29.07 inquiry about effectiveness of counsel did not occur until probation was revoked, this inquiry is not required at the conclusion of final sentencing with an SES. Case remanded for abandonment hearing.

Altic v. State, 2017 WL 587290 (Mo. App. S.D. Feb. 14, 2017):
Holding: Where nothing in the record indicated that counsel's request for an extension of time to file Rule 29.15 motion had been granted, amended motion was untimely and case must be remanded for abandonment hearing.

Williams v. State, 2016 WL 6651439 (Mo. App. S.D. Nov. 10, 2016):
(1) Where 29.15 legal file on appeal showed a "notification" of counsel, but no "appointment," it is not possible to determine from the record if counsel's amended motion was timely because there is no appointment date to count from under Rule 29.15(g); (2) counsel must be "appointed" for indigent movants; and (3) even though the motion court's Findings stated that counsel "timely filed" the amended motion, where the legal file in 29.15 appeal did not contain date of appointment, the appellate court cannot determine if the amended motion was timely; case must be remanded for determination of whether amended motion was timely and possible abandonment hearing.
Discussion: Under Rule 29.15(g), an amended motion is due the earlier of (1) the date counsel is appointed, or (2) the date counsel that is not appointed enters an appearance. Rule 29.15(e) requires appointment of counsel for indigent movants. Here, the court apparently "notified" the public defender of the case indicating that this was an "appointed" counsel case. But the record on appeal does not show a date of appointment. Thus, it's impossible to determine from the record on appeal when the amended motion was due. Case must be remanded to determine when counsel was appointed, and possible abandonment hearing if motion was not timely.

Yelton v. State, 2016 WL 7147941 (Mo. App. S.D. Dec. 7, 2016):
Holding: Where counsel's amended 24.035 motion was untimely filed, case must be remanded for an abandonment hearing.

Campbell v. State, 2016 WL 6945700 (Mo. App. S.D. Nov. 28, 2016):
Holding: Where postconviction counsel files a statement in lieu of amended motion, there is no abandonment; by investigating the case and filing a statement complying with Rule 29.15(e), counsel does not abandon a Movant.

Galbreath v. State, 2016 WL 3974566 (Mo. App. S.D. July 25, 2016):
Even though prior 29.15 counsel had filed a statement in lieu of amended motion, where new 29.15 counsel filed a motion for abandonment, the motion court granted it, and new 29.15 counsel was allowed to file an amended motion, State waived claim on appeal that the motion court should not have found abandonment and allowed the amended motion, because State did not object on these grounds in the motion court.
Facts: Movant timely filed a pro se 29.15 motion, and later, counsel timely filed a statement in lieu of amended motion. Subsequently, new counsel entered the case. New counsel filed a motion to find abandonment and allow an amended motion, which the motion court sustained. Counsel filed an amended motion. The State did not object in the motion court. The court heard the case and issued a ruling on the merits.
Holding: The State claims on appeal that the motion court erred in finding abandonment and allowing the filing of the amended motion. However, a party should not be allowed on appeal to claim error on the part of the motion court when the party did not raise the issue below and give the motion court an opportunity to rule on the issue. "To label the state's posture in the motion court as waiver, acquiescence, estoppel, invited error, or Rule 78.09 violation yields the same result: we will not now address these complaints for the first time on appeal."

Williams v. State, 2016 WL 4385081 (Mo. App. S.D. Aug. 17, 2016):
Holding: Even though counsel's 29.15 amended motion was only one day late, court remands for an abandonment hearing.

Wright v. State, 2016 WL 2753960 (Mo. App. S.D. May 11, 2016):
Holding: Even though the motion court decided the case on the merits after recognizing that the amended 24.035 motion was untimely, the motion court was required to conduct an abandonment hearing; case remanded for abandonment hearing.

Price v. State, 2016 WL 2864452 (Mo. App. S.D. May 13, 2016):
Holding: Where amended 24.035 motion was untimely filed, appellate court must remand for abandonment hearing.

Hill v. State, 2016 WL 3453630 (Mo. App. S.D. June 23, 2016):
Holding: Where amended 24.035 motion was untimely filed, case must be remanded for an abandonment hearing.

Gale v. State, No. SD341119 (Mo. App. S.D. June 30, 2016):
Holding: Even though the amended 29.15 motion was untimely, where (1) counsel submitted it with a motion to consider the amended motion as timely filed, (2) counsel explained in the timeliness motion that the untimely filing of the amended was due to the fault of counsel and not Movant, and (3) the motion court granted the timeliness motion, the motion court had implicitly ruled that abandonment occurred and accepted the amended motion; thus, appellate court need not remand for an abandonment hearing.

Hatmon v. State, 2020 WL 4244589 (Mo. App. S.D. July 29, 2020):
Holding: Where counsel's amended 24.035 motion was filed late, case must be remanded for an abandonment hearing.

McAllister v. State, 2020 WL 2028267 (Mo. App. W.D April 28, 2020):
Holding: Even though 29.15 motion court stamped "leave granted" and signed a motion to deem an amended 29.15 motion as timely filed, the record is insufficient for appellate court to conduct its independent timeless review, because motion court failed to make any findings of fact on this matter, require any testimony from postconviction counsel, or inform Movant of counsel's response and give Movant an opportunity to reply; case remanded for abandonment inquiry.
Discussion: A sufficient record of abandonment is required on appeal for the appellate court to determine that the finding of abandonment is not clearly erroneous. In an abandonment inquiry, the motion court should inquire not only of postconviction counsel, but should ensure Movant is informed of counsel's response and given an opportunity to reply. "Rubber stamping" counsel's motion is not a sufficient inquiry and does not provide a sufficient record for appeal.

White v. State, 2020 WL 6572572 (Mo. App. W.D. Nov. 10, 2020):
Holding: Where (1) the record did not reflect that the motion court had granted counsel's request for an extension of time to file an amended 29.15 motion, and (2) counsel filed the motion outside the un-extended time limit, case must be remanded for abandonment hearing.

Eckert v. State, 2019 WL 7340509 (Mo. App. W.D. Dec. 31, 2019):
Holding: Even though postconviction counsel filed a motion for a 30-day extension to file the amended motion as permitted by Rule 29.15(g), where the motion court never ruled on the motion to extend time, the amended motion was untimely and case must be remanded for an abandonment hearing; extensions cannot be presumed to have been granted without a record thereof.

Muhammad v. State, 2019 WL 3083164 (Mo. App. W.D. July 16, 2019):
Holding: Even though Movant's retained direct appeal counsel told Movant the wrong time limit for filing his pro se Rule 29.15 motion, the untimely filing is not excused under the third-party interference doctrine because Movant hired the attorney and is bound by the attorney's actions.

Stewart v. State, 2019 WL 1522905 (Mo. App. W.D. April 9, 2019):
Holding: Even though Movant's *pro se* 29.15 motion was facially defective in not sufficiently alleging facts or claims, postconviction counsel did not abandon Movant by filing a statement in lieu of amended motion which set forth the review of the case which counsel made; just because counsel cannot find valid claims does not equate to abandonment.
Discussion: Movant contends that postconviction counsel abandoned him by filing a statement in lieu of amended motion stating there were not additional claims to be asserted, when the *pro se* motion failed to plead sufficient facts or claims. The statement in lieu stated that counsel had reviewed the case before filing the statement in lieu. Most postconviction cases do not have valid claims. Just because a movant files a *pro se* motion does not mean that counsel will be able to find valid claims. Counsel has an ethical duty not to raise invalid claims. Just because counsel cannot find valid claims does not equate to abandonment. Movant does not on appeal allege any additional claims that could have been raised. Movant argues that because the Missouri Supreme Court has disallowed the *Anders* procedure, postconviction counsel should not be able to use statements in lieu rather than filing a motion to withdraw. But Movant's postconviction counsel was not proceeding under *Anders*. Denial of postconviction relief affirmed.
Concurring opinion: Judge Ahuja would favor a rule requiring an abandonment hearing when the *pro se* motion fails to assert any claim for relief or any facts to support a claim, and counsel files a statement in lieu asserting no additional claims or facts.

Pickens v. State, 2019 WL 2260675 (Mo. App. W.D. May 28, 2019):
Holding: Even though 29.15 Movant's counsel filed a motion under Rule 103.06 that her amended motion was filed late because Case.net was unavailable (not functioning) on the due date and counsel had proof of this, where the motion court never ruled on that motion but simply noted the late filing date, case must be remanded for an abandonment

hearing for motion court to determine in first instance if counsel abandoned Movant because Case.net was unavailable.

Washington-Bey v. State, 2019 WL 659684 (Mo. App. W.D. Feb. 19, 2019):
Holding: Where a motion court had dismissed Movant's timely-filed 29.15 motion in 2005 without appointing counsel, the motion court erred in ruling that it did not have "jurisdiction" to hear Movant's abandonment claim filed in 2018; a motion court in which an original postconviction motion was timely-filed has jurisdiction to later reopen those proceedings to address abandonment.

Perkins v. State, 2018 WL 2720913 (Mo. App. W.D. Aug. 7, 2018):
Holding: A "reply" filed in response to a statement in lieu of amended motion under Rule 24.035(e) gives a Movant the opportunity to put facts on the record that could trigger an independent abandonment inquiry.

Perkins v. State, 2018 WL 5795536 (Mo. App. W.D. November 6, 2018):
(1) Even though Movant's original pro se motion (Form 40) said "to be amended by counsel" for claims, and counsel later filed a timely statement in lieu of amended motion that alleged no claims, this did not create a presumption of abandonment and there was no need for an abandonment inquiry; and (2) even though, within 10 days of counsel having filed the statement in lieu, Movant filed a pro se amended motion alleging claims, this was not the Reply authorized by Rule 24.035(e), because it did not expressly "respond to" counsel's statements made in the statement in lieu; this pro se motion was an untimely amended motion, and could not be considered.
Facts: Movant filed a timely *pro se* motion (Form 40) which listed as claims "to be amended by appointed counsel." On the last day for filing an amended motion, counsel filed a statement in lieu, stating that counsel had investigated the case and found no additional facts or claims than those alleged in the *pro se* motion. Within 10 days later, Movant filed his own *pro se* amended motion, alleging claims.
Holding: (1) Movant claims that an abandonment inquiry is required because the original Form 40 asserted no claims, and neither did the statement in lieu. However, that is immaterial to whether appointed counsel complied with his duties under Rule 24.035(e). Appointed counsel stated in the statement in lieu that he had investigated the case and that there were no claims to be raised. The statement in lieu is not deficient merely because the Form 40 asserted no claims. (2) Rule 24.035(e) allows a Movant to file a Reply to a statement in lieu. But a Reply must expressly respond to the statement in lieu. Here, Movant filed his own *pro se* amended motion, which did not discuss the statement in lieu at all. This amended motion cannot be considered because it is untimely. The time for filing an amended motion expired on the 90th day (the day counsel filed the statement in lieu).

Fields v. State, 2018 WL 1061592 (Mo. App. W.D. Feb. 27, 2018):
(1) Even though incarcerated Rule 29.15 Movant filed her pro se motion four years late, where she alleged that before it was originally due, she mailed her motion to her direct appeal attorney, who promised to file it for her but did not, these facts, if true, would allow Movant to use "third-party interference" doctrine to excuse the untimely filing

because did all she could do to file her motion on time; and (2) even though Movant waited a long time to discover that her motion was never filed, her lack of diligence does not defeat a "third-party interference" claim.
Facts: Movant was incarcerated. Her *pro se* Rule 29.15 motion was due in 2013. Because Movant was experiencing some problems with the prison mail, her direct appeal attorney told her to mail her pro se motion to him, and he would file it. Movant mailed her motion before the deadline, but the attorney apparently never filed it. When Movant filed a *pro se* motion four years later, she sought to use the "third-party interference" doctrine to excuse the untimeliness. The motion court dismissed as untimely.
Holding: (1) Movant's alleged facts, if proven, would be sufficient to invoke the "third-party interference" exception to timeliness. By preparing her motion and sending it to counsel within the original time limit, incarcerated Movant took all steps she could within the time limitations to see that her motion was filed on time. (2) Even though Movant did not act diligently thereafter to find out what happened to her motion, the length of the inmate's tardiness is irrelevant, because once the original deadline was missed, Movant "completely waived" her 29.15 rights, absent an exception to timeliness. Nothing Movant did after the original deadline could have cured the "complete waiver" which occurred. Other cases have allowed an inmate to claim "third-party interference" more than 15 years after an initial *pro se* motion was dismissed as untimely. Case remanded for hearing on "third-party interference."

Carter v. State, 2018 WL 1061688 (Mo. App. W.D. Feb. 27, 2018):
Holding: Where (1) 24.035 counsel was appointed June 3 and requested a 30-day extension of time to file an amended motion, but the record does not reflect that the court ever ruled on the extension request, and (2) the guilty plea and sentencing transcript was filed on July 22, the amended motion was due 60 days after July 22, and the motion filed afterwards was untimely; case remanded for abandonment hearing.

Staten v. State, 2018 WL 1158912 (Mo. App. W.D. March 6, 2018):
Holding: Where the record did not reflect that 24.035 counsel's motion for extension of time to file an amended motion had ever been ruled on, the amended motion filed by counsel was untimely and case must be remanded for abandonment hearing.

Waggoner v. State, 2018 WL 1384567 (Mo. App. W.D. March 20, 2018):
Editor's note: Judge Ahuja writes a significant dissenting opinion in which he contends that 29.15 counsel can have abandoned Movant by filing an insufficient amended motion. Here, counsel made only minor modifications to a pro se motion. Judge Ahuja notes that the Missouri Supreme Court has deemed an amended motion a nullity when counsel merely replicated a facially deficient pro se motion. The amended motion filed by counsel here fails to demonstrate that counsel fulfilled counsel's obligations under Rule 29.15(e) to investigate Movant's claims and determine if additional facts and claims need to be asserted.

Ross v. State, 527 S.W.3d 116 (Mo. App. W.D. Aug. 22, 2017):
Holding: Where postconviction counsel filed amended 29.15 motion late, case must be remanded for abandonment hearing; appellate court is unwilling to resolve factual issues in the first instance concerning why motion was filed late.

Hougardy v. State, 2017 WL 2773953 (Mo. App. W.D. June 27, 2017):
Holding: Even though (1) 29.15 counsel told the motion court on the record that the amended motion was filed late through no fault of Movant, and (2) motion court's Findings stated that motion was "timely filed," appellate court must remand for abandonment hearing because there is nothing in the record explaining why counsel filed the amended motion late or whether the motion court found abandonment. The motion court's Finding that the amended motion was "timely filed" is clearly erroneous unless the court found "abandonment." Appellate court is not authorized to assume this unexpressed Finding.

Cornelious v. State, 2017 WL 487013 (Mo. App. W.D. Feb. 7, 2017):
Holding: Even though privately-retained 29.15 counsel had represented Movant on direct appeal and did not file an amended motion, the "abandonment" doctrine does not apply to privately-retained counsel so no abandonment occurred; the "abandonment" doctrine applies only to appointed counsel for indigent movants, and was intended to ensure that the limited right to counsel provided by Rules 24.035(e) and 29.15(e) protected the right to appointed counsel; Rules 24.035(e) and 29.15(e) do not impose duties on privately-retained counsel.

Graves v. State, 2017 WL 770968 (Mo. App. W.D. Feb. 28, 2017):
Holding: Even though the 29.15 motion court "notified" the Public Defender that Movant had filed a Form 40 rather than "appointed" the Public Defender and counsel later entered an appearance, notification constitutes appointment and starts the time for filing an amended motion (not the later entry of appearance date); since amended motion was not timely filed, case remanded for abandonment hearing.

Moxley v. State, 2017 WL 968782 (Mo. App. W.D. March 14, 2017):
Holding: Where motion court "referred" a pro se 29.15 motion to Public Defender, this notification was an appointment which started the time limits for filing amended motion; where amended motion was not filed within 90 days of that date, case remanded for abandonment hearing.

Hicks v. State, 2017 WL 1149192 (Mo. App. W.D. March 28, 2017):
Holding: Where nothing in the record on appeal showed that an extension of time to file amended 29.15 motion had ever been requested or granted, the amended motion filed beyond the initial 60-day time limit was untimely and case must be remanded for abandonment hearing.

Price v. State, 500 S.W.3d 324 (Mo. App. W.D. Oct. 4, 2016):
Holding: Where amended 29.15 motion was filed late, case must be remanded for abandonment hearing.

Williams v. State, 2016 WL 6591793 (Mo. App. W.D. Nov. 8, 2016):
Holding: Where amended 29.15 motion was untimely filed, case must be remanded for abandonment hearing; the only exception is where the motion court has adjudicated all claims in both the pro se and amended motions.

Williams v. State, 2016 WL 4087054 (Mo. App. W.D. Aug. 2, 2016):
Even though 24.035 Movant had not returned a public defender application, motion court should not have granted public defender's motion to withdraw without giving Movant notice and opportunity to be heard, and without determining if counsel's withdrawal would constitute "abandonment."
Facts: Movant filed a pro se 24.035 motion. The Public Defender was appointed, but before filing an amended motion or statement in lieu, moved to withdraw because Movant had not returned a public defender application. The withdrawal motion did not include Movant on the certificate of service. The motion court granted the withdrawal motion without notifying Movant or giving him an opportunity to be heard. The court then denied the pro se 24.035 motion without a hearing. Later, a different public defender filed for an appeal out-of-time. The appellate court granted late notice of appeal.
Holding: Rule 24.035(e) gives indigent Movants the right to appointed counsel at the motion court level (though the right to appointed counsel on appeal is "less clear"). Once appointed, counsel had a duty to file an amended motion or statement in lieu. The motion court was required to determine whether allowing counsel to withdraw would constitute an "abandonment" under the Rule, before allowing the withdrawal. Further, the motion court was required to give notice and opportunity to be heard to Movant before allowing the motion to withdraw. Counsel also was required to give notice to Movant that counsel was withdrawing, because counsel has an obligation to do that anytime counsel withdraws. The motion court abused its discretion in allowing counsel to withdraw without these requirements. Reversed and remanded for abandonment and indigence inquiry.

Sayre v. State, 2016 WL 3537761 (Mo. App. W.D. June 28, 2016):
Holding: Where (1) the amended 24.035 motion was not timely filed, (2) it contained a different claim that the pro se motion, and (3) the motion court issued Findings only on the amended motion, appellate court must remand for an abandonment hearing because that will determine which motion (amended or pro se) must be considered; the only time that an appellate court need not remand for an abandonment hearing is when the motion court issued Findings on all of the amended and pro se claims.

McCullough v. State, 2016 WL 312652 (Mo. App. W.D. Jan. 26, 2016):
Holding: Where amended 29.15 motion was untimely filed, appellate court must remand for an abandonment hearing.

Frazee v. State, 480 S.W.3d 442 (Mo. App. W.D. Jan. 26, 2016):
Holding: Where amended 29.15 motion was not timely filed, appellate court must remand for an abandonment hearing; remand is unnecessary only where all claims in both the pro se and amended motions have been adjudicated with written findings.

Ramirez v. U.S., 2015 WL 5011965 (7th Cir. 2015):
Holding: Defendant was abandoned by postconviction counsel who missed deadline to appeal the denial of his motion to vacate.

Foley v. Biter, 2015 WL 4231283 (9th Cir. 2015):
Holding: Federal habeas petitioner was abandoned by counsel where counsel failed to communicate with petitioner, threw away petitioner's letters under the mistaken belief counsel was no longer doing the representation, failed to notify petitioner that his petition was denied, and failed to appeal; this was true even though petitioner waited a long time to try to rectify the situation, because petitioner was under belief caused by counsel that there would be a long delay before receiving a decision from district court.

Ake Issues

*** Ayestas v. Davis, ___ U.S. ___, 138 S.Ct. 1080 (U.S. March 21, 2018):**
Holding: Applicants seeking funding for expert and investigative assistance under 18 U.S.C. Sec. 3599 must only show that their requests are "reasonably necessary" for their cases; Court rejects stricter test which required applicants to show both a "substantial need" for services, and that the merits of their claims were not procedurally barred.

*** McWilliams v. Dunn, ___ U.S. ___, 137 S.Ct. 1790 (U.S. June 19, 2017):**
Holding: *Ake v. Oklahoma*, 470 U.S. 68 (1985) holds that an indigent defendant is entitled to expert mental health assistance for (1) examination of the defendant, and expert assistance in (2) evaluation, (3) preparation and (4) presentation of the defense. Even though Alabama provided defendant with an expert for an examination, the expert was not available for the other prongs of *Ake*; thus, the state court's ruling that the expert satisfied *Ake* was an unreasonable application of federal law. The expert did not help the defense evaluate extensive medical records or translate those into a legal strategy; prepare an explanation for why defendant was not faking his symptoms; prepare for direct or cross-examination of any witnesses; and did not himself testify.

Panetti v. Davis, 103 Crim. L. Rep. 456 (5th Cir. 7/11/17):
Holding: Death-sentenced inmate was entitled to funding for experts in order to challenge death sentence.

Sorto v. Davis, 101 Crim. L. Rep. 298 (5th Cir. 6/15/17):
Holding: Defendant was entitled to funding to pursue *Atkins* claim as bar to execution.

U.S. v. Pete, 99 Crim. L. Rep. 70 (9th Cir. 4/11/16):
Holding: Juvenile who won resentencing under *Miller* was entitled to an expert to show that he had matured and been rehabilitated in prison.

State v. Dahl, 2016 WL 280417 (Iowa 2016):
Holding: Motions by indigent Defendants for funding of investigators should be conducted ex parte, so that Defendants need not reveal their defense to prosecution.

People v. Kennedy, 103 Crim. L. Rep. 353 (Mich. 6/29/18):
Holding: Indigent defendants have right to court-appointed DNA expert to assist with defense.

Appellate Procedure

State v. Russell, 2020 WL 2036711 (Mo. banc April 28, 2020):
Where (1) before Bazell, Defendant pleaded guilty to felony stealing, Sec. 570.030, and received a suspended imposition of sentence, but (2) after Bazell, when the State sought revocation, he timely objected to felony sentencing but received a 7-year sentence anyway, Defendant can raise this error on direct appeal because Sec. 547.070 authorizes a direct appeal of final judgments, and Bazell applied forward to his case. Remanded for misdemeanor sentencing.
Facts: In 2013, Defendant pleaded guilty to felony stealing and received an SIS. In 2016, *Bazell* was decided, effectively making the offense a misdemeanor. In 2017, the State sought to revoke Defendant's probation. At his sentencing, Defendant timely asserted that *Bazell* required misdemeanor sentencing and objected to felony-level sentencing. The court imposed a 7-year sentence. Defendant filed a direct appeal.
Holding: The State argues that Defendant cannot do a direct appeal of a guilty plea, and that his sole remedy, if any, was under Rule 24.035 for imposing an excessive sentence. The right of appeal is statutory. Sec. 547.070 provides a direct appeal in all cases of final judgment. This statutory language does not prohibit the right of appeal after guilty pleas, and neither can the Supreme Court, because Mo. Const. Art. V, Sec. 5, prohibits the Court from enacting Rules that change substantive rights "or the right of appeal." Rule 24.035 does not purport to change the right of appeal. It simply provides that procedure for seeking relief from an excessive sentence *in the sentencing court*. Rule 24.035 does not say – and the Court could not adopt a rule that says – this procedure supplants the statutory right to direct appeal. This Court has previously stated that *Bazell* applies "forward" and the "appropriate remedy is a direct appeal." Defendant raised his *Bazell* claim after *Bazell* – i.e., forward – and he pursued a direct appeal. While Defendant could have waived his claim by not objecting at his sentencing, here, he did object and fully preserved his *Bazell* issue for appeal. Judgment reversed and remanded for sentencing as misdemeanor.

Lemasters v. State, 2020 WL 2029271 (Mo. banc April 28, 2020):
Where (1) Defendant/Movant's sentence and judgment stated he had been convicted of two counts, when he actually had only been convicted of Count I; (2) Defendant/Movant

took a direct appeal of the two counts; (3) the appellate court "affirmed" conviction on Count I but remanded with directions to "vacate" Count II (the erroneous count); (4) the trial court made a docket entry stating only "affirmed;" and (4) Movant filed his pro se 29.15 motion 97 days after the mandate on direct appeal, the 29.15 motion is premature – not untimely -- because there was no "final judgment" in the criminal case since the trial court did not strictly follow the appellate mandate to vacate Count II; (2) this is true even though the trial court discovered its error in the sentence and judgment, and sua sponte corrected it before the appellate court ruled in the direct appeal.

Facts: Defendant was convicted at jury trial of Count I. The State dismissed Count II. The written sentence and judgment erroneously stated Defendant had been convicted of both Count I and II. While the direct appeal was pending, the trial court, *sua sponte*, discovered the error in the written sentence and corrected it, but no one told the appellate court. On direct appeal, the appellate court "affirmed" Count I, and remanded with directions to vacate Count II. The trial court then made a docket entry saying only "Affirmed." Defendant/Movant then filed a *pro se* 29.15 motion 97 days after the mandate – beyond the permissible 90 days. Movant argued an exception to timeliness, which the motion court found and ultimately denied relief on the merits. Movant appealed.

Holding: The immediate issue on appeal is whether the *pro se* motion is timely filed. Movant now asserts a new theory, for the first time on appeal, as to why his motion is premature, not untimely. The State argues this is waived because not raised below. But that doesn't end the inquiry here, because there's no final judgment. When an appellate court gives specific direction to a trial court on remand, the trial court cannot deviate from the appellate court's direction. Here, contrary to the appellate court's remand direction, the trial court did *not* vacate Count II on remand. This may have been because the trial court had already fixed the error, but strict compliance with the appellate court's direction was still required. Given the trial court's failure to strictly comply with the appellate direction, no "new judgment" has yet been entered here. Further, a judgment of conviction that resolves fewer than all counts is not "final." Thus, Movant's motion is prematurely filed. The motion will be deemed filed after final judgment is entered, and when the time for filing commences under Rule 29.15(b).

State v. Waters, 2020 WL 1270751 (Mo. banc March 17, 2020):

Holding: Where (1) a jury convicts on some counts of an indictment or information and Defendant is sentenced on those counts, but (2) the jury hung on other counts and those counts remain pending, the judgment is not "final" because all counts have not been disposed, so appellate court lacks jurisdiction for appeal.

Discussion: Sec. 547.070 authorizes appeals only of final judgments. A judgment in a criminal case is final only if the judgment disposes of all disputed issues and leaves nothing for future adjudication. Here, Defendant was sentenced on some counts, but other counts on which the jury hung remain pending. There is not a final judgment so long as any count in the indictment or information remains pending. Thus, the appellate court lacks jurisdiction for appeal. Cases to the contrary should no longer be followed. In situations such as the one here, trial courts can avoid a defendant being incarcerated on some sentences with no right to appeal by avoiding imposing sentence on all counts until all counts are finally disposed, though this is not required. Appeal dismissed.

State v. Ward, 2019 WL 1247070 (Mo. banc March 19, 2019):
Holding: Where, after bench trial, a trial court entered a judgment finding a statute "unconstitutionally overbroad" as applied to Defendant and also finding Defendant "not guilty," case is remanded to trial court to clarify the nature of the court's ruling, because the State cannot appeal a factual verdict of "not guilty" since that would be barred by Double Jeopardy, but could appeal a dismissal on grounds that the statute was overbroad.

In the Interest of D.C.M. v. Pemiscot County Juvenile Office, 578 S.W.3d 776 (Mo. banc Aug. 13, 2019):
Holding: (1) Even though Juvenile turned 18 and was released from supervision while appeal of his adjudication (juvenile conviction) was pending, the case is not moot since his juvenile adjudication could be used against him in any later adult proceeding, and there is a stigma that flows from the judgment against him; (2) Juveniles have right to effective assistance of counsel but no statute or case provides a mechanism to raise such a claim, so Court holds that (a) if the claim can be adjudicated from the direct appeal record, court will resolve the claim on direct appeal, but (b) if the claim requires an evidentiary hearing (which will be likely for claims of failure to investigate or prepare, or pursue particular defenses or witnesses), case will be remanded to juvenile court for evidentiary hearing; and (3) if counsel is found ineffective, Juvenile will receive a new adjudication hearing.

State v. Hughes, 563 S.W.3d 119 (Mo. banc Dec. 18, 2018):
Holding: (1) Taking a motion to suppress evidence "with the case" during a bench trial largely negates the purpose of a motion to suppress, one of which is to avoid delays during trial in determining the issue, but since the parties didn't object to the procedure, any error in failing to rule on the motion before trial is not preserved; (2) even though defense counsel stated "no objection" during the bench trial to introduction of evidence that was the subject of the motion to suppress, this did not waive the claim under the facts of this case because under the mutual understanding doctrine, the parties understood that this meant no objection other than those stated in the motion to suppress; however, this should be avoided by making objections to admission of contested evidence during the bench trial and having the motion to suppress ruled before trial; but (3) there was no prejudice in denying the motion to suppress because defense counsel introduced evidence through questioning of police (about whether they found drugs in Defendant's property) or stipulated to other evidence (lab reports) which proved Defendant's guilt; Defendants waive any objections to evidence made part of the record through their own questioning even if counsel's actions in doing so were strategic.

Goldsby v. State, 2018 WL 3626507 (Mo. banc July 31, 2018):
Holding: (1) The docket fee required by Rule 81.04(e) is not a jurisdictional prerequisite for appeal; (2) where an appellant timely files a notice of appeal but fails to pay the docket fee at that time, the appellant must be given notice of the procedural defect under Rule 84.08 and given 15 days to remedy the defect by paying the fee; thus (3) where appellant timely filed his notice of appeal, but paid his docket fee after the time for notice

of appeal had expired, appellant cured his procedural defect and appellate court has jurisdiction to hear the appeal.

Discussion: To interpret Rule 81.04(e)'s requirement of a docket fee as a necessary for the notice of appeal to be valid would violate Mo. Const. Art. V, Sec. 5's prohibition on the Supreme Court establishing rules affecting the statutory *right* to appeal. Under Art. V, Sec. 5, it is for the legislature to set the requirements for the right to appeal. Sec. 512.050 requires only the filing of notice of appeal, and while the statute specifically allows the Supreme Court to impose additional requirements for an appeal, those requirements do not affect "the validity of the appeal." Since Sec. 512.050 no longer requires the filing of a docket fee for a notice of appeal to be effective, the Supreme Court may not so require either. Cases to the contrary should no longer be followed.

State v. Rohra, 545 S.W.3d 344 (Mo. banc May 1, 2018):

Holding: Where (1) the information charged Defendant with unlawful possession of a firearm because he had a prior felony "conviction," and (2) Defendant pleaded guilty to unlawful possession of a firearm, Defendant, by pleading guilty, waived his argument that the prior felony did not count as a "conviction" because it was a deferred prosecution under Oklahoma law; and (2) even though a direct appeal from a guilty plea lies if the charging document is insufficient, Defendant's claim on appeal is not a challenge to the sufficiency of the information but is a substantive legal argument over the meaning of the word "conviction" in Sec. 571.070, which was waived by the guilty plea.

State v. Pierce, 2018 WL 2928086 (Mo. banc June 12, 2018):

(1) Even though the sentencing judge erroneously believed that persistent offender status increases the minimum sentence (when it increases only the maximum sentence), where the judge explained that he was sentencing Defendant to prevent recidivism, Defendant must show that the judge's mistaken belief as to the sentencing range played a significant part in the sentence imposed in order to receive plain error relief; here, the Defendant cannot meet that test because of the judge's statements about recidivism; and (2) Even assuming that Defendant did not "consent" to allow Officers into his home, where Officers entered his home after Defendant called a suicide hotline and was mentally disturbed, and Officers saw child pornography on Defendant's computer when they entered the home, application of the exclusionary rule to suppress the pornography is not warranted, because the exclusionary rule is designed to deter police misconduct, but here, there is no indication the police acted in bad faith in entering the home.

Facts: Defendant was found guilty of a Class B felony as a persistent offender. Under Sec. 558.016.7(2), this increases the maximum sentence to 30 years, but the minimum sentence remains five years. The sentencing judge stated that the sentence was 10 to 30 years, and sentenced Defendant to 15 years to prevent recidivism.

Holding: Defendant seeks re-sentencing based on plain error. However, this Court has never vacated a sentence based on plain error simply because the record shows that the judge was mistaken about the range of punishment. Rather, this Court has vacated sentences when the record shows the judge imposed a sentence *based on* his mistaken belief. To obtain plain error relief, Defendant must show that the judge's mistaken belief played a significant part in his sentencing decision. Here, while the record shows that the judge held a mistaken belief about the range of punishment, he said he was basing his

sentence on the need to prevent recidivism. Thus, Defendant has failed to show manifest injustice. To the extent that court of appeals' decisions have granted resentencing based on plain error merely because a sentencing court held a mistaken belief about the range of punishment, those cases should no longer be followed.

Bartlett v. Mo. Dept. of Insurance, 2017 WL 3598216 (Mo. banc Aug. 22, 2017):
Where a circuit court issued a summons rather than a preliminary writ in a mandamus action and then purported to enter a "judgment" on the merits, this procedure was not authorized by Rule 94 and the "judgment" is not appealable. An "appeal" will lie from the denial of a mandamus writ petition only when a lower court has issued a preliminary order in mandamus then denies a permanent writ. In the absence of a preliminary writ, petitioners' remedy was to file a new mandamus action in the next highest court.
Facts: Petitioners/appellants filed a "petition for writ of mandamus." The clerk asked petitioners/appellants if they wanted the case handled as a writ or a "regular" civil case. Petitioner/appellants told the clerk to treat it as a "regular" civil case. The circuit court then issued a summons, directing defendant to answer. Defendant objected on grounds that the circuit court could only issue a preliminary order in mandamus. The circuit court eventually entered a "judgment" on the merits, denying a permanent writ. Petitioners/appellants appealed.
Holding: The rules of mandamus are different than for normal civil actions. A petitioner is required to file an application, suggestions in support, and exhibits supporting the application, Rule 94.03. Instead of issuing a summons in a mandamus proceeding, the circuit court issues a "preliminary order," or preliminary writ of mandamus, if the court believes a preliminary order should be granted, Rule 94.04. If the court does not grant a preliminary order, the petitioner then must file its writ petition in the next highest court. In contrast, an appeal will lie from the denial of a writ petition when a lower court has issued a preliminary order in mandamus but then denies a permanent writ. Here, the circuit court ultimately purported to deny petitioners' writ on the merits. But having never been granted a preliminary writ, petitioners' course of action was to file a new mandamus action in the next higher court; they cannot "appeal." Appeal dismissed.

Editor's Note: In ***State ex rel. Tivol Plaza, Inc. v. Mo. Comm'n on Human Rights***, 527 S.W.3d 837 (Mo. banc Aug. 22, 2017), the Court exercised its discretion to treat the issuance of a summons as a preliminary writ to allow an appeal due to the general interest and important of the merits issue in that case, but stated "[p]arties should not expect unending tolerance from the appellate courts for such failures to follow Rule 94.04."

McKay v. State, 2017 WL 2774621 (Mo. banc June 27, 2017):
Holding: Where (1) appellate court "affirmed in part and remanded in part" for a hearing on whether Defendant was denied a speedy trial: (2) Movant filed 29.15 motion regarding "affirmed" convictions; (3) Movant ultimately was denied relief on "affirmed" convictions by motion court and on subsequent appeal; and (4) after Movant was later denied relief on "remanded" speedy trial claim and subsequent appeal, he filed a second 29.15 motion (within 90 days of that appellate mandate) alleging ineffective assistance regarding the speedy trial remand, the second motion was not a prohibited "successive" motion because the first 29.15 motion was premature on these unusual facts. The

appellate court should not have "affirmed in part and remanded part," but either reversed all the convictions or held the case pending remand (because the speedy trial issue would affect all the convictions), in which case there would have been only one mandate followed by one 29.15 motion. For future reference, where a premature 24.035 or 29.15 motion is filed, it should be held pending the time for filing of a postconviction motion. (Revised Rules 24.035 and 29.15 effective Jan. 1, 2018, provide for this.)
Discussion: Because Rule 29.15 allows only a single postconviction motion, it is vital that a Movant not be misled into filing his motion prematurely and thereby lose the ability to seek postconviction relief of a still-pending claim through partial affirmance of a judgment. An appellate court cannot "affirm in part" a conviction it is remanding for further hearing and possible vacation. A review of the opinion shows the appellate court did not, in fact, "affirm in part" but instead rejected all claims other than the speedy trial claim. But the speedy trial claim related to *all* convictions. The appellate court should have either reversed all the convictions, or held the case pending a remand (and appeal back to the appellate court). Then there would have been only one mandate, following which a single 29.15 motion could have been filed.

Mercer v. State, 2017 WL 986109 (Mo. banc March 14, 2017):
(1) Where Petitioner filed a motion under Sec. 547.035 claiming that DNA testing would prove actual innocence, trial court erred in dismissing the motion by docket entry without entering findings of fact and conclusions of law to allow meaningful appellate review; (2) the 12-month window for seeking late notice of appeal under Rule 30.03 applies to Sec. 547.035 motions, not the shorter 6-month window for civil cases under Rule 81.07(a); (3) even though the trial court's docket entry was not denominated a "judgment," it was appealable because Rule 74.01(a)'s requirement for use of the word "judgment" does not apply to postconviction cases.
Facts: In October 2013, Petitioner filed a motion for postconviction DNA testing under Sec. 547.035. In April 2014, the trial court dismissed the motion by docket entry which said the motion was "overruled and denied." In August 2014, Petitioner wrote the trial court a letter saying that the court had failed to issue required findings. In March 2015, Petitioner filed a 30.03 motion seeking late notice of appeal, which the Southern District granted.
Holding: As an initial matter, the 12-month window for seeking a late notice of appeal (Rule 30.03) rather than the 6-month window for a civil case (Rule 81.07(a)) applies to postconviction cases, so there is jurisdiction for the appeal under Rule 30.03. Also, even though the docket entry was not denominated a "judgment," as required by Rule 74.01(a), that Rule is inapplicable to postconviction cases because it would delay processing of postconviction claims. Rule 78.07(c) requires a petitioner who claims error relating to the failure to make findings to bring this to the attention of the trial court, but here, Petitioner did that by sending his letter telling the trial court it had to make findings. Sec. 547.035 requires findings sufficient for meaningful appellate review. Reversed and remanded for findings.

Green v. State, 2016 WL 4236156 (Mo. banc Aug. 9, 2016):
Holding: (1) Where Movant's pro se 29.15 claims were attached to his amended motion, but the motion court expressly ruled only on the amended motion claims, the

judgment is not final under Rule 74.01(b) for purposes of appeal because there was not an adjudication of all claims; (2) Rule 78.07(c) applies to postconviction motions, but even though Movant did not file a 78.07(c) motion to correct the "form or language" of the judgment regarding the omitted claims, 78.07(c) is inapplicable here because there is a difference between an error with the "form or language" of an adjudicated claim, and the failure to adjudicate the claim itself (as here); and (3) even though Rule 73.01(c) provides that "all fact issues upon which no specific findings were issued shall be considered as having been found in accordance with the result reached," this Rule is inapplicable here because there is a difference between "fact issues" and unadjudicated claims (as here). Appeal dismissed.

State v. Smiley, 478 S.W.3d 411 (Mo. banc Jan. 26, 2016):

Even though the trial court ruled before plea or trial that the three-year mandatory minimum sentence for ACA was unconstitutional as applied to Juvenile-Defendant, this was not a final judgment, so the State had no right to appeal under Sec. 547.200; the State or Defendant cannot appeal or seek a writ until after the trial court renders a final judgment, i.e., an actual dismissal of the charge or actual sentence.

Facts: Juvenile-Defendant was charged with armed criminal action. Sec. 571.015 contains a mandatory minimum three-year sentence for ACA. Before any plea or trial of Defendant, the trial court ruled that the three-year mandatory minimum was unconstitutional as applied to juveniles, because juveniles must receive individualized sentencing under cases such as *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The State appealed.

Holding: The appeal must be dismissed because there is no authority to appeal at this stage. The trial court did not dismiss the ACA. Rather, it merely purported to strike the three-year minimum. Sec. 547.200.1 and 2 allow the State to appeal in certain enumerated circumstances and "in all other criminal cases except in those cases where the possible outcome of such appeal would result in double jeopardy." However, appeals may only be sought after a final judgment that disposes of all issues. In criminal cases, a final judgment occurs when sentence is entered or the trial court dismisses the case before trial in such a manner to preclude further prosecution. Here, even though the trial court denominated its ruling a "judgment," Defendant has not been convicted or sentenced. The State argues the court's ruling is an "effective" dismissal. But Defendant continues to face trial on the ACA charge. Thus, the court's ruling is not a dismissal. If Defendant is found guilty, the court's ruling merely suggests what the court will do at sentencing; the court cannot state what its sentence will be before conviction. If Defendant is convicted of ACA, the trial court will face several alternatives. It can hold that the ACA statute is unconstitutional as applied to Defendant, does not allow the court to impose any sentence, and dismiss the charge; in that event, the State can then appeal under the "all other criminal cases" language of 547.200.2. Or the court can sentence Defendant to a minimum three years, in which case the Defendant can appeal and pursue her constitutional claim on appeal. Or the court can purport to impose an SIS or SES, which the State can challenge through an extraordinary writ. Appeal dismissed.

State v. Johnson, 2020 WL 2028265 (Mo. App. E.D. April 28, 2020):
Holding: Where Appellant's letter to Court cited a new, post-briefing opinion and made *arguments* about the opinion, under Eastern District Rule 370 the letter can only call the Court's attention to a new case by *citing* a new opinion; arguments about the opinion belong in a supplemental brief, which can only be filed with leave of Court; Court strikes letter.

City of Bellefontaine Neighbors v. Carroll, 2020 WL 202097 (Mo. App. E.D. Jan. 14, 2020):
Holding: Where City had announced at trial that it was abandoning a certain charge against Defendant, but trial court's judgment found Defendant guilty of that charge anyway, judgment of conviction on that count is reversed and appellate court amends the judgment accordingly.

Rogers v. State, 2020 WL 6139863 (Mo. App. E.D. Oct. 20, 2020):
Holding: Where the motion court issued Findings on only three of Movant's four Rule 24.035 claims, there is no "final judgment" for purposes of appeal because not all claims were disposed of; case dismissed and remanded with directions to rule on all claims.

Harding v. State, 2020 WL 7702249 (Mo. App. E.D. Dec. 29, 2020):
Holding: Even though constitutional claims must generally be raised on direct appeal, where 29.15 Movant was unaware of alleged *Brady* violation during the direct appeal and only discovered it during the postconviction case, fundamental fairness require that it be allowed to be considered in postconviction case (but claim fails on merits because non-disclosed information not material).

Tresler v. State, 2019 WL 6704881 (Mo. App. E.D. Dec. 10, 2019):
Holding: (1) Where 29.15 Movant raised four claims, but motion court only ruled on three of them, there is no final judgment so appeal must be dismissed; and (2) Movant was not required to file a Rule 78.07(c) motion to preserve the non-decided claim, because such a motion is required only where a motion court explicitly denies a claim without required findings; here, the motion court simply ignored the claim altogether.
Discussion: The State argues Movant was required to file a Rule 78.07(c) motion to preserve the motion court's failure to rule on his claim. But such a motion is required only where a court explicitly denies a claim but without the required findings. When that happens, the Movant must ask the motion court to amend the judgment to include findings in order to preserve the claim for appeal. Here, however, the court's findings contain no acknowledgment or mention of the non-decided claim. This means there is no final judgment. Case dismissed for lack of final judgment.

State v. Johnson, 2019 WL 7157665 (Mo. App. E.D. Dec. 24, 2019):
Holding: Where (1) Defendant was convicted of murder in 1995 and exhausted all appeals, but (2) in 2019, Prosecutor's "Conviction Integrity Unit" filed a motion for new trial alleging that Defendant was actually innocent, various *Brady* violations and other claims to set aside the conviction, the motion was untimely and there is no statutory right to appeal such an untimely motion; thus Eastern District must dismiss appeal. But Eastern District transfers case to Missouri Supreme Court to decide questions of general interest and importance such as whether and to what extent a duly elected Prosecutor can correct prior wrongful convictions, and the procedures for doing so.

In the Interest of D.R.C., 2019 WL 4419695 (Mo. App. E.D. Sept. 17, 2019):
Holding: Where Juvenile turned 18 and was discharged from DYS during the pendency of his direct appeal, the case is moot and no exception to mootness applies, because Juvenile has not challenged his adjudication of delinquency on appeal, and has admitted committing the offenses; thus, collateral consequences concerns are not an issue in this appeal.
Discussion: Juvenile seeks remand for a new dispositional hearing. Implicitly, he seeks discharge from his commitment to DYS. But DYS has already discharged him. He has received all relief he's entitled to from this court or the juvenile court. We acknowledge that exceptions exist to mootness, but those exceptions don't apply here. The critical distinction between Juvenile's case and those found not to be moot is that cases found not to be moot were challenging the initial adjudication of delinquency (such as challenging sufficiency of evidence, or denial of right to counsel). Those cases were found not to be moot because Juveniles could suffer collateral consequences as an adult. But Juvenile here doesn't challenge his adjudication of delinquency. That adjudication would stand, regardless of the result reached on appeal on the merits.

State v. Mott, 2019 WL 923616 (Mo. App. E.D. Feb. 26, 2019):
Holding: Where Defendant/Appellant died before the mandate issued in his appeal (even though an opinion affirming his conviction had issued), his death abates the prosecution entirely and case is remanded with directions to dismiss the underlying criminal case.

C.S.G. v. R.G., 559 S.W.3d 416 (Mo. App. E.D. Oct. 23, 2018):
Holding: (1) Even though trial court may have lacked statutory authority to order Defendant to pay Plaintiff's mortgage in order of protection case, this did not deprive the court of subject-matter jurisdiction and Defendant's only remedy was to pursue a direct appeal; Defendant could not later collaterally attack the order after Plaintiff sought civil contempt and the court sought indirect criminal contempt for failure to pay; (2) on remand, the court is directed to enter a judgment of civil contempt but before ordering a jail sentence must convince itself of Defendant's ability to pay, or create a non-imprisonment remedy that would allow Defendant to purge himself of the contempt.
Discussion: (1) Defendant claims he cannot be held in contempt because the trial court's order directing him to pay the mortgage was not statutorily authorized. However, this is an impermissible collateral attack on that judgment. Defendant could have taken a direct appeal from the judgment, but did not. A contempt proceeding cannot be used to collaterally attack the judgment. The underlying judgment can only be attacked if it is

void for lack of personal or subject matter jurisdiction. Here, Defendant claims only that the trial court lacked statutory authority. But even if true, the trial court had both personal and subject matter jurisdiction. (2) An order of contempt must specify how Defendant can purge himself of the contempt. Inability to pay is an affirmative defense that must be raised by Defendant. However, the coercive purpose of imprisonment for civil contempt is frustrated if Defendant does not have a key to the jailhouse door. Before the trial court can enter a civil contempt order committing Defendant to jail for failure to pay, it must convince itself that Defendant has ability to pay. If the court cannot convince itself that Defendant has ability to pay, the court must fashion a different remedy to allow Defendant to purge himself of contempt.

State v. Gray, 2018 WL 5538761 (Mo. App. E.D. Oct. 30, 2018):
Holding: (1) Where appellate court had remanded for hearing on whether new trial should be granted due to newly discovered evidence, trial court abused discretion in not granting a continuance to allow Defendant more time to subpoena necessary and critical witness who was the subject of the new evidence; and (2) where appellate court had remanded for hearing on newly discovered evidence, trial court was without authority to do anything other than follow the appellate mandate, and failed to reasonably follow it here when it denied a continuance for the necessary and critical witness who was the subject of the newly discovered evidence motion.

McAllister v. State, 561 S.W.3d 492 (Mo. App. E.D. Nov. 20, 2018):
Holding: Where Movant's amended 29.15 motion raised four claims on which the motion court failed to issue findings, there is no final judgment disposing of all claims, and the appeal must be dismissed.

Conn v. State, 564 S.W.3d 386 (Mo. App. E.D. Nov. 27, 2018):
Holding: Where Movant's 24.035 motion asserted three claims, but the court failed to issue Findings on one of the claims, there is no "final judgment" because the Findings did not resolve all claims and issues, so the appeal must be dismissed.

State ex rel. Welty v. Lewis, 2018 WL 2630465 (Mo. App. E.D. June 5, 2018):
Holding: Writ of mandamus issues to compel trial court to denominate its dismissal on the merits as a "judgment," Rule 74.01(a), so that losing party can have right of appeal; a trial court cannot deprive a losing party of the right to appeal, Sec. 512.020, by refusing to denominate a dismissal as a "judgment."

Maguire v. State, 2017 WL 4364474 (Mo. App. E.D. Oct. 3, 2017):
Holding: (1) Time for filing amended 29.15 motion began when counsel was first appointed, and even though Movant later hired private counsel, motion court had no authority to "rescind" appointment of appointed counsel (Public Defender) and grant private counsel additional time to file amended motion beyond original time limit when Public Defender was first appointed; (2) private counsel's amended motion filed beyond original time limit was untimely and cannot be considered; (3) Movant cannot use "abandonment doctrine" to have amended motion be deemed timely because "abandonment doctrine" does not apply to privately-retained counsel under *Gittemeier*;

and (4) motion court can consider timely-filed *pro se* motion, but because motion court did not issue Findings on all *pro se* claims, the judgment is not final and appeal must be dismissed.

In the Interest of S.B.A., 530 S.W.3d 615 (Mo. App. E.D. Oct. 17, 2017):
Holding: Even though juvenile court terminated jurisdiction over Defendant-Juvenile while appeal of his adjudication for a misdemeanor was pending, appellate court will not dismiss case as moot because the misdemeanor adjudication could have significant collateral consequences on Defendant in the future.

Emory v. State, 2017 WL 4896786 (Mo. App. E.D. Oct. 31, 2017):
Holding: Even though the motion court discussed a portion of Movant's Rule 29.15 claim in its Findings, where the court did not rule on a second part of the claim, there is no final judgment and the appeal must be dismissed.
Discussion: A final judgment which disposes of all claims in the motion is a prerequisite for appeal. When a motion court fails to acknowledge, discuss, adjudicate or dispose of all claims, the judgment is not final and the appeal must be dismissed. Although the motion court denied the motion "on all grounds," the appellate court has limited the application of broad denials to claims specifically addressed in the judgment.

State v. Rohra, 2017 WL 5580221 (Mo. App. E.D. Nov. 21, 2017):
Holding: (1) Even though Defendant pleaded guilty to felon-in-possession, he may a pursue a direct appeal on grounds that the information was defective because the predicate felony did not count as a "conviction"; (2) Eastern District would hold that where Defendant received a deferral of judgment in Oklahoma, this was not a felony "conviction" under Sec. 571.070(1), which would render possession of a gun by Defendant unlawful, but Eastern District transfers case to Missouri Supreme Court due to general interest and importance.
Discussion: Defendant had filed a motion to dismiss, but ultimately pleaded guilty. The State claims Defendant waived his claim about his Oklahoma judgment by pleading guilty. But a defect in the information may be raised for the first time on appeal. An information may be deemed insufficient if (1) it does not by any reasonable construction charge the offense of which Defendant was convicted and (2) the defendant demonstrates actual prejudice. The information here meets this test. A person who pleads guilty can challenge an information by direct appeal.

State ex rel. Hayes v. Dierker, 535 S.W.3d 372 (Mo. App. E.D. Dec. 12, 2017):
Holding: (1) Mandamus is appropriate to review trial court's sustaining of discovery objections because trial court has no discretion to deny discovery which is relevant and reasonably likely to lead to discovery of admissible evidence when the matters are neither work product nor privileged; (2) party objecting to discovery must produce a privilege log to enable opposing party to identify and show a substantial need for discoverable work product that it cannot, without undue hardship, obtain by other means, as provided in Rule 56.01(b).

Murphy v. State, 2017 WL 588184 (Mo. App. E.D. Feb. 14, 2017):
Holding: Because plain error review is not available in Rule 24.035 cases, appellate court cannot review Movant's claim, not raised in his amended motion, that his felony stealing conviction is contrary to *Bazell*.

State v. Feldt, 2107 WL 900082 (Mo. App. E.D. March 7, 2017):
Holding: (1) Even though (a) counsel filed a motion with the court indicating the parties had agreed to waive a jury trial; (b) Defendant said after he was found guilty and sentenced that he and counsel had "discussed" whether to have a jury trial; and (c) Defendant never objected to a bench trial, trial court plainly erred in conducting bench trial because the record did not reflect with unmistakable clarity that Defendant *personally* understood and voluntarily waived his right to a jury trial; and (2) even though appellate court is granting new trial, it must first consider Defendant's sufficiency of evidence claim on appeal because to fail to do so would possibly subject Defendant to double jeopardy, if State had presented insufficient evidence to convict (but evidence was sufficient here).

State v. Cecil McBenge, 2016 WL 6695799 (Mo. App. E.D. Nov. 15, 2016):
(1) Even though Defendant and his brother's DNA were found at a murder scene where Victim's house had been ransacked and Victim beaten to death, the evidence was insufficient to convict of first degree murder because there was no evidence that Defendant or his brother personally deliberated on the killing; but (2) because Defendant was also charged with second degree felony-murder based on first degree burglary and because the evidence was sufficient to prove Defendant committed first degree burglary and Victim was killed as a result, case is remanded for trial on second degree felony-murder. (3) Similarities between 1980 burglary in which Brother was implicated and 1984 burglary-murder were not sufficient to prove Defendant's motive, intent or identity in 1984 murder, so evidence of 1980 murder was not admissible; there is no authority providing that the motive, intent or identity exceptions to uncharged crimes applies to crimes committed by an accomplice; Defendant's intent was never at issue because he did not clam the offense was a mistake or accident; he denied committing the offense; additionally, the 1980 murder's prejudicial effect was greater than its probative value.
Facts: Defendant and his brother were charged with first degree murder in the 1984 death of Victim. Alternatively, they were charged second degree felony-murder based on burglarizing her house, and Victim's resultant death. Defendant's Brother dated Victim's granddaughter and knew Victim kept money in a Calumet baking powder can in her house. In 1980, Victim's house was burglarized. Brother was not linked to that crime until 1986, when a fingerprint lifted from the scene was tested and matched Brother. Brother was apparently never charged with the 1980 burglary because the three-year statute of limitations ran by 1986. Meanwhile, Victim's house was burglarized again in 1984 in the crime at issue. Her house was ransacked, and Victim was beaten to death. In 2011, Brother's DNA was found on a cheese wrapper at the house, and Defendant's DNA was found on a stocking. The trial court admitted evidence about the 1980 burglary to prove Defendant's motive, intent and identity. The jury was instructed on first degree murder, and second degree felony-murder based on the burglary. The jury convicted of first degree murder.

Holding: (1) The evidence is not sufficient to convict of first degree murder. The State must prove Defendant committed acts which aided another in killing; it was Defendant's conscious purpose in committing those acts that Victim be killed; and Defendant personally deliberated on Victim's death. There is no evidence Defendant or his brother personally committed Victim's murder or personally deliberated in killing Victim. There is no evidence that Defendant or his brother had an agreement to kill Victim. There is no evidence Defendant or his brother made a statement or exhibited any conduct indicating an intent to kill Victim. No deadly weapon was used; instead Victim was beaten. While the fact that Victim was beaten shows that someone deliberated, it does not prove that Defendant deliberated. In short, there was not sufficient evidence to find Defendant personally deliberated on Victim's death. The first degree murder conviction must be reversed. (2) But this does not mean Defendant must be discharged. Here, Defendant was also charged with second degree felony-murder based on burglarizing Victim's house. It is not possible for appellate court to just enter a conviction for second degree felony-murder because the jury was not required to find that Victim's death occurred as a result of Defendant's commission of the burglary, although the jury had been so instructed. Unlike first degree murder, a defendant may be convicted as an accomplice to second degree murder without a finding that defendant had any culpable mental state other than intent to promote commission of the offense. In other words, a defendant can be convicted of second degree murder as an aider without proof that defendant specifically intended to kill Victim. There was sufficient evidence to prove Defendant committed first degree burglary and Victim was killed as a result. Case remanded for trial on second degree felony-murder. (3) The trial court abused discretion in admitting evidence of the 1980 burglary. The State argues the 1980 burglary is logically relevant to prove motive, intent or identity. As an initial matter, there is no legal authority that the State may use evidence of uncharged crimes committed by an accomplice to prove motive, intent or identity. However, appellate court assumes for purposes of this appeal only that the State may do this. Even so, the 1980 burglary should not have been admitted. Even if evidence is logically relevant because it tends to prove guilt, it is legally relevant only if its probative value outweighs the prejudicial effect. The 1980 burglary was more prejudicial than probative. There was not a strict necessity to admit the 1980 burglary to show motive because other evidence showed motive, i.e., Granddaughter testified Brother knew Victim kept money in the Calumet can. The 1980 burglary did not show intent because Defendant never put his intent at issue. A defendant puts intent at issue only if he admits the charged acts, but claims they were committed innocently or by mistake. A defendant's denial of a charged act does not make intent an issue. Nor did the 1980 burglary prove identity. Although there were similarities in the 1980 and 1984 crimes, there were also differences. The methodologies were not so unusual and distinctive to resemble a "signature."

State v. Brian McBenge, 2016 WL 6695801 (Mo. App. E.D. Nov. 15, 2016):
(1) Even though Defendant and his brother's DNA were found at a murder scene where Victim's house had been ransacked and Victim beaten to death, the evidence was insufficient to convict of first degree murder because there was no evidence that Defendant or his brother personally deliberated on the killing; but (2) because Defendant was also charged with second degree felony-murder based on first degree burglary and

because the evidence was sufficient to prove Defendant committed first degree burglary and Victim was killed as a result, case is remanded for trial on second degree felony-murder. (3) Similarities between 1980 burglary and 1984 burglary-murder were not sufficient to prove Defendant's motive or identity in 1984 murder, so evidence of 1980 murder was not admissible, because its prejudicial effect was greater than its probative value.

Facts: Defendant and his brother were charged with first degree murder in the 1984 death of Victim. Alternatively, they were charged with second degree felony-murder based on burglarizing her house, and Victim's resultant death. Defendant dated Victim's granddaughter and knew Victim kept money in a Calumet baking powder can in her house. In 1980, Victim's house was burglarized, but Defendant was not linked to that crime until 1986, when a fingerprint lifted from the scene was tested and matched Defendant. Defendant was apparently never charged with the 1980 burglary because the three-year statute of limitations ran by 1986. Meanwhile, Victim's house was burglarized again in 1984 in the crime at issue. Her house was ransacked, and Victim was beaten to death. In 2011, Defendant's DNA was found on a cheese wrapper at the house, and his brother's DNA was found on a stocking. The trial court admitted evidence about the 1980 burglary to prove Defendant's motive and identity. The jury was instructed on first degree murder, and second degree felony murder based on the burglary. The jury convicted of first degree murder.

Holding: (1) The evidence is not sufficient to convict of first degree murder. The State must prove Defendant committed acts which aided another in killing; it was Defendant's conscious purpose in committing those acts that Victim be killed; and Defendant personally deliberated on Victim's death. There is no evidence Defendant or his brother personally committed Victim's murder or personally deliberated in killing Victim. There is no evidence that Defendant or his brother had an agreement to kill Victim. There is no evidence Defendant or his brother made a statement or exhibited any conduct indicating an intent to kill Victim. No deadly weapon was used; instead Victim was beaten. While the fact that Victim was beaten shows that someone deliberated, it does not prove that Defendant deliberated. In short, there was not sufficient evidence to find Defendant personally deliberated on Victim's death. The first degree murder conviction must be reversed. (2) But this does not mean Defendant must be discharged. Here, Defendant was also charged with second degree felony-murder based on burglarizing Victim's house. It is not possible for appellate court to just enter a conviction for second degree felony-murder because the jury was not required to find that Victim's death occurred as a result of Defendant's commission of the burglary, although the jury had been so instructed. Unlike first degree murder, a defendant may be convicted as an accomplice to second degree murder without a finding that defendant had any culpable mental state other than intent to promote commission of the offense. In other words, a defendant can be convicted of second degree murder as an aider without proof that defendant specifically intended to kill Victim. There was sufficient evidence to prove Defendant committed first degree burglary and Victim was killed as a result. Case remanded for trial on second degree felony-murder. (3) The trial court abused discretion in admitting evidence of the 1980 burglary. The State argues the 1980 burglary is logically relevant to prove motive or identity. However, even if evidence is logically relevant because it tends to prove guilt, it is legally relevant only if its probative value outweighs the prejudicial

effect. The 1980 burglary was more prejudicial than probative. There was not a strict necessity to admit the 1980 burglary to show motive because other evidence showed motive, i.e., Granddaughter testified Defendant knew Victim kept money in the Calumet can. Nor did the 1980 burglary prove identity. Although there were similarities in the 1980 and 1984 crimes, there were also differences. The methodologies were not so unusual and distinctive to resemble a "signature."

Goetz v. State, 2016 WL 6871543 (Mo. App. E.D. Nov. 22, 2016):
Holding: Where 29.15 court's judgment completely failed to discuss one of the claims, the judgment is not final and appeal must be dismissed.
Discussion: *Green v. State*, 494 S.W.3d 525 (Mo. banc 2016), held that when a motion court fails in its judgment to acknowledge, discuss or adjudicate all claims, the judgment is not final. Nor does there need to be a motion under Rule 78.07(c) to correct this, because that rule only addresses errors in the "form or language" of the judgment, and failing to dispose of or adjudicate a claim is not a mere error of form.

Miller v. State, 2016 WL 2339049 (Mo. App. E.D. May 3, 2016):
(1) Movant was entitled to evidentiary hearing on his claim that his plea counsel was ineffective in failing to object to a "group plea" procedure which rendered his plea involuntary; "group pleas" are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea; (2) redacted transcripts on appeal violate Rule 81.15(b), which requires an accurate transcript be provided for appeal; transcripts must provide all parts of the proceeding.
Facts: Movant pleaded guilty in two separate cases, involving two different counties and two different defense counsel, at a "group guilty plea" involving six unrelated defendants. He filed a 24.035 motion, contending that his counsel were ineffective in failing to object to the "group plea" procedure, which rendered his pleas involuntary. The motion court denied the claim without a hearing.
Holding: (1) In at least 10 prior cases, the Eastern District has condemned the practice of "group" guilty pleas, but this has fallen on "deaf ears." "[T]he attorneys practicing in this courtroom either have tuned us out or they fear retribution from the trial judge for raising objections to this procedure." While the Supreme Court has held that group pleas are not automatically impermissible, they are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea. Defense counsel may be ineffective in failing to object to "group pleas." Counsel's failure to object, in and of itself, is sufficient to warrant a hearing. (2) On a separate matter, a redacted transcript of the "group plea" was submitted on appeal. Rule 81.15(b) requires a true and accurate transcript be submitted. "This court should never be provided redacted transcripts."

State v. Ivory, 2016 WL 3180096 (Mo. App. E.D. June 7, 2016):
Holding: Appellate court lacks authority to hear an "appeal" of denial of writ of mandamus by trial court unless (1) a preliminary order was granted by the trial court and then the trial court determined on the merits whether the writ should be made permanent or quashed, or (2) the trial court issues a summons, the functional equivalent of a

preliminary order, and then denied a permanent writ; without either condition, a petition for mandamus must be refiled in the appellate court.

In the Interest of N.R.W., 2016 WL 720634 (Mo. App. E.D. Feb. 23, 2016):
(1) Even though Juvenile turned 18 before appeal of his adjudication of delinquency was filed, appeal is not moot because his act was a felony and he may be subject to collateral consequences during adulthood from the adjudication; (2) where trial court did not offer counsel to Juvenile or his parents during adjudication hearing, and never obtained a waiver of counsel on the record, Juvenile and parents were denied right to counsel, even though the court appointed an attorney for Juvenile at a later, post-adjudication stage before sending Juvenile to DYS.
Facts: Juvenile was charged with felony drug possession. An adjudication hearing was held, at which Juvenile was represented by his Father, who was not an attorney. No record was made regarding the right to counsel, or waiver of counsel. Juvenile was found guilty. Later, when juvenile violated terms of his post-adjudication supervision, the court held a hearing and ordered Juvenile to DYS. The court appointed counsel for Juvenile at that hearing, but did not appoint counsel for Father, who requested counsel.
Holding: Juvenile is entitled to counsel in all juvenile court proceedings under Sec. 211.211.1. After a petition is filed, 211.211.3 requires appointment of counsel unless counsel is knowingly and intelligently waived. If the record does not disclose a knowing waiver, the presumption arises that it was not. The State has the burden of showing a valid waiver. A waiver must be made with an understanding of the nature of the charges, the range of punishment, possible defenses and mitigation, and other relevant circumstances. Also, there must be a *record* demonstrating a knowing and intelligent waiver *before* the waiver takes place. None of that occurred at the adjudication hearing; thus, reversal is required. The court also erred in not appointing counsel for Father. Sec. 211.211.4 allows a child's custodian to be appointed counsel where the custodian is indigent and requests counsel.

State v. Long, 2020 WL 2097566 (Mo. App. S.D. May 1, 2020):
Holding: Generally, a Point Relied On attacking only the trial court's ruling on a motion to suppress or motion in limine without attacking the trial court's *admission* of the evidence at trial is deficient because it does not identify the actual ruling that is subject to challenge (i.e., admission at trial); but where, in bench trial, the motion to suppress / motion in limine was taken with the case and defense counsel was allowed continuing objections at trial, appellate court will consider the issues related to admission of the challenged evidence as preserved, even though "admission" is not in Point Relied On.

State v. Campbell, 2020 WL 289270 (Mo. App. S.D. Jan. 21, 2020):
Holding: Even though trial court denominated its *nunc pro tunc* order (which changed the written to sentence to conform to what court had orally pronounced) an "amended judgment," this does not provide grounds for a new direct appeal of the underlying conviction because a *nunc pro tunc* order does not change the original judgment itself, but merely corrects clerical errors in that judgment; *nunc pro tunc* orders should be entitled "judgment *nunc pro tunc*" rather than "amended judgments."

Hicks v. State, 2020 WL 1503237 (Mo. App. S.D. March 30, 2020):
Holding: 29.15 Movant failed to preserve for appellate review his claim that motion court entered insufficient findings, where Movant filed a generic Rule 78.07(c) motion in motion court which merely stated that court did not address all issues, without specifying which issues.
Discussion: Movant filed a 78.07(c) motion stating that the court's findings did "not address all issues presented in the amended motion without ambiguity and in sufficient detail to allow meaningful review on appeal." This generic allegation does not point to any specific finding in the judgment that is alleged to be deficient or to any specific issue for which findings are allegedly lacking. This generic allegation brings no claim of error to the motion court's attention for potential correction. This generic allegation could be asserted verbatim in any motion to amend judgment without regard to specific issues in the case. This would defeat the purpose of Rule 78.07(c) and nullify it.

State v. Mahurin, 2020 WL 6498631 (Mo. App. S.D. Nov. 5, 2020):
Holding: A Point Relied On which raises both an inadmissible hearsay claim and an inadmissible testimonial evidence claim (Confrontation Clause claim) in a single Point violates Rule 84.04 as multifarious and preserves nothing for appeal; a Point is multifarious if it involves separate and distinct legal analysis; here, the hearsay claim involves an "abuse of discretion" standard of review, while the Confrontation Clause claim involves a "de novo" standard of review, so combining the issues in one Point is multifarious.

State v. Johnson, 2020 WL 7584948 (Mo. App. S.D. Dec. 22, 2020):
(1) Sec. 575.150.5 does not enhance resisting arrest for a parole violation to a felony, even if the underlying offense is a felony; thus, trial court did not err in granting Defendant's motion for judgment notwithstanding the verdict (JNOV) when jury found Defendant guilty of felony resisting, and convicting Defendant of misdemeanor resisting arrest; and (2) the State could appeal the grant of JNOV, because when a jury returns a verdict of guilty and a trial judge sets aside the verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not prevent the State from appealing to reinstate the jury's verdict.
Facts: Defendant was on parole for a felony offense. He failed to report to his Parole Officer, who then issued a warrant for his arrest. When he was arrested, he resisted arrest. He was charged with felony resisting arrest, 575.150, on grounds that he resisted arrest for a felony. Defendant was found guilty by a jury. Later, the judge granted Defendant's motion for JNOV on grounds that 575.150 doesn't enhance resisting arrest for a parole violation to a felony. The trial court entered a misdemeanor conviction. The State appealed.
Holding: As relevant here, Sec. 575.150.5 makes resisting arrest a misdemeanor unless the State proves the arrest was for a (1) felony; (2) a warrant for failure to appear on a felony case; or (3) a warrant issued for a *probation* violation on a felony case. Defendant's arrest didn't fall into any of these categories Under the statute's plain

language, resisting an arrest on a parole warrant is not a felony. We presume the omission of parole warrants from the statute was intentional. And the fact that the offense underlying the parole was a felony does not make Defendant's arrest be one for a felony. He was not being arrested "because of" or "an account of" the underlying felony. He was arrested for violating conditions of parole.

Finley v. State, 2019 WL 6711461 (Mo. App. S.D. Dec. 10, 2019):
Holding: Where (1) motion court denied Movant's 29.15 motion on grounds that motion court did not believe Movant's testimony that trial counsel had told him he could not be convicted of a greater offense and, instead, believed counsel's testimony otherwise; (2) the appellate court affirmed; but (3) after the affirmance, Movant found a letter from trial counsel that wasn't available during the postconviction case and which supported Movant's testimony that he had been misadvised, Movant was entitled to recall of the 29.15 appellate mandate to present this newly discovered evidence.
Discussion: After the 29.15 proceedings were over, Movant obtained his Public Defender file and found a letter from his trial counsel telling him that he couldn't be convicted of the greater offense. This letter was not in the file when postconviction counsel was representing him; there was evidence that it was missing during that time. This letter supports Movant's 29.15 testimony and contradicts trial counsel's 29.15 testimony. If postconviction counsel had had this letter, he could have impeached trial counsel with it. Giving incorrect advice about the maximum penalty would be ineffective. Mandate is withdrawn, and case remanded to motion court to allow Movant to present this newly available evidence.

State v. Waters, 2019 WL 1649448 (Mo. App. S.D. April 17, 2019):
Holding: Where Defendant was convicted and sentenced on two counts, but the jury hung on two other counts, the appeal on the convicted counts must be dismissed because there is not a "final judgment" under Sec. 547.070 or Rule 30.01(a), since two counts will be retried; Southern District recognizes, however, that the Eastern District rules this scenario is a "final judgment" for the convicted counts.

Editor's Note: This scenario is a "final judgment" in the Eastern and (probably) Western Districts, so attorneys in those districts should file notices of appeal for the convicted counts immediately after conviction for the notice to be timely.

Steele v. State, 2018 WL 3802025 (Mo. App. S.D. Aug. 10, 2018):
Holding: Where a retained private counsel filed Movant's amended 29.15 motion late, the abandonment doctrine cannot be used to deem the motion timely because abandonment does not apply to privately retained counsel; thus, the only motion before the court was a timely filed pro se amended motion, and since the motion court did not adjudicate all claims in that motion, the judgment is not final and the appeal is dismissed.

Hicks v. State, 2018 WL 3120817 (Mo. App. S.D. June 26, 2018):
Holding: (1) Where 29.15 Movant's amended motion raised 8 claims for relief, but the motion court issued no findings regarding two of the claims, the appeal must be dismissed because the judgment is not final; (2) even though Movant did not file a motion to amend judgment under Rule 78.07(c), there is a difference between the

sufficiency of the motion court's findings on a particular claim, and whether there is a final judgment.

Bryan v. State, 536 S.W.3d 808 (Mo. App. S.D. Jan. 26, 2018):
Holding: Where 29.15 Movant raised 18 claims of ineffective assistance of counsel, but the motion court did not issue Findings on all of them, there is no final judgment, and appeal must be dismissed; a final judgment resolving all claims is a prerequisite for appeal.

Sanders v. State, 531 S.W.3d 82 (Mo. App. S.D. Oct. 18, 2017):
(1) Rule 24.035 Movant lacks standing to appeal a judgment which vacated his conviction and sentence for stealing, because – having been granted one of the types of relief authorized by Rule 24.035(j) – he is not an "aggrieved" party under Sec. 512.020(5), which allows only "aggrieved" parties to appeal; (2) motion court has discretion to choose which remedy to impose under Rule 24.035.
Facts: Movant pleaded a *Bazell* claim in his 24.035 motion, claiming that his conviction for felony stealing under Sec. 570.030.3 should be a misdemeanor. The motion court granted relief by vacating the conviction and sentence (which would allow him to be tried for something else). Movant wanted the motion court only to reduce his conviction to a misdemeanor. Movant appealed.
Holding: Sec. 512.020(5) provides a right to appeal to an "aggrieved" party. A party cannot appeal from a judgment wholly in his favor, but can appeal from a judgment which gives only part of the relief he seeks. Rule 24.035(j) provides four remedies to which a Movant is entitled: (1) vacate and set aside the judgment, or (2) resentence Movant, or (3) order a new trial, or (4) correct the judgment and sentence as appropriate. The type of relief chosen is within the motion court's discretion, and the court does not commit error merely by choosing one of the four possible remedies. Because Movant is not an "aggrieved" party, he lacks standing to appeal. Appeal dismissed.

Galbreath v. State, 2016 WL 3974566 (Mo. App. S.D. July 25, 2016):
Even though prior 29.15 counsel had filed a statement in lieu of amended motion, where new 29.15 counsel filed a motion for abandonment, the motion court granted it, and new 29.15 counsel was allowed to file an amended motion, State waived claim on appeal that the motion court should not have found abandonment and allowed the amended motion, because State did not object on these grounds in the motion court.
Facts: Movant timely filed a pro se 29.15 motion, and later, counsel timely filed a statement in lieu of amended motion. Subsequently, new counsel entered the case. New counsel filed a motion to find abandonment and allow an amended motion, which the motion court sustained. Counsel filed an amended motion. The State did not object in the motion court. The court heard the case and issued a ruling on the merits.
Holding: The State claims on appeal that the motion court erred in finding abandonment and allowing the filing of the amended motion. However, a party should not be allowed on appeal to claim error on the part of the motion court when the party did not raise the issue below and give the motion court an opportunity to rule on the issue. "To label the state's posture in the motion court as waiver, acquiescence, estoppel, invited error, or

Rule 78.09 violation yields the same result: we will not now address these complaints for the first time on appeal."

In re Marriage of Davis, 2016 WL 3661809 (Mo. App. S.D. July 7, 2016):
Holding: Although pre-1979 cases hold that appellate courts cannot take judicial notice of local court rules (and that the local rule must be introduced into evidence), Southern District holds that it can take judicial notice of a local court rule because Sec. 478.245.3 (1979) provides a procedure for adopting local court rules and filing them with the supreme court, and their publication allows an appellate court to take judicial notice.
Discussion: Pre-1979 cases hold that appellate courts cannot take judicial notice of local court rules. However, Sec. 478.245.3, enacted in 1979, provides an express procedure for adopting local court rules. There are no appellate cases to date interpreting the effect of 478.245.3. The statute requires that local rules be filed with the supreme court, which will maintain them as public records. Once so adopted, local rules are published by West as part of Missouri Court Rules, and are available on the supreme court website. Thus, any uncertainty as to the existence or content of local court rules that gave rise to the prohibition against taking judicial notice of them has been eliminated. As a result, appellate courts can take judicial notice of local court rules.

State v. McCauley, 2016 WL 1757464 (Mo. App. S.D. May 2, 2016):
Even though a trial court has continuing authority over its records and can enter a nunc pro tunc order in a criminal case at any time, the order (or denial of an order) relates back to the original judgment and is not a new, final judgment that can be appealed; however, an appellate remedy may be available via a writ.
Facts: Six years after conviction, Defendant filed a *nunc pro tunc* motion under Rule 29.12(c) to correct his judgment and sentence. After it was denied, he appealed.
Holding: *Nunc pro tunc* in criminal cases is governed by Rule 29.12(c), and in civil cases by 74.06(a). A trial court may grant *nunc pro tunc* relief at any time, because a court has continuing authority over its records. However, *nunc pro tunc* relief creates no new judgment, but relates back to the original judgment. Under Sec. 547.070, criminal appeals are authorized from a final judgment only. Nearly all rulings after final judgment are non-appealable. By contrast, Sec. 512.020(5) authorizes civil appeals from "special order[s] after final judgment[s]." The matter here, however, is not civil. It's criminal because it relates to a judgment in a criminal case. Thus, it is not appealable. However, a writ or "other remedies" may protect the narrowly-limited right Defendant asserts on appeal. Appeal dismissed.

State v. Johnson, 2020 WL 420746 (Mo. App. W.D. Jan. 28, 2020):
Holding: (1) Where Prosecutor, in first-degree murder trial, argued that "you are only going to get to these [lesser-included offenses] if you find he is not guilty of murder first degree," this was an improper "acquittal-first" argument which misstated the law, because lesser-included instructions do not require jurors to acquit of the greater offense before considering the lesser, but this wasn't plain error here; and (2) a claim of "prosecutorial misconduct" can only be raised on direct appeal, but it is not a "freestanding claim;" instead, it must be framed in terms of trial court error.

Discussion: (1) Lesser-included offenses do not require a defendant first be acquitted of the greater offense before the jury can consider the lesser. MAI-CR3d 313.04 provides juries can consider the lesser if they "do not find the defendant guilty" of the greater. The State contends telling a jury they must find a defendant "not guilty" of the greater is the same as telling them they can only consider the lesser if they "do not find the defendant guilty." We disagree. MAI-CR4th 402.05 provides the jury's "verdict, whether guilty or not guilty, must be agreed to by each juror." A finding of "not guilty" thus requires a jury to unanimously acquit a defendant. As a result, the State's argument the jury had to find Defendant "not guilty" of first-degree murder before going to the lessers was an improper "acquittal first" argument, but not plain error under the facts here. (2) Defendant also raises the prosecutor's argument as a "freestanding claim" of prosecutorial misconduct, which he claims requires reversal. We agree that prosecutorial misconduct which is apparent at trial (such as in closing argument) must be raised, if at all, only on direct appeal. We do not agree, however, that it is a "freestanding" claim independent of trial court error. The claim must raise that the trial court erred in some way, such as overruling preserved error or failing to *sua sponte* intervene.

State v. Mosley, 2020 WL 534917 (Mo. App. W.D. Feb. 4, 2020):
Holding: A "continuing objection" signifies the mutual understanding between counsel and the court that counsel intends to keep an objection alive "throughout" trial; thus, it was unnecessary for counsel to repeat the objection at each different stage of the trial in order to preserve it for appeal.

State v. Cooper, 2020 WL 1016608 (Mo. App. W.D. March 3, 2020):
Holding: Where Defendant had not yet been convicted or sentenced, Defendant could not appeal denial of his pretrial motion to dismiss criminal charge as unconstitutional and "summary judgment" on the pleadings, because there is no final judgment in a criminal case until sentence is entered, so appellate court lacks jurisdiction.

State v. Basnight, 2020 WL 7214152 (Mo. App. W.D. Dec. 8, 2020):
Where trial court had polled and dismissed jury without objection, the State cannot later appeal allegedly inconsistent verdict, because Sec. 547.200.2 does not allow State to appeal if the outcome would subject Defendant to Double Jeopardy; State's appeal dismissed.
Facts: A jury returned a verdict on "Count I" finding Defendant guilty of a lesser-included offense and "not guilty." Neither the State nor defense objected to the verdict. The jury was polled and then discharged. A month after trial, the State moved to set aside the judgment on the lesser-included offense on grounds that it was an inconsistent verdict, and retry Defendant. After the trial court denied the request and sentenced Defendant, the State appealed.
Holding: The State argues the verdict violates MAI-CR 4th 404.12, which instructs jurors to return only one verdict for each charge. Sec. 547.200.2 authorizes the State to appeal certain cases, "except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant." Here, the State is seeking an outcome that would retry Defendant on the greater charge. This would violate the federal Double Jeopardy Clause by subjecting Defendant to prosecution for the same offense

after acquittal, or prosecuting him for the same offense after conviction. Although *State v. Zimmerman*, 941 S.W.2d 821 (Mo. App. W.D. 1997), would appear to allow this outcome, *Zimmerman* was decided under the Missouri constitution's Double Jeopardy provision, which provides less protection than the federal Double Jeopardy provision. Here, Defendant relies on the Fifth Amendment's Double Jeopardy provision. Because remanding for a retrial would place Defendant in jeopardy a second time under the Fifth Amendment, Sec. 574.200.2 does not authorize the State's appeal. Appeal dismissed.

Southside Ventures LLC v. Lacrosse Lumber Co., 2019 WL 1995155 (Mo. App. W.D. May 7, 2019):
Holding: (1) Where Appellant files a notice of appeal after a judgment, but then the circuit court timely enters an amended judgment, Appellant should then file a new notice of appeal because the amended judgment is the final judgment for appellate purposes; Appellant can then dismiss the prior notice of appeal or move to consolidate the two cases, thereby allowing the appellate court to resolve which notice of appeal should be operative (if there is question about this); but (2) where Appellant, instead of filing a new notice of appeal, filed a letter asking that the amended judgment be considered in connection with the previously-filed notice of appeal, the appellate court would liberally construe the notice of appeal as effective since the opposing party was not misled about the appeal.

State ex rel. Malin v. Joyce, 2019 WL 2423976 (Mo. App. W.D. June 11, 2019):
Holding: Even though (1) trial court ruled that "motion for summary judgment is granted" and signed such order, and (2) the Case.net entry for the case was changed from "Not Disposed" to "Tried by Court – Civil," this was not a "final judgment" for purposes of appeal – it was merely a ruling on the motion for summary judgment; writ of mandamus issues to require trial court to issue a final, appealable judgment.
Discussion: There is "persistent confusion" about what a final judgment is. A judgment is a legally enforceable judicial order that fully resolves at least one claim in a lawsuit and establishes all rights and liabilities of the parties regarding that claim. A judgment must be denominated a "judgment" and signed by a judge, though the designation of "judgment" can appear at the top, or in the body of the document, or in a docket entry.

Bishop v. State, 566 S.W.3d 269 (Mo. App. W.D. Jan. 29, 2019):
Holding: (1) Where motion court dismissed Movant's *pro se* 24.035 motion without appointing counsel, this violated Rule 24.035(e) which requires appointment of counsel; (2) even though Movant answered "yes" on his pro se motion as to whether he was seeking to proceed in forma pauperis, but did not write anything in the forma pauperis affidavit, where he had been represented by the Public Defender at his guilty plea, it was clear from the record that he was indigent and counsel should have been appointed; and (3) even though motion court dismissed Movant's case "without prejudice" and this would usually be non-appealable, where a dismissal has the effect of terminating the litigation (which this did), the dismissal is appealable.

State v. Seymour, 570 S.W.3d 638 (Mo. App. W.D. March 26, 2019):
Holding: (1) Even though, at the conclusion of trial, court grant judgment of acquittal on grounds that the statute of limitations had expired, State could appeal without violating Double Jeopardy because the acquittal was not based on Defendant's factual guilt or innocence; and (2) where (a) the Labor and Industrial Relations' Fraud and Noncompliance Unit began investigating Defendant's lack of worker's comp insurance in February 2014 but then inexplicably stopped the investigation for months before referring the matter to the Attorney General in June 2014, and (b) the Attorney General filed the charge of failure to maintain worker's comp insurance in May 2017, the charge was barred by the three-year statute of limitations in Sec. 287.128.11 which requires a charge be brought within three years of "discovery of the offense."
Discussion: This case turns on the meaning of "discovery of the offense." This is determined by an objective standard. So long as an ongoing investigation is objectively reasonable, the statute of limitations will not begin to run until the investigation is complete. But here the Fraud Unit discovered the violation in February 2014 and inexplicably stopped the investigation for several months. Thus, the time taken to complete the investigation was not objectively reasonable. Thus, the accrual period began in February 2014, and the charge filed in May 2017 was more than three years later.

Benedict v. State, 2018 WL 6047963 (Mo. App. W.D. Nov. 20, 2018):
Holding: (1) Where, after Movant had failed to appear at scheduled sentencing, the court sentenced Movant to a sentence which was allegedly in excess of that authorized by law, the "escape rule" did not bar his 24.035 claim because the "escape rule" does not apply to post-capture error; and (2) even though Movant's claim that his sentence was in excess of that authorized by law may not be meritorious, the appellate court cannot decide the claim in the first instance but must remand for motion court to enter Findings on the claim.

State v. Buckner, 566 S.W.3d 261 (Mo. App. W.D. Dec. 26, 2018):
Holding: Even though (1) appointed counsel voluntarily dismissed without prejudice Movant's DNA testing case under Sec. 547.035; and (2) the trial court later denied Movant's *pro se* motion to reinstate his DNA testing case and appoint new counsel, the appellate court looks to the substance of a "judgment" (not how it is denominated), and the trial court's denial of the motion to reinstate was not a final judgment from which an appeal can be taken because it does not resolve all issues in the case leaving nothing for future determination; Movant can cure the voluntary dismissal by filing a new DNA testing case.

Butler v. State, 2018 WL 3232627 (Mo. App. W.D. July 3, 2018):
Holding: Where Movant did not raise as an issue in his Rule 29.15 amended motion that there is a clerical error in the sentence and judgment, this cannot be reviewed on appeal or remanded to circuit court to correct because Rule 29.15 does not allow for plain error review (disagreeing with Eastern District opinion that remanded in similar situation for correction of clerical error); but Movant can file a *nunc pro tunc* motion directly in the circuit court to correct the clerical error.

State v. Backues, 2018 WL 3232634 (Mo. App. W.D. July 3, 2018):
Holding: Even though Sec. 27.050 states that the attorney general "shall…represent the state in all appeals to which the state is a party other than misdemeanors," the statute does not *preclude* the attorney general from representing the state in misdemeanors; the use of the word "shall" only details those cases the attorney general is *required* to handle.

State v. Rall, 2018 WL 3846420 (Mo. App. W.D. Aug. 14, 2018):
Holding: (1) Rule 29.12(b) does not provide an independent mechanism to challenge a felony stealing conviction from 2011 under *Bazell*, because the Rule does not provide a post-sentence procedure; Rule 29.12(b) presupposes that the criminal case is still pending before the circuit court and provides a mechanism for a circuit court to consider plain errors *before* imposing sentence, i.e., while it still has jurisdiction in the criminal case; and (2) even though Sec. 27.050 states that the attorney general "shall…represent the state in all appeals to which the state is a party other than misdemeanors," the statute does not *preclude* the attorney general from representing the state in misdemeanors if the attorney general chooses to do so.

State v. Baker, 2018 WL 2407543 (Mo. App. W.D. May 29, 2018):
Holding: (1) Where Defendant pleaded guilty to a Class A misdemeanor, the trial court exceeded its authority and plainly erred in imposing 180 days "shock time" detention as a condition of probation because Sec. 559.026(1) provides that "in misdemeanor cases, the period of detention under this section shall not exceed the *shorter* of 30 days or the maximum term of imprisonment authorized for the misdemeanor by Chapter 558," here one year; (2) appellate court decided case in a direct appeal of the sentence following the guilty plea; (3) a sentence in excess of the maximum authorized by law is plain error and not waived by a guilty plea.

State v. Knox, 2018 WL 2921996 (Mo. App. W.D. June 12, 2018):
Holding: Where after a guilty plea but *before* sentencing Defendant filed a motion under Rule 29.07(d) to withdraw his guilty plea (which was denied and Defendant was then sentenced), Defendant may direct appeal, because Defendant is appealing the final judgment and sentence, raising the denial of the 29.07(d) motion as an allegation of error.
Discussion: The State erroneously contends that a denial of a 29.07(d) motion is not appealable. The State confuses the procedural posture of the cases it cites. Once a defendant enters a guilty plea, he may seek to withdraw the plea *before* sentencing under Rule 29.07(d) and *after* sentencing *only* under Rule 24.035. This case is procedurally a direct appeal from the final judgment which incorporates allegations of error in the court's ruling on the 29.07(d) motion.

Petsch v. Jackson County Prosecuting Attorneys Office, 2018 WL 3118455 (Mo. App. W.D. June 26, 2018):
Holding: Where the presiding judge refused to conduct a 600.063 conference (regarding public defender caseloads) on the record, case must be remanded because the lack of record precludes meaningful appellate review.

Harshman v. State, 2018 WL 606024 (Mo. App. W.D. Jan. 30, 2018):
Holding: Where 24.035 motion court's Findings ruled only on Movant's amended motion claims and not his attached pro se claims (which were permissible to attach to an amended motion prior to Jan. 1, 2017), the judgment is not final, and the appeal must be dismissed; a final judgment disposing of all claims is a prerequisite to appeal.

Gates v. State, 2018 WL 605249 (Mo. App. W.D. Jan. 30, 2018):
Holding: Even though 24.035 Movant claimed on appeal that motion court – as the remedy for his *Bazell* claim regarding his felony stealing conviction under 570.030 – should have reduced his conviction to a misdemeanor rather than vacated his guilty plea, where – while his appeal was pending -- Movant pleaded guilty to receiving stolen property in his underling criminal case, his appeal as to 24.035 remedy was moot.
Discussion: Movant's guilty plea to the amended charge of receiving stolen property makes it impossible to grant the requested relief of resentencing as a misdemeanor on the original charge. Any opinion we might issue as to the motion court's authority to vacate the original guilty plea when that remedy was not sought by Movant would have no practical effect, since Movant has voluntarily agreed to an alternative resolution of his criminal case by pleading guilty to receiving stolen property. Appeal dismissed as moot.

Watson v. State, 2018 WL 1061729 (Mo. App. W.D. Feb. 27, 2018):
Holding: (1) Even though 24.035 motion court dismissed motion by docket entry which was not signed by judge, an order disposing of a 24.035 or 29.15 motion need not be denominated a "judgment" or signed by judge to be "final" for appeal; (2) even though the motion court did not issue Findings, and summarily denied the timely-filed Rule 78.07(c) motion requesting Findings (which would be error), appellate court will not reverse for Findings because Movant has not raised this issue on appeal; and (3) even though a claim that a sentence is "in excess of the maximum authorized by law" is procedurally cognizable under 24.035, Movant cannot prevail on his timely-filed 24.035 claim that his stealing conviction violated *Bazell* because *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017), held that *Bazell* "applies prospectively only, except in those cases pending on direct appeal."

City of Kansas City v. Cosic, 2018 WL 1061358 (Mo. App. W.D. Feb. 27, 2018):
Holding: (1) An appellate court cannot take judicial notice of a municipal ordinance, so where the ordinance was not introduced as evidence or made part of the record in the trial court, the appellate court cannot recognize it; (2) even though the ordinance might have been introduced as an exhibit in the trial court, where Appellant failed to deposit the exhibit with the appellate court, appellate court cannot recognize it; and (3) even though Appellant included the ordinance in an appendix to its brief, the mere inclusion of a document in an appendix does not make it part of the record on appeal; only matters in the legal file or deposited with the appellate court are part of the record. Appeal based on municipal ordinance not before the appellate court dismissed.

State v. Rainey, 2018 WL 1061959 (Mo. App. W.D. Feb. 27, 2018):
Holding: Where after jury's guilty verdict (1) trial court granted Defendant's motion for judgment of acquittal on grounds that the evidence was insufficient to convict, but (2) on

appeal by State, appellate court reverses on grounds that the evidence was sufficient, case must be remanded for trial court to decide Defendant's alternative motion for new trial, even though this motion was indirectly overruled by operation of law under Rule 29.11(g).

State v. Raulerson, 534 S.W.3d 921 (Mo. App. W.D. Dec. 5, 2017):
Holding: Where Defendant died during direct appeal, his death abates the prosecution against him; case is remanded with directions to dismiss underlying prosecution.

City of Raymore v. O'Malley, 527 S.W.3d 857 (Mo. App. W.D. Aug. 29, 2017):
Even though Defendant charged with municipal violation claimed she had a legal justification defense that could be determined from the evidence in the municipal trial, where Defendant was seeking a trial de novo in circuit court, circuit court erred in granting pretrial motion to dismiss because a justification defense must be supported by evidence and a trial de novo proceeds as if no action had been taken in municipal court.
Discussion: Regarding Defendant's justification defense, she had the burden of injecting the issue and it was required to be supported by evidence. Here, Defendant presented her motion to dismiss to the circuit court before her requested trial de novo. Her claim could not have been supported by any evidence, given that none had been adduced at the time the circuit court granted the motion to dismiss. Defendant seeks to rely on evidence presented at the municipal court trial to support her claimed defense. But the concept of a trial de novo is that it is a new prosecution. The trial de novo proceeds as if no action had been taken in the municipal court (division). Even so, it is possible for a court to properly grant a motion to dismiss based on an affirmative defense if the defense is irrefutably established *by the pleadings*. But the only pleadings in this case are the uniform citation and amended information which charged the offense; neither irrefutably establishes that Defendant's conduct was justified as a matter of law. Grant of motion to dismiss reversed.

Strickland v. State, 2017 WL 2332754 (Mo. App. W.D. May 30, 2017):
Holding: (1) Where Rule 24.035 allowed pro se claims to be physically attached to an amended motion, and pursuant to a local e-filing rule, counsel uploaded the pro se claims as an attachment to the amended motion and the amended motion expressly incorporated those claims, the contemporaneous uploading of the amended motion and attachment is the functional equival
ent of physically attaching the pro se claims; and (2) where motion court failed to rule on the pro se claims, appeal is dismissed for want of a final judgment under Rule 74.01(b).

Editor's note: Amended Rule 24.035(g), effective Jan. 1, 2017, now prohibits incorporation of pro se claims by attachment.

Shoate v. State, 2017 WL 2778059 (Mo. App. W.D. June 27, 2017):
Holding: Where (1) 24.035 Movant's amended motion raised various claims regarding sentencing and the prayer for relief requested vacating the sentences (among other relief); and (2) the motion court vacated the sentences and ordered resentencing, the appeal must be dismissed because Movant is not an "aggrieved or injured party," which is a necessary prerequisite for appeal; this is true even though Movant apparently wanted the motion

court to impose concurrent sentences as the remedy, rather than vacate the sentences for resentencing. Movant received the relief he requested in his amended motion.
Discussion: Movant argues the relief granted was too broad. The right to appeal is purely statutory. One must be an "aggrieved or injured party" in order to appeal. Here, Movant's amended motion requested, among other relief, vacation of his sentences. The motion court ultimately vacated the sentences (though on somewhat different grounds that Movant sought), so Movant got what he requested. He cannot appeal from a judgment in his favor. Movant's real concern is that he will receive a longer sentence on re-sentencing, and seeks by appealing to place a limitation on the court's discretion at resentencing. But Movant cannot complain about receiving the relief he requested in his amended motion. The speculative possibility that Movant might receive a longer sentence does not make him an aggrieved party for appeal.

State v. Doss, 2016 WL 6440422 (Mo. App. W.D. Nov. 1, 2016):
Holding: Where on direct appeal the appellate court found the evidence insufficient to support a first-degree robbery conviction but remanded the case for a new penalty phase on other counts because improper evidence had been introduced, the appellate court's mandate limited the trial court on remand to conducting a new penalty phase, and the court could not consider vacating a second-degree felony-murder count which was based on the vacated first-degree robbery.
Discussion: On remand, Defendant sought to vacate his second-degree felony murder conviction which was based on the vacated first-degree robbery. This issue had not been raised on direct appeal. However, the scope of the trial court's authority on remand is defined by appellate mandate. There are two types of remands. A "general remand" does not provide specific direction and leaves all issues open to consideration at the new trial. A "remand with directions" requires the trial court to comply with the mandate. The remand here was a remand with directions to conduct a new penalty phase on the remaining convictions, so the trial court had no authority to consider setting aside the second-degree murder conviction; it could only hold a new penalty phase.

Navarro v. Navarro, 2016 WL 6871556 (Mo. App. W.D. Nov. 22, 2016):
Holding: An appellate appendix is not part of the legal file or otherwise part of the record on appeal, and exhibits contained within it are not in front of the court.

State v. Nelson, 2016 WL 7438736 (Mo. App. W.D. Dec. 27, 2016):
Holding: (1) A denial by the trial court of a nunc pro tunc motion to correct a clerical error in a judgment under Rule 29.12(c) is not appealable; cases to the contrary are to no longer be followed, but (2) a defendant may pursue a remedy via a writ if the alleged clerical errors infringe upon his rights.
Discussion: We do not have authority to hear an appeal from a denial of a nunc pro tunc motion under Rule 29.12(c) as appeals in criminal cases may only be from a final judgment rendered upon indictment or information, Sec. 547.070. A nunc pro tunc judgment creates no new judgment from which there is a statutory right to appeal. However, Defendant is not without any avenue for relief if the clerical error actually

infringes on his rights. A writ and perhaps other remedies are adequate to protect the narrowly limited right here.

Gray v. State, 2016 WL 4538084 (Mo. App. W.D. Aug. 30, 2016):
(1) Where Defendant had completed a prior sentence and was no longer detained on it (but was seeking to set it aside because it was being used to enhance a federal charge), Rule 29.07(d) might be available to correct manifest injustice (but there was no manifest injustice here); (2) denial of Rule 29.07(d) motions are appealable where filed after sentencing.
Discussion: (1) Rule 29.07(d) does not have a time limit on when a guilty plea can be withdrawn after sentence to correct manifest injustice. However, Rule 29.07(d) is not a substitute for Rule 24.035 or Rule 91 habeas corpus. If a defendant raises claims that could have been raised in a Rule 24.035 motion, the claims are generally waived unless Rule 91 habeas relief is available. Here, Defendant is not eligible for habeas relief because he has completed his sentence. It is "not at all clear" that 29.07(d) relief is not available to prevent manifest injustice where a defendant has completed a sentence and is no longer detained. However, here the claims raised do not result in manifest injustice. (2) The State argues a Rule 29.07(d) motion is not appealable, but this Court has previously held that they are appealable where filed after sentencing.

State ex rel. Tivol Plaza Inc. v. Missouri Comm. on Human Rights, 2016 WL 1435970 (Mo. App. W.D. April 12, 2016):
Holding: Where Appellant filed a petition for writ of mandamus in the trial court, but the trial court issued a summons rather than a preliminary order in mandamus before ultimately granting a motion to dismiss the case, the appellate court lacks authority to hear an appeal; the remedy is to file a new writ in the appellate court.
Discussion: Generally, when the circuit court denies a petition for mandamus, the petitioner's proper course of action is not to appeal the denial, but to file the writ in a higher court. But where a preliminary order in mandamus is granted and the circuit court then determines on the merits whether the writ should be made permanent or quashed, then appeal is the proper remedy. Here, the circuit court issued a *summons*, not a preliminary order in mandamus, before it ruled on the merits; this did not comply with Rule 94. Courts and litigants must follow the procedures set forth in Rule 94. Appeal dismissed.

*** U.S. v. Seneneng-Smith, ___ U.S. ___, 140 S.Ct. 1575 (U.S. May 7, 2020):**
Holding: Ninth Circuit violated principle of party presentation when it appointed outside interest groups to raise issues in appeal that weren't raised by appellant; although appellate court can sometimes play a modest role in initiating issues, the court generally should wait for cases and issues to come to it and not go looking for wrongs to right.

* **Holguin-Hernandez v. U.S., 2020 WL 908880, ___ U.S. ___ (U.S. Feb. 26, 2020):**
Holding: A defendant properly preserves for appeal a claim that his sentence is unreasonable where he argued for a lesser sentence in the district court, because this falls within the first prong of Rule 51(b) of the federal rules of criminal procedure, which provides that a party preserves claims of error by (1) informing the court of the action the

party wishes the court to take, or (2) making an objection to the court's action and the grounds for that objection.

* **Davis v. U.S., 2020 WL 1325819, ___ U.S. ___ (U.S. March 23, 2020):**
Holding: Fifth Circuit's "outlier" practice of refusing to review certain unpreserved factual claims for "plain error" is contrary to Rule 52(b), which states that "plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention"; nothing in 52(b) exempts factual errors from plain-error review; thus, Fifth Circuit should not have refused to review, as plain error, defendant's claim he was entitled to concurrent sentences under "same course of conduct" Sentencing Guideline.

* **U.S. v. Sanchez-Gomez, ___ U.S. ___, 138 S.Ct. 1532 (U.S. May 14, 2018):**
Holding: Individual criminal defendants' claims that a pretrial shackling policy was unconstitutional became moot when the defendants' criminal cases were concluded.

* **Ortiz v. United States, ___ U.S. ___, 138 S.Ct. 2165 (U.S. June 22, 2018):**
Holding: (1) Even though the Court of Appeals for the Armed Forces (CAAF) was established under Article I and is in the Executive Branch, the Supreme Court has appellate jurisdiction over its decisions because the Court's appellate jurisdiction includes more than just Article III courts, e.g., state courts, and courts of U.S. territories and the District of Columbia; (2) a military officer's simultaneous service as a judge on both the Air Force appeals court and the Court of Military Commission Review (CMCR) did not violate either 10 U.S.C. Sec. 973(b)(which prohibits an active-duty military officer from holding certain civil offices) or the constitution's Appointments Clause; the Appointments Clause does not impose rules about service in dual offices or prohibit service in dual offices, but only establishes procedures for how office holders are appointed.

* **Tharpe v. Sellers, ___ U.S. ___, 138 S.Ct. 545 (U.S. Jan. 8, 2018):**
Holding: Even though state court had determined that habeas Petitioner (who was black) failed to present clear and convincing evidence that allegedly racist Juror's presence on the jury had prejudiced him, where Petitioner presented an affidavit from Juror in which Juror made racist remarks about blacks and Petitioner (but denied that his views affected his verdict), lower court erred in denying a certificate of appealability because jurists of reason could debate whether Petitioner has shown by clear and convincing evidence that the state court's factual determination finding no prejudice was wrong.

*** Class v. U.S., ___ U.S. ___, 138 S.Ct. 798 (U.S. Feb. 21, 2018).**
Holding: A guilty plea does not bar federal defendants from appealing that the statute under which they were convicted was unconstitutional.

*** Manrique v. U.S., ___ U.S. ___, 137 S.Ct. 1266 (U.S. April 19, 2017):**
Holding: In order to appeal an order imposing restitution in a deferred restitution case, a defendant must file a notice of appeal following that order. A prior notice appealing the conviction and sentence was not effective to also cover the restitution order.

*** Buck v. Davis, 2017 WL 685534, ___ U.S. ____ (U.S. Feb. 22, 2017):**
Holding: (1) Death penalty counsel was ineffective in calling an expert who testified that the defendant's race made him statistically more likely to be dangerous in the future, even though the expert's principal testimony was that the particular defendant probably would not be dangerous; race cannot be a factor in assessing a death sentence; (2) appellate court erred in essentially deciding merits of case in denying a certificate of appealability because that imposes too high a standard for COA's; the statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then – if it is – an appeal in the normal course.

*** Molina-Martinez v. U.S., ___ U.S. ___, 136 S.Ct. 1338 (U.S. April 20, 2016):**
Holding: Where a defendant is sentenced under an incorrect USSG sentencing range (but this error is not noticed until appeal), the plain error rule does not require some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings; this error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome under the plain error rule.

*** Musacchio v. United States, 2016 WL 280757, ___ U.S. ___ (U.S. Jan. 25, 2016):**
Holding: (1) Even though a jury instruction contains an extra element, sufficiency of the evidence should be assessed only against the statutory elements of the charged crime; (2) a statute-of-limitations defense under 18 U.S.C. Sec. 3282(a), the general federal criminal statute of limitations, cannot be raised for the first time on appeal; it must have been raised in the district court in order to be considered on appeal; the issue cannot be considered as plain error.

U.S. v. Delgado-Prez, 101 Crim. L. Rep. 558 (1st Cir. 8/16/17):
Holding: (1) Even though a guilty plea typically waives a right to appeal a denial of motion to suppress, where plea court had repeatedly said that Defendant would be able to appeal, appellate court allows the appeal; (2) merely because a Defendant is arrested for drug trafficking in his home does not, by itself, give reason to believe another dangerous person is in the home to authorize a "protective sweep."

U.S. v. Milan-Rodriguez, 2016 WL 1612850 (1st Cir. 2016):
Holding: Sentence of 168 months for possessing firearm while being an unlawful user of controlled substance was plain error because maximum sentence is 120 months; remedy is not for appellate court to reduce to statutory maximum but to remand for appropriate sentence and explanation.

Taylor v. U.S., 2016 WL 2783449 (2d Cir. 2016):
Holding: (1) Indigent defendants are entitled to CJA counsel when seeking rehearing on appeal; (2) where CJA counsel failed to seek rehearing, court of appeals can recall its mandate to allow filing of petition for rehearing.

Lynch v. Dolce, 2015 WL 3771891 (2d Cir. 2015):
Holding: Appellate counsel ineffective by not appealing trial court's failure to give a mandatory jury instruction; even though counsel raised a sufficiency claim and the instructional claim would not have resulted in discharge, the sufficiency claim was legally weaker.

U.S. v. Cowley, 2016 WL 771142 (4th Cir. 2016):
Holding: An appeal of denial of motion for DNA testing under Innocence Protection Act is not subject to a certificate of appealability.

U.S. v. Duncan, 97 Crim. L. Rep. 693 (4th Cir. 9/2/15):
Holding: Appellate review of trial court's finding that Defendant forfeited his right to counsel by his conduct is de novo, even if Defendant failed to object.

Etienne v. Lynch, 98 Crim. L. Rep. 286 (4th Cir. 12/30/15):
Holding: Alien who was deported in expedited removal proceeding may raise legal arguments on appeal that were not presented in the administrative proceeding; administrative exhaustion doctrine doesn't apply since an alien subjected to expedited removal isn't given a realistic opportunity to raise legal claims.

U.S. v. Heredia-Holguin, 99 Crim. L. Rep. 342, 2016 WL 2957853 (5th Cir. 5/20/16):
Holding: Even though alien-Defendant was deported, this did not moot his appeal of his supervised release terms, because he continued to be subject to the terms of release.

U.S. v. Hornyak, 98 Crim. L. Rep. 139 (5th Cir. 10/30/15):
Holding: Holding of *Johnson v. U.S.* (U.S. 2015), which struck down residual clause in ACCA, applied to cases pending on direct appeal under plain error rule; keeping a defendant in prison for an extra 68 months because of a clause declared unconstitutional during the pendency of his direct appeal would "cast significant doubt on the fairness of the criminal justice system."

Washington v. Ryan, 99 Crim. L. Rep. 622 (9th Cir. 8/15/16):
Holding: Even though death penalty defense counsel filed notice of appeal one day late, appellate court allows this to be corrected under Rule 60(b) by ordering district court to vacate and reenter judgment so the appeal could be considered timely; this relief was warranted because both defendant's co-defendants' had received relief from their death sentences, and tremendous disparity would result if defendant's death sentence were denied review.

U.S. v. Hardman, 2014 WL 7877497 (11th Cir. 2014):
Holding: Even though Defendant's original sentence contained an appeal waiver, where the sentence was subsequently modified based on a Gov't motion for reduction based on substantial assistance, Defendant could appeal the modified sentence; the waiver was effective for the original sentence only.

U.S. v. Durham, 2015 WL 4637900 (11th Cir. 2015):
Holding: Even though Defendant did not raise an issue in opening brief, he can do a motion to file a substitute brief where a new Supreme Court or Court of Appeals decision overrules a prior case that was on the books when the opening brief was filed, and the overruling of which supports a new claim on appeal.

U.S. v. Puentes-Hurtado, 2015 WL 4466279 (11th Cir. 2015):
Holding: Defendant's appeal waiver in plea agreement did not bar his appeal where Defendant alleged that the Gov't breached the plea agreement, and that his counsel's ineffectiveness rendered his plea involuntary; appellate review of a plea agreement is allowed where the claim is that the Gov't breached the very agreement that includes the waiver; also, if the plea was involuntary due to ineffective counsel, the plea is not constitutional.

State v. Reed, 2020 WL 398703 (Ariz. 2020):
Holding: Statute requiring dismissal of appeal upon death of defendant violated separation of powers; legislature had no authority to direct appellate courts how to adjudicate appeals.

Gardner v. App. Div. of Superior Ct. of San Bernadino Cnty, 245 Cal. Rptr. 3d 58 (Cal. 2019):
Holding: State's interlocutory appeal of grant of motion to suppress is a critical stage at which Defendant-Respondent is entitled to appointed counsel to defend suppression.

People v. Rangel, 2016 WL 1176584 (Cal. 2016):
Holding: In cases tried before *Crawford v. Washington*, a Defendant need not have made a Confrontation Clause objection at trial to be able to raise a "*Crawford* claim" on appeal.

State v. Dickey, 2015 WL 2445810 (Kan. 2015):
Holding: Defendant's challenge to trial court's classification of his prior juvenile adjudication for burglary as a person felony for criminal history and sentencing enhancement purposes could be raised for first time on appeal, under statute allowing court to correct illegal sentences at any time.

Com. v. Bruneau, 97 Crim. L. Rep. 695 (Mass. 8/27/15):
Holding: Even though Defendant was acquitted based on a verdict of NGRI, he has right to appeal because he is "aggrieved" by a judgment that has harsh consequences.

Rowsey v. State, 2015 WL 7770771 (Miss. 2015):
Holding: Even though Defendant failed to obtain a ruling from the trial court on his denial of speedy trial claim, this did not mean the issue was waived or could only be reviewed for plain error on appeal; rather, Defendant's failure was a merely "factor" to be considered as part of the speedy trial factors in *Barker v. Wingo.*

People v. Novak, 102 Crim. L. Rep. 118 (N.Y. 10/24/17):
Holding: Due process precluded an appellate judge from ruling in a case which they presided over as a trial judge.

State v. Houston, 2015 WL 773718 (Utah 2015):
Holding: Even though Juvenile did not preserve his claim that he could not be sentenced to LWOP, the claim was reviewable on appeal under rule allowing court to correct an illegal sentence; this was a legal issue only, that did not require the appellate court to delve into the record or make findings of fact.

State v. Lazarides, 2016 WL 852889 (Or. 2016):
Holding: Court of Appeals lacked authority to apply escape rule after Defendant had been returned to custody.

People v. Subramanyan, 2016 WL 1298516 (Cal. App. 2016):
Holding: Even though Victim's Bill of Rights gave victims the right to seek restitution "in any trial or appellate court with jurisdiction over the case," this did not authorize Victim to appeal the trial court's denial of a motion for additional restitution.

People v. Brown, 2015 WL 5315595 (Cal. App. 2015):
Holding: Where (1) Victim was raped at two different locations, but only the first location involved use of force, (2) prosecutor during closing argument elected to base the charge only on the second incident, and (3) no unanimity instruction was given, then in reviewing the sufficiency of the evidence for forcible rape the appellate court is bound by the prosecutor's election, so reviews only whether the evidence was sufficient to support the second incident (which it wasn't); otherwise, the Court may be reviewing a non-unanimous verdict.

People v. Loper, 2015 WL 925447 (Cal. 2015):
Holding: Defendant had right to appeal court order denying DOC's recommendation that Defendant be granted compassionate release due to medical condition; the appeal statute allowed appeal "from any order made after judgment, affecting the substantial rights of a party."

Jones v. State, 2015 WL 2259311 (Fla. App. 2015):
Holding: Appellate counsel was ineffective in failing to raise a jury instruction issue, where there had been two favorable appellate opinions on the issue before movant's appeal, and a third favorable opinion prior to the initial appellate brief.

Hoever v. Florida Dept. of Corrections, 2015 WL 233300 (Fla. App. 2015):
Holding: The date on which a DOC staff member acknowledged receipt of an appeal did not conclusively refute inmate's allegation that he had submitted the appeal in a timely fashion, where there was no initialing process to show that the date of receipt was the same as the date inmate placed his appeal in the "grievance box."

People v. Shinaul, 2015 WL 5817986 (Ill. App. 2015):
Holding: A trial court's denial of a motion to reinstate previously nolle-prossed charges is not a "dismissal" of charges under statute giving State right of appeal following "dismissal," so State cannot appeal.

State v. Wachtendorf, 2015 WL 7306398 (Tex. App. 2015):
Holding: Time period for State to file notice of appeal started on date that judge signed order, not the later date order was filed with clerk.

Armed Criminal Action

State v. Jones, 479 S.W.3d 100 (Mo. banc Jan. 26, 2016):
(1) Where Defendant entered an open garage door with a gun in order to commit burglary, this was sufficient to also convict of ACA because Sec. 571.015.1 only requires that a Defendant commit a crime "by, with, or through" the "use, assistance or aid" of a weapon; the statute does not require that the weapon be the means of forcing entry, either directly or indirectly; (2) even though Officer who chased Defendant after the burglary told him only to "stop running," Defendant should have reasonably known he was under arrest, so evidence was sufficient to convict of resisting arrest.
Facts: Defendant entered an open garage door. He had a gun. He then went into the residence, and after scuffling with a resident, fled. Shortly thereafter, police arrived, and saw Defendant in the area. An officer told Defendant to "stop running," and chased him. Defendant was convicted of first degree burglary, armed criminal action and resisting arrest.
Holding: (1) Defendant claims the evidence is insufficient to convict of ACA because he didn't "use" a weapon to enter the residence, because he entered through an open garage door. Sec. 571.015.1 does not contain only the word "use" of a weapon. The statute makes it a crime to act "by, with, or through" the "use, assistance or aid" of a weapon. The noun "use" does not mean that the weapon must have been necessary to commit the crime or that but for the Defendant's "use" of the weapon the crime would not have occurred. Regarding a burglary, the weapon need not have been the means of forcing entry, either directly or indirectly. Aside from "use," Defendant ignores the "with" and "through" "assistance" and "aid" language of the statute. The statute is intended to reach as far as possible and discourage defendants from arming themselves during commission of felonies. (2) Defendant claims the evidence is insufficient to convict of resisting arrest, Sec. 575.150.1, because Officer said only "stop running" and not "stop running, you're under arrest." However, it is not necessary for police to specifically say, "you are under arrest," when the circumstances indicate Officer is attempting an arrest. Here,

when Officer identified himself and told Defendant to stop running, Defendant fled and kept running as Officer chased him. There was sufficient evidence to infer that Defendant knew or reasonably should have known he was being arrested for crimes he had just committed.

State v. Jacobson, 2017 WL 2118655 (Mo. App. W.D. May 16, 2017):
Holding: Where jury convicted Defendant-Driver of second-degree assault and armed criminal action for running over a pedestrian, trial court erred in granting judgment of acquittal on ACA because (1) even though second-degree assault has a mental state of criminal negligence and ACA required acting purposely or knowingly, ACA applies to conviction for "any felony" so the mental state required for the underlying felony is irrelevant, and (2) Defendant's truck qualified as a "dangerous instrument" under Sec. 566.061(20) under circumstances used here because Defendant drove while intoxicated, had modified the truck to obstruct his line of sight, and knew he hit something but left the scene.
Discussion: Whether something is a "dangerous instrument" depends on whether the item was used in a manner or under circumstances in which it is readily capable of causing death or serious injury. Not every instance of a person involved in an injury accident while intoxicated will automatically support an ACA conviction. The decision here is based on "the unusual facts of this case." In addition to being intoxicated, Defendant knew he was driving in a high pedestrian area, had modified the truck to impair his line of sight, left the scene, and lied to police about the incident, suggesting he was aware of the dangerous nature of his conduct.

Attorney's Fees

*** Murphy v. Smith, ___ U.S. ___, 138 S.Ct. 784 (U.S. Feb. 21, 2018):**
Holding: When prisoners win civil rights cases for unconstitutional conditions in prison, the Prison Litigation Reform Act requires that 25% of the judgment be used to pay their attorney's fees before the defendants can be required to pay any excess attorney's fees; district courts do not have discretion under the PLRA to allow prisoners to pay less than 25% of the judgment before requiring the defendants to also pay.

Bail – Pretrial Release Issues

Lopez-Matias v. State, 2016 WL 7212407 (Mo. banc Dec. 8, 2016):
(1) Sec. 544.455, which prohibits bail for Alien-Defendants unless they can prove their lawful presence in the U.S., is unconstitutional under Art. I, Sec. 20, Mo.Const., which which provides that "all persons" shall be entitled to bail except for capital cases; (2) trial court may deny bail to Alien-Defendant only after making an individualized determination that Alien-Defendant may pose a danger to victim or public, or be a flight risk.
Facts: Alien-Defendant was charged with possessing a forged social security card. The trial court categorically denied bail under Sec. 544.455, which provides that there shall be

a "presumption" that releasing an Alien on bail will not reasonably assure his appearance, and that the Alien shall not be allowed bail unless they can prove their "lawful presence" in U.S. Alien sought relief from appellate court under Rule 33.09.
Holding: Art. I, Sec. 20, Mo.Const., provides that "all persons" shall be bailable, except in capital cases. Sec. 544.455 violates Art. I, Sec. 20, because it denies the right to bail to an entire class of persons who are not able to establish their "lawful presence." The State claims that Sec. 544.455 is constitutional under Art. I, Sec. 32, Mo.Const., which allows a court to deny bail if a defendant poses a danger to anyone or the community. The State is not wrong to suggest that Art. I. Sec. 32, authorizes a trial court to deny bail in a proper case, but it does not authorize denying bail to an entire class of persons without individualized examination of each person's case. The right to bail is subject to reasonable conditions. The fact that a person is an alien may or may not suggest that the person poses a particular danger or flight risk. Case remanded to trial court to conduct individualized determination whether Alien-Defendant should be granted bail.

Nichols v. McCarthy, 2020 WL 5640263 (Mo. App. E.D. Sept. 22, 2020):
(1) Where the appellate courts had denied Defendant's writs of mandamus under Rule 33.09 to consider his ability to pay a bond without opinions, that was not a ruling on the merits, so trial court erred in dismissing Defendant's subsequent declaratory judgment action regarding the same issue on grounds that Defendant had an adequate remedy at law (i.e., a writ of mandamus); and (2) even though a ruling in the declaratory judgment case may no longer affect Defendant, the declaratory judgment case is not moot because it satisfies the "public interest exception" to mootness in that it's a recurring issue that may evade appellate review if not addressed.
Facts: Defendant was arrested on a warrant that contained a monetary condition of release of $30,000 cash only. Defendant subsequently had two hearings, at which the court ruled he was a danger to the community and should be held without bond. The court rejected Defendant's claim that the *initial* arrest warrant must be recalled because the monetary condition of release ($30K cash only) was set without any consideration of his ability to pay. Defendant sought writs of mandamus under Rule 33.09 in the Court of Appeals, and Supreme Court, which were denied without opinion. He then filed the instant declaratory judgment action seeking a declaration that the initial arrest warrant must be recalled because it didn't consider Defendant's ability to pay bond. The trial court dismissed the action on grounds that Defendant had an adequate remedy at law, i.e., a writ of mandamus.
Holding: Defendant has no adequate remedy at law. The denial of the writs of mandamus without opinions was not a ruling on the merits. Such a denial does not necessarily mean that Defendant cannot later seek to establish a right to relief in the declaratory judgment action. He is entitled to seek a declaratory judgment on the merits of his claim.

*** Jennings v. Rodriguez, ___ U.S. ___, 138 S.Ct. 830 (U.S. Feb. 27, 2018):**
Holding: The Immigration and Nationality Act's statutory provisions do not require that persons held under the Act be granted bail, but Court does not decide whether detainees have a constitutional right to bail.

Curry v. Yachtera, 99 Crim. L. Rep. 671 (3d Cir. 9/1/16):
Holding: Third Circuit criticizes bail policy for low-risk defendants saying bail has become a "threat to equal justice;" court says high bail forces defendants to accept plea deals; defendant was charged with stealing $130 and bail was set at $20,000.

Jauch v. Choctaw County, 102 Crim. L. Rep. 118 (5th Cir. 10/24/17):
Holding: Even though a judge wasn't available for 96 days until a new court term, holding a pretrial detainee for 96 days before bringing them before a judge violates due process because indefinite pretrial detention without arraignment or other court appearance violates deeply rooted principles of justice.

O'Donnell v. Harris County, 103 Crim. L. Rep. 245, 892 F.3d 147 (5th Cir. 6/1/18):
Holding: (1) County's bail procedures are likely unconstitutional as applied to indigent Defendants where (a) an arrest hearing doesn't take place with 24 hours; (b) indigent Defendants are given the highest bail on the bail schedule 90% of the time; (c) indigent Defendants are more likely to plead guilty than non-indigent Defendants, and receive sentences twice as long as those who can afford bail; (2) County must engage in case-by-case evaluation, give a bond hearing within 48 hours, and provide a reasoned decision on bond.

U.S. v. $11,500 in U.S. Currency, 101 Crim. L. Rep. 600 (9th Cir. 9/5/17):
Holding: 21 USC 881(a)(6), which allows the Gov't to seize money that is intended to be used in a drug transaction, did not allow Gov't to seize the bail money which Husband posted for Wife, even though both Husband and Wife were drug addicts; it was speculative to look forward or backward in time to assume that they intended to use this money to buy drugs; forfeiture requires they take some action manifesting an intent.

Sopo v. Attorney General, 99 Crim. L. Rep. 396 (11th Cir. 6/15/16):
Holding: Aliens facing mandatory detention as aggravated felons pending removal must receive a bond hearing within a reasonable time; here, Defendant had finished a sentence for bank fraud, but had been held 4 years in custody pending removal.

U.S. v. Rodriguez, 2015 WL 7820494 (D.N.M. 2015):
Holding: Even though Defendant was charged with possession with intent to distribute 50 kilos of marijuana, pretrial detention was not warranted given the Executive Branch's decision not to prosecute federal marijuana offenses in states that permit marijuana for recreational purposes; this makes it difficult for the Gov't to show that release of marijuana defendants would be a danger to the community.

Johnson v. State, 2018 WL 6441484 (Fla. App. 2018):
Holding: Even though Defendant appeared late for court, this did not establish that he was a danger to the community requiring him to be incarcerated.

Brady Issues

Harding v. State, 2020 WL 7702249 (Mo. App. E.D. Dec. 29, 2020):
Holding: Even though constitutional claims must generally be raised on direct appeal, where 29.15 Movant was unaware of alleged *Brady* violation during the direct appeal and only discovered it during the postconviction case, fundamental fairness require that it be allowed to be considered in postconviction case (but claim fails on merits because non-disclosed information not material).

State ex rel. Schmitt v. Green, 2020 WL 2027317 (Mo. App. W.D. April 28, 2020):
(1) Habeas relief granted where State failed to disclose fingerprint report which would have shown that another person's fingerprints were at crime scene other than those of Petitioner (Defendant) and Victim. This is true even though another fingerprint report was disclosed which showed none of the prints at the scene belonged to Petitioner. The undisclosed report would have been forensic evidence that a different person was at the scene; supported Petitioner's actual innocence defense; and impeached Officer's false testimony that only Victim's prints were found at scene. (2) County Prosecutor's Office (not Attorney General) is authorized party to decide whether to retry or release Petitioner.
Facts: In 1998, Petitioner was convicted at trial of first degree assault and ACA, and sentenced to 50 years. Victim came home at night and found an intruder -- a young, African-American male, who ultimately shot Victim and fled. Police gathered latent fingerprints from where the intruder had entered. At first, the only identification Victim could make of the intruder was that he was a young, African American male. However, by the time of the preliminary hearing and after some prompting at a lineup and apparently reviewing police reports, Victim positively identified Petitioner. Officer at trial gave testimony leading to the conclusion that only Victim's fingerprints were at the house. Another Officer testified Petitioner confessed, but Officer "destroyed" his notes before anyone saw them. There was no recording or writing of the confession. Other witnesses testified Petitioner had a gun the day of the shooting. Petitioner's trial defense was actual innocence. After his direct appeal and postconviction case were denied, Petitioner made a Sunshine Law request for records, and discovered an undisclosed police report showing an unidentified person's fingerprints at the scene. A habeas court granted relief for the *Brady* violation. The State sought a writ of certiorari.
Holding: (1) In order to overcome his default for not raising his *Brady* claim on direct appeal or in postconviction, Petitioner must show either (1) the claim involves manifest injustice because newly discovered evidence makes it more likely than not that no reasonable juror would have convicted (a gateway innocence claim), or (2) that an objective factor external to the defense impeded his ability to comply with the procedural rules for review of claims, and which has resulted in actual and substantive prejudice infecting his entire trial with constitutional error (a gateway cause and prejudice claim). Here, the habeas court found a gateway cause and prejudice claim. The State claims that Petitioner had enough information at trial to have known there must be an undisclosed fingerprint report. But nothing in Officer's testimony at trial would have suggested that there was any police report that identified a fingerprint other than Victim's. Further, Officer's testimony was false, because there was, in fact, an undisclosed police report that

fingerprints of an unidentified person were found. The State's reliance on false trial testimony to argue that Petitioner should have known of the undisclosed report "borders on the incredulous." Petitioner was prejudiced because the undisclosed report would have supported his actual innocence defense by allowing him to argue that a "third party" (not him) was at the scene. This evidence is exculpatory and far more persuasive than simply arguing that Petitioner was innocent because his prints were not found at the scene. (2) Petitioner must be released unless State chooses not to retry him within 10 days. The County Prosecutor's Office is the Office to make the decision.

State ex rel. Hawley v. Beger, 2018 WL 1755482 (Mo. App. S.D. April 12, 2018):
Holding: Where Highway Patrol failed to disclose exculpatory and impeaching gunshot residue test to either Prosecutor or Defense Counsel prior to trial, habeas court did not exceed its authority in vacating conviction and ordering new trial for Petitioner, because court's judgment was supported by the evidence.
Discussion: The State claims that Petitioner should have raised this claim on direct appeal or in a Rule 29.15 case, even though the State admits the evidence was not disclosed until after both. Given the State's admission that it failed to disclose this evidence, the State's argument that Petitioner should have discovered the undisclosed evidence in time to raise it on direct appeal or in 29.15 is repugnant. There is no basis to charge Petitioner with having known about this evidence when it wasn't known by the Prosecutor or Defense Counsel due to the Highway Patrol's failure to disclose. The State argued that Petitioner wasn't prejudiced by the failure to disclose because he cannot show that he would have been acquitted. But it was enough to show a reasonable probability of a different result, i.e., that the nondisclosure undermines confidence in trial's outcome. The question is not whether Petitioner would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

*** Turner v. U.S., ___ U.S. ___, 137 S.Ct. 1885 (U.S. June 22, 2017):**
Holding: Court holds in very fact-specific case that even though Government violated *Brady* in not disclosing Witnesses who would have supported a defense theory that someone else did the murder and in not disclosing other evidence impeaching other Witnesses, reversal of conviction is not required because the non-disclosed evidence was not "material" here, where (1) the defense at trial never suggested somebody else did the murder; (2) multiple witnesses indicated that the murder was a "group attack" by multiple defendants, but the non-disclosed evidence would have been that the murder was by another lone individual – not a "group attack"; and (3) the impeachment evidence was largely cumulative to other evidence the jury heard. Court finds that if the evidence had been disclosed, there would be no reasonable probability of a different result, and confidence in the outcome is not undermined.

*** Wearry v. Cain, ___ U.S. ___, 136 S.Ct. 1002 (U.S. March 7, 2016):**
Holding: State violated *Brady* by failing to disclose in murder case: (1) statements by fellow inmates of State's key witness that would have impeached key witness' credibility (key witness told other inmates he had a vendetta against Defendant and also asked fellow inmates to lie about having witnessed the murder); (2) that, contrary to

Prosecutor's assertions at trial, another witness had twice sought a deal to reduce his sentence in exchange for testifying (the Prosecutor had told jurors that witness "hadn't asked for a thing" for testifying); and (3) medical records regarding a person who key witness said was running during the crime, but the records would have shown he had had knee surgery close to the crime and could not have run.

U.S. v. Flores-Rivera, 2015 WL 2445440 (1st Cir. 2015):
Holding: State violated *Brady* by failing to disclose a cooperating witness' letter to prosecutor, notes cooperating witness had written to other cooperating witnesses, and notes of an FBI interview of a co-conspirator who did not testify at trial.

Lewis v. Conn. Com'r of Corrections, 2015 WL 3823858 (2d Cir. 2015):
Holding: State court unreasonably applied federal law in holding that Defendant was required to exercise due diligence to discover *Brady* evidence which the State withheld; here, State failed to disclose that its chief witness had previously repeatedly denied knowledge of the murder, that police had coached the witness about the details of the murder, and that police had induced witness to testify falsely to secure his release from custody.

Juniper v. Zook, 102 Crim. L. Rep. 181 (4th Cir. 11/16/17):
Holding: Brady violated where Gov't failed to disclose evidence that a Witness heard gunshots and saw a vehicle that contradicted Gov't's theory of the case.

Sims v. Hyatte, 2019 WL 406268 (7th Cir. 2019):
Holding: Habeas relief granted because State withheld impeachment evidence that Victim had been hypnotized before trial to enhance recollection of the charged shooting.

U.S. v. Walter, 101 Crim. L. Rep. 598 (7th Cir. 8/29/17):
Holding: Gov't violated Brady by not disclosing that a prosecution witness lied in saying he had quit dealing drugs.

Browning v. Baker, 101 Crim. L. Rep. 660 (9th Cir. 9/20/17):
Holding: (1) Gov't violated Brady in failing to disclose that Witness was given leniency on unrelated charges in exchange for testimony; impeachment evidence that a Witness had once hired someone to assault his wife; police reports showing discrepencies over eyewitness identification; and bloody footprints at scene; and (2) counsel was ineffective in failing to interview Officers who would have given information about these facts.

Shelton v. Marshall, 2015 WL 4664530 and 2015 WL 4680334 (9th Cir. 2015):
Holding: Prosecutor violated *Brady* by not disclosing that key State Witness had, as part of their plea agreement, agreed not to submit to a mental evaluation; this precluded the defense from challenging the mental competence of Witness.

U.S. v. Hampton, 2015 WL 3794750 (D. Mass. 2015):
Holding: State lab chemist who willfully tampered with evidence was an agent of the prosecution, and thus, the tampering amounted to a *Brady* violation for failure to disclose it.

U.S. v. Sember, 99 Crim. L. Rep. 345 (S.D. Ohio 5/27/16):
Holding: Gov't cannot destroy a hard driving allegedly containing contraband that may be subject to future civil litigation; here, after Defendant was found not guilty of theft of gov't property, he planned to bring a civil action that could involve the data on the hard drive.

Beville v. State, 100 Crim. L. Rep. 564 (Ind. 3/17/17):
Holding: Even though state law generally prohibited disclosing identity of an informant, Defendant was entitled to a video of his alleged drug sale to aid his defense.

State v. Colvin, 2016 WL 3067445 (Mont. 2016):
Holding: Where the defense had specifically requested that a vehicle in which the charged attempted-murder occurred be preserved, State violated *Brady* by releasing vehicle back to victim without the defense having been able to examine it for gunshot residue and blood-spatter; remedy was dismissal of charges.

Buffey v. Ballard, 2015 WL 7103326 (W.Va. 2015):
Holding: *Brady* applies to plea negotiation stage, and Defendant may withdraw a guilty plea based upon Prosecutor's failure to disclose favorable evidence.

Starling v. State, 98 Crim. L. Rep. 269 (Del. 12/14/15):
Holding: (1) counsel ineffective in failing to cross-examine a key prosecution Witness about inconsistent statements he made before trial that would have exculpated Defendant; (2) counsel ineffective in failing to show that police threatened to charge Witness with a crime unless he inculpated Defendant, because this would show Witness' statement was involuntary and possibly inadmissible; and (3) prosecutor violated *Brady* by telling defense that probation violation proceedings against another Witness were "pending" when they had, in fact, been dismissed, because this could have been used to impeach Witness.

Manning v. State, 2015 WL 574726 (Miss. 2015):
Holding: State violated *Brady* by failing to disclose that an apartment, from which a key witness claimed to have seen the crime, was actually vacant at the time of the crime.

People v. McGhee, 2019 WL 6902810 (N.Y. 1st Dept. 2019):
Holding: *Brady* violated where State failed to disclose witness statement that would have impeached only eyewitness to shooting; Defendant had little basis to question eyewitness without the statement, and the statement created an alternative theory of crime.

Civil Procedure

State ex rel. Vacation Mgmt. Solutions LLC v. Moriarty, 610 S.W.3d 700 (Mo. banc Nov. 24, 2020):
Holding: Where Defendant filed a motion to transfer venue and Plaintiff did not file a reply as required by Rule 51.045(b), the action must be transferred pursuant to Rule 51.045(c); writ of mandamus requiring transfer to other county granted.
Discussion: Rule 51.045(b) provides that within 30 days of filing of a motion to transfer for improper venue, an opposing party "may" file a reply. Rule 51.045(c) provides that "if no reply is filed, the court shall order transfer to one of the counties specified in the motion."

Hicklin v. Schmitt, 2020 WL 6881220 (Mo. banc Nov. 24, 2020):
Holding: (1) Even though Petitioner was convicted of first-degree murder and sentenced to life-without-parole when she was a Juvenile, Missouri has complied with *Miller* and *Montgomery* by granting parole-eligibility after 25 years, and allowing Parole Board to determine whether such Juveniles should be released, Sec. 558.047.1(1); *Montgomery* allowed States discretion whether to grant new sentencing hearings to such Juveniles or grant parole-eligibility, and Missouri chose the latter; and (2) challenges to the constitutionality of statutes are brought as a declaratory judgment action, but attacks on validity of sentence should be brought in habeas corpus; to the extent Petitioner seeks a judgment about the constitutionality of the first degree murder statute, Sec. 558.047, and their application to her, declaratory judgment is proper; declaratory judgment is also proper to determine when Petitioner is eligible for parole under applicable statutes, and to challenge what process a parole hearing must use to comply with relevant statutes.

State ex rel. Universal Credit Acceptance, Inc. v. Reno, 2020 WL 3529370 (Mo. banc June 30, 2020):
Holding: Where Plaintiff filed its motion for change of venue one week after its motion for change of judge, the venue motion should not have been granted because Rule 51.06(a) provides that a "party who desires both a change of venue and a change of judge must join and present both in a *single* application"; because the change of venue motion was not filed at the same time as the change of judge motion, writ of mandamus to retransfer the case back to the original county is granted.

State ex rel. Helperbroom LLC v. Davis, 566 S.W.3d 240 (Mo. banc Jan. 29, 2019):
Holding: Even though Rule 51.045(b) does not impose a time limit for when a court must rule on a motion to transfer venue because of improper venue, Sec. 508.010.10 requires a court to rule within 90 days; if a court does not rule, the motion is granted.

Alpert v. State, 543 S.W.3d 589 (Mo. banc April 3, 2018):
Holding: (1) Even though Petitioner (who had been convicted of felonies and wanted to possess firearms) had not been charged with violation of Sec. 571.070, his declaratory judgment action that Sec. 571.070 was unconstitutional as applied to him was "ripe" because he need not violate the law and subject himself to prosecution in order to assert a constitutional claim for declaratory relief; but (2) even though Petitioner had been

convicted of felonies in the 1970s, and in 1983 had had his rights to possess a firearm restored by the Attorney General under 18 U.S.C. 925(c), Sec. 571.070 (2008) makes it unlawful for anyone convicted of a felony to possess a firearm, and this does not violate Mo. Const. Art. I, Sec. 23, or the Second Amendment.

Bartlett v. Mo. Dept. of Insurance, 2017 WL 3598216 (Mo. banc Aug. 22, 2017):
Where a circuit court issued a summons rather than a preliminary writ in a mandamus action and then purported to enter a "judgment" on the merits, this procedure was not authorized by Rule 94 and the "judgment" is not appealable. An "appeal" will lie from the denial of a mandamus writ petition only when a lower court has issued a preliminary order in mandamus then denies a permanent writ. In the absence of a preliminary writ, petitioners' remedy was to file a new mandamus action in the next highest court.
Facts: Petitioners/appellants filed a "petition for writ of mandamus." The clerk asked petitioners/appellants if they wanted the case handled as a writ or a "regular" civil case. Petitioner/appellants told the clerk to treat it as a "regular" civil case. The circuit court then issued a summons, directing defendant to answer. Defendant objected on grounds that the circuit court could only issue a preliminary order in mandamus. The circuit court eventually entered a "judgment" on the merits, denying a permanent writ. Petitioners/appellants appealed.
Holding: The rules of mandamus are different than for normal civil actions. A petitioner is required to file an application, suggestions in support, and exhibits supporting the application, Rule 94.03. Instead of issuing a summons in a mandamus proceeding, the circuit court issues a "preliminary order," or preliminary writ of mandamus, if the court believes a preliminary order should be granted, Rule 94.04. If the court does not grant a preliminary order, the petitioner then must file its writ petition in the next highest court. In contrast, an appeal will lie from the denial of a writ petition when a lower court has issued a preliminary order in mandamus but then denies a permanent writ. Here, the circuit court ultimately purported to deny petitioners' writ on the merits. But having never been granted a preliminary writ, petitioners' course of action was to file a new mandamus action in the next higher court; they cannot "appeal." Appeal dismissed.

Editor's Note: In ***State ex rel. Tivol Plaza, Inc. v. Mo. Comm'n on Human Rights***, 527 S.W.3d 837 (Mo. banc Aug. 22, 2017), the Court exercised its discretion to treat the issuance of a summons as a preliminary writ to allow an appeal due to the general interest and important of the merits issue in that case, but stated "[p]arties should not expect unending tolerance from the appellate courts for such failures to follow Rule 94.04."

Mercer v. State, 2017 WL 986109 (Mo. banc March 14, 2017):
(1) Where Petitioner filed a motion under Sec. 547.035 claiming that DNA testing would prove actual innocence, trial court erred in dismissing the motion by docket entry without entering findings of fact and conclusions of law to allow meaningful appellate review; (2) the 12-month window for seeking late notice of appeal under Rule 30.03 applies to Sec. 547.035 motions, not the shorter 6-month window for civil cases under Rule 81.07(a); (3) even though the trial court's docket entry was not denominated a "judgment," it was appealable because Rule 74.01(a)'s requirement for use of the word "judgment" does not apply to postconviction cases.

Facts: In October 2013, Petitioner filed a motion for postconviction DNA testing under Sec. 547.035. In April 2014, the trial court dismissed the motion by docket entry which said the motion was "overruled and denied." In August 2014, Petitioner wrote the trial court a letter saying that the court had failed to issue required findings. In March 2015, Petitioner filed a 30.03 motion seeking late notice of appeal, which the Southern District granted.
Holding: As an initial matter, the 12-month window for seeking a late notice of appeal (Rule 30.03) rather than the 6-month window for a civil case (Rule 81.07(a)) applies to postconviction cases, so there is jurisdiction for the appeal under Rule 30.03. Also, even though the docket entry was not denominated a "judgment," as required by Rule 74.01(a), that Rule is inapplicable to postconviction cases because it would delay processing of postconviction claims. Rule 78.07(c) requires a petitioner who claims error relating to the failure to make findings to bring this to the attention of the trial court, but here, Petitioner did that by sending his letter telling the trial court it had to make findings. Sec. 547.035 requires findings sufficient for meaningful appellate review. Reversed and remanded for findings.

State ex rel. Malashock v. Jamison, 2016 WL 6441285 (Mo. banc Nov. 1, 2016):
Even though Plaintiff had designated Expert as witness Plaintiff intended to call at trial and the general subject matter of Expert's testimony, where Plaintiff never revealed the Expert's analysis, opinions or conclusions, Rule 56.01 allowed Plaintiff to later rescind the endorsement of Expert; thus, Plaintiff did not irrevocably waive the work-product protections surrounding Expert, and Defendant could not depose Expert.
Facts: Plaintiff designated Expert as a witness expected to testify at trial regarding the "performance and factors" of a vehicle. Later, Plaintiff "de-endorsed" Expert. Defendant then sought to depose Expert. The trial court ordered the deposition on grounds that Plaintiff waived the work-product doctrine by designating Expert as a witness. Plaintiff sought a writ of prohibition.
Holding: An expert's knowledge, opinions and conclusions are the work product of the attorney retaining the expert. The designation of an expert before trial begins the process of waiving work-product, but the waiver is not complete until there has been a "disclosing event," which is the actual disclosure of the expert's opinions and conclusions. Here, Expert's opinions and conclusions were never disclosed. Plaintiff "de-endorsed" Expert before trial without disclosing Expert's opinions and conclusions. Expert is no longer expected to testify at trial. Thus, Plaintiff did not waive the work product doctrine. Writ granted.

Laramore v. Jacobsen, 2020 WL 6733487 (Mo. App. E.D. Nov. 17, 2020):
Holding: (1) Where Petitioner's property was seized by Sheriff during his arrest, the statute of limitations for a replevin action to seek return of the property begins to run three years from the date the property is no longer needed as evidence, under Sec. 516.130(1) for an action against officers; where Petitioner still had a pending postconviction or criminal case where the property may be needed as evidence, the statute of limitations had not yet run; (2) although an inmate has no constitutional right to be present for a civil proceeding, Sec. 491.230 authorizes a writ of habeas corpus ad testificandum where the inmate will be "substantially and irreparably prejudiced" by

failure to attend; inmate must petition circuit court for issuance of such a writ and demonstrate necessity to attend; circuit court is not requires to issue writ *sua sponte*.

In the Interest of T.M.L., 2020 WL 7502308 (Mo. App. E.D. Dec. 22, 2020):
Holding: (1) In termination of parental rights case, where Father (whose rights were being terminated) unexpectedly did not show for trial, trial court did not discretion in denying oral motion for continuance because Rule 65.03 requires a continuance motion be in writing and accompanied by an affidavit setting forth the facts upon which the motion is based, unless the adverse party consents to oral motion; but (2) where, immediately after trial, counsel filed a Motion to Reopen and to present evidence (on grounds Father's illness prevented him from attending trial), trial court abused discretion in not granting Motion to Reopen without a hearing on the Motion.
Discussion: When there is no inconvenience to the court nor unfair advantage to one of he parties, it is an abuse of discretion to refuse to permit introduction of material evidence which might affect merits of case. Here, trial did not conduct a hearing on the Motion to Reopen and merely entered a judgment terminating Father's parental rights. There is nothing to suggest that reopening to allow Father to present evidence would have created inconvenience or given Father unfair advantage. Termination of parental rights is an "awesome power" that should not be done "lightly." Remanded for hearing on Motion to Reopen, so trial court can make credibility determination as to reasons for Father's failure to appear.

Nichols v. McCarthy, 2020 WL 5640263 (Mo. App. E.D. Sept. 22, 2020):
(1) Where the appellate courts had denied Defendant's writs of mandamus under Rule 33.09 to consider his ability to pay a bond without opinions, that was not a ruling on the merits, so trial court erred in dismissing Defendant's subsequent declaratory judgment action regarding the same issue on grounds that Defendant had an adequate remedy at law (i.e., a writ of mandamus); and (2) even though a ruling in the declaratory judgment case may no longer affect Defendant, the declaratory judgment case is not moot because it satisfies the "public interest exception" to mootness in that it's a recurring issue that may evade appellate review if not addressed.
Facts: Defendant was arrested on a warrant that contained a monetary condition of release of $30,000 cash only. Defendant subsequently had two hearings, at which the court ruled he was a danger to the community and should be held without bond. The court rejected Defendant's claim that the *initial* arrest warrant must be recalled because the monetary condition of release ($30K cash only) was set without any consideration of his ability to pay. Defendant sought writs of mandamus under Rule 33.09 in the Court of Appeals, and Supreme Court, which were denied without opinion. He then filed the instant declaratory judgment action seeking a declaration that the initial arrest warrant must be recalled because it didn't consider Defendant's ability to pay bond. The trial court dismissed the action on grounds that Defendant had an adequate remedy at law, i.e., a writ of mandamus.
Holding: Defendant has no adequate remedy at law. The denial of the writs of mandamus without opinions was not a ruling on the merits. Such a denial does not necessarily mean that Defendant cannot later seek to establish a right to relief in the

declaratory judgment action. He is entitled to seek a declaratory judgment on the merits of his claim.

State v. Hudson, 2020 WL 5160463 (Mo. App. W.D. Sept. 1, 2020):
Holding: (1) Trial court erred in conducting Defendant's sentencing via Polycom over Defendant's objection that he had a right to be personally present, because Sec. 546.550 and Rule 29.07(b)(2) require in-person sentencing, as does due process, and Sec. 561.031.1(6) provides for sentencing by Polycom only upon waiver of in-person appearance by Defendant; new sentencing ordered; and (2) Western District notes in footnote that even though Defendant's case arose before COVID-19, the Missouri Supreme Court has encouraged all courts to use teleconferencing during COVID, but this "does not change applicable statutory provisions," even though the Supreme Court has suspended certain court rules.

Fed. Home Loan Mortgage Corp. v. Pennington-Thurman, 2020 WL 1860678 (Mo. App. E.D. April 14, 2020):
Holding: Where (1) Defendant was served with process on August 22, 2018, for suit in state court; (2) on August 23, 2018, the suit was removed to federal court; (3) the case was remanded back to state court on February 14, 2019; and (4) Defendant filed her application for automatic change of judge on April 1, 2019, the application was timely because Rule 55.34 states that the date of the remand order is deemed to be the date of "service" for determining when a pleading shall be filed or an action taken, and Rule 51.05(b) grants 60 days from "service" to file for automatic change of judge. Because of Rule 55.34, the April 1 application was filed within 60 days of "service." Trial court erred in ruling that application for change of judge was untimely.

State ex rel. Gardner v. Stelzer, 2019 WL 577400 (Mo. App. E.D. Feb. 13, 2019):
Holding: Where (1) Officer filed an action for a temporary restraining order to prevent Prosecutor from disseminating her "exclusion list" of officers, and (2) Officer claimed dissemination of the list would harm his reputation and employment prospects, Officer failed to invoke any substantive legal principles entitling him to relief and did not meet the elements of a recognized cause of action; thus, trial court abused its discretion in not granting Prosecutor's Motion to Dismiss the action, and in not quashing a subpoena related to the action. Writ of prohibition granted.

C.S.G. v. R.G., 559 S.W.3d 416 (Mo. App. E.D. Oct. 23, 2018):
Holding: (1) Even though trial court may have lacked statutory authority to order Defendant to pay Plaintiff's mortgage in order of protection case, this did not deprive the court of subject-matter jurisdiction and Defendant's only remedy was to pursue a direct appeal; Defendant could not later collaterally attack the order after Plaintiff sought civil contempt and the court sought indirect criminal contempt for failure to pay; (2) on remand, the court is directed to enter a judgment of civil contempt but before ordering a jail sentence must convince itself of Defendant's ability to pay, or create a non-imprisonment remedy that would allow Defendant to purge himself of the contempt.
Discussion: (1) Defendant claims he cannot be held in contempt because the trial court's order directing him to pay the mortgage was not statutorily authorized. However, this is

an impermissible collateral attack on that judgment. Defendant could have taken a direct appeal from the judgment, but did not. A contempt proceeding cannot be used to collaterally attack the judgment. The underlying judgment can only be attacked if it is void for lack of personal or subject matter jurisdiction. Here, Defendant claims only that the trial court lacked statutory authority. But even if true, the trial court had both personal and subject matter jurisdiction. (2) An order of contempt must specify how Defendant can purge himself of the contempt. Inability to pay is an affirmative defense that must be raised by Defendant. However, the coercive purpose of imprisonment for civil contempt is frustrated if Defendant does not have a key to the jailhouse door. Before the trial court can enter a civil contempt order committing Defendant to jail for failure to pay, it must convince itself that Defendant has ability to pay. If the court cannot convince itself that Defendant has ability to pay, the court must fashion a different remedy to allow Defendant to purge himself of contempt.

Eaton v. Doe, 2018 WL 2122907 (Mo. App. E.D. May 9, 2018):
Holding: Even though Plaintiff had previously been arrested without a warrant and then released within 24 hours without being charged with a crime, he lacked standing to obtain injunctive relief to prevent the arresting officers from ever testifying in support of a future arrest warrant, because Plaintiff failed to establish a likelihood that he will be re-arrested without a warrant or that he will be held in custody without a probable cause determination.

State ex rel. Welty v. Lewis, 2018 WL 2630465 (Mo. App. E.D. June 5, 2018):
Holding: Writ of mandamus issues to compel trial court to denominate its dismissal on the merits as a "judgment," Rule 74.01(a), so that losing party can have right of appeal; a trial court cannot deprive a losing party of the right to appeal, Sec. 512.020, by refusing to denominate a dismissal as a "judgment."

State ex rel. Hayes v. Dierker, 535 S.W.3d 372 (Mo. App. E.D. Dec. 12, 2017):
Holding: (1) Mandamus is appropriate to review trial court's sustaining of discovery objections because trial court has no discretion to deny discovery which is relevant and reasonably likely to lead to discovery of admissible evidence when the matters are neither work product nor privileged; (2) party objecting to discovery must produce a privilege log to enable opposing party to identify and show a substantial need for discoverable work product that it cannot, without undue hardship, obtain by other means, as provided in Rule 56.01(b).

Turner v. State, 2016 WL 6440407 (Mo. App. E.D. Nov. 1, 2016):
Holding: (1) Under Rule 44.01(a), the time for filing a pro se Rule 24.035 motion began on the day after Movant was delivered to the DOC (i.e., the day after counts as day "number 1"), since the day of actual delivery is not included under 44.01(a); and (2) where the deadline day for filing (180th day) fell on a Saturday and the following Monday was a federal holiday, the motion was due on Tuesday pursuant to Rule 44.01(a).

State v. Ivory, 2016 WL 3180096 (Mo. App. E.D. June 7, 2016):
Holding: Appellate court lacks authority to hear an "appeal" of denial of writ of mandamus by trial court unless (1) a preliminary order was granted by the trial court and then the trial court determined on the merits whether the writ should be made permanent or quashed, or (2) the trial court issues a summons, the functional equivalent of a preliminary order, and then denied a permanent writ; without either condition, a petition for mandamus must be refiled in the appellate court.

In the Interest of C.L.F. and S.A.R. v. K.J.R., 2020 WL 7416747 (Mo. App. S.D. Dec. 18, 2020):
Holding: Even though Mother objected to the appearance of the GAL by Webex because Sec. 210.160 states the GAL should "appear for" the minor, the Webex appearance was authorized by Sec. 561.031.1(8) which allows a person to appear by means of a two-way video conference in "any civil proceeding other than trial by jury."

Amsden v. State, No. SD35341 (Mo. App. S.D. Dec. 21, 2018):
Holding: (1) The civil rules do not recognize a "Motion to Reconsider," but Rule 75.01 allows a motion court to "vacate, reopen, amend or modify" a judgment within 30 days of its entry and an inaptly-named "Motion to Reconsider" shall be treated as an authorized Rule 75.01 motion; (2) where within 30 days of entry of 24.035 judgment a Prosecutor filed a "Motion to Reconsider" and the motion court heard argument and "took the matter under advisement," the motion court had authority to issue a new judgment denying 24.035 relief more than 90 days later because the "taking under advisement," in effect, had vacated the prior judgment granting relief.

Pate v. State, 2017 WL 4856782 (Mo. App. S.D. Oct. 27, 2017):
Holding: Where (1) Rule 29.15 motion court granted relief; (2) Prosecutor filed a "motion to vacate judgment" within 30 days thereafter; and (3) the motion court granted the motion to vacate within 76 days thereafter, the court had authority to vacate its prior judgment (and later enter a new judgment denying relief), because Rule 75.01 allows a motion court to retain control over its judgments for 30 days, and the filing of the "motion to vacate" is treated as an authorized motion for new trial, which, under Rule 81.05(a)(2)(A), allowed the motion court up to 90 days from the time the motion was filed to rule on it.

In the Matter of the Care and Treatment of Braddy, 2017 WL 5784678 (Mo. App. S.D. Nov. 29, 2017):
Holding: Trial court has no authority to extend the 30-day time for filing a new trial motion under Rule 78.04, because Rule 44.01(b) expressly prohibits this; thus, even though Defendant filed his new trial motion within the additional time granted by the trial court, the new trial motion was untimely and issues raised therein are not preserved for appeal.

Spence v. BNSF Railway Co., 2016 WL 7439115 (Mo. App. S.D. Dec. 27, 2016):
Holding: Rule 69.025, which requires a party to conduct a "reasonable investigation" on Case.net of potential jurors' "litigation history," did not apply to situation where juror

failed to answer voir dire question as to whether any jurors had "been in an auto accident;" although a Case.net search would have revealed that Juror had been involved in a *lawsuit* over an auto accident, Rule 69.025 applies to *litigation history only* and the question asked was not about that, so defendant did not waive claim of Juror's nondisclosure by failing to discover this on Case.net before trial; Juror's intentional non-disclosure requires new trial.

State v. Hudson, 2020 WL 5160463 (Mo. App. W.D. Sept. 1, 2020):
Holding: (1) Trial court erred in conducting Defendant's sentencing via Polycom over Defendant's objection that he had a right to be personally present, because Sec. 546.550 and Rule 29.07(b)(2) require in-person sentencing, as does due process, and Sec. 561.031.1(6) provides for sentencing by Polycom only upon waiver of in-person appearance by Defendant; new sentencing ordered; and (2) Western District notes in footnote that even though Defendant's case arose before COVID-19, the Missouri Supreme Court has encouraged all courts to use teleconferencing during COVID, but this "does not change applicable statutory provisions," even though the Supreme Court has suspended certain court rules.

Bey v. Precythe, 2019 WL 5699935 (Mo. App. W.D. Nov. 5, 2019):
Holding: Secs. 482.365 and 506.366 do not require a *pro se* inmate to file an *in forma pauperis* motion or an inmate account statement to file a request for a trial *de novo* from small claims court; circuit courts cannot create additional "jurisdictional requirements" not set out in the statutes.

State ex rel. Malin v. Joyce, 2019 WL 2423976 (Mo. App. W.D. June 11, 2019):
Holding: Even though (1) trial court ruled that "motion for summary judgment is granted" and signed such order, and (2) the Case.net entry for the case was changed from "Not Disposed" to "Tried by Court – Civil," this was not a "final judgment" for purposes of appeal – it was merely a ruling on the motion for summary judgment; writ of mandamus issues to require trial court to issue a final, appealable judgment.
Discussion: There is "persistent confusion" about what a final judgment is. A judgment is a legally enforceable judicial order that fully resolves at least one claim in a lawsuit and establishes all rights and liabilities of the parties regarding that claim. A judgment must be denominated a "judgment" and signed by a judge, though the designation of "judgment" can appear at the top, or in the body of the document, or in a docket entry.

Lynch v. Hurley, 2019 WL 580431 (Mo. App. W.D. Feb. 13, 2019):
Holding: Even though (1) a habeas court had previously denied Petitioner's jail-time credit claim on grounds that it was not cognizable in habeas and would not lead to his immediate release, but (2) the habeas court then proceeded to address and deny the claim on the merits, Petitioner was not collaterally estopped from re-litigating the jail-time credit claim in a declaratory judgment action because the habeas court's merits ruling was not necessary to dispose of the habeas claim and, thus, was gratuitous surplusage.

City of Raymore v. O'Malley, 527 S.W.3d 857 (Mo. App. W.D. Aug. 29, 2017):
Even though Defendant charged with municipal violation claimed she had a legal justification defense that could be determined from the evidence in the municipal trial, where Defendant was seeking a trial de novo in circuit court, circuit court erred in granting pretrial motion to dismiss because a justification defense must be supported by evidence and a trial de novo proceeds as if no action had been taken in municipal court.
Discussion: Regarding Defendant's justification defense, she had the burden of injecting the issue and it was required to be supported by evidence. Here, Defendant presented her motion to dismiss to the circuit court before her requested trial de novo. Her claim could not have been supported by any evidence, given that none had been adduced at the time the circuit court granted the motion to dismiss. Defendant seeks to rely on evidence presented at the municipal court trial to support her claimed defense. But the concept of a trial de novo is that it is a new prosecution. The trial de novo proceeds as if no action had been taken in the municipal court (division). Even so, it is possible for a court to properly grant a motion to dismiss based on an affirmative defense if the defense is irrefutably established *by the pleadings*. But the only pleadings in this case are the uniform citation and amended information which charged the offense; neither irrefutably establishes that Defendant's conduct was justified as a matter of law. Grant of motion to dismiss reversed.

State ex rel. N.N.H. v. Wagner, 2016 WL 6958715 (Mo. App. W.D. Nov. 29, 2016):
Holding: Trial court lacked authority to require transgender Juvenile, who sought a change of name, to undergo mental examination.
Discussion: Although Rule 60.01 and Sec. 510.040 allow a court to order a mental exam if a person's mental condition is "in controversy," this means the party's mental condition must be "directly involved in some material element" of the case; the mental state of a party seeking a name change does not directly relate to any material element of the case. Further, the Rule and statute require the court give notice, which did not occur here.

Gall v. Steele, 2016 WL 7094037 (Mo. App. W.D. Dec. 6, 2016):
Holding: Even though declaratory judgment action involving the power of 2nd Circuit Judge to appoint clerks was heard by 13th Circuit Judge, the case was not one in which one circuit court was improperly exercising powers over another circuit court. "[T]his case involves a declaratory judgment action as provided by Sec. 527.010 and Rule 87. As such the Thirteenth Judicial Circuit did not assert superintending control over the Second Judicial Circuit, but, instead, this case was tried as a contested declaratory judgment action as provided by law."

Larsen v. Union Pacific Railroad Co., 2016 WL 4480770 (Mo. App. W.D. Aug. 23, 2016):
Holding: Rule 78.08's plain error provision can be used to raise issue of Juror nondisclosure after time for filing New Trial Motion has expired.

S.H. v. Cannon, 2016 WL 5030454 (Mo. App. W.D. Sept. 20, 2016):
Holding: Even though Defendant had pleaded guilty to statutory rape (Sec 566.032) and statutory sodomy (Sec. 566.062), these were not listed offenses under Sec. 537.046 which allows a Plaintiff-Victim to recover civil monetary damages for childhood sexual abuse; further, the trier of fact in the civil case was not required to find that Defendant committed acts that would have constituted a violation of Sec. 537.046. Judgment for Defendant affirmed.

State ex rel. Tivol Plaza Inc. v. Missouri Comm. on Human Rights, 2016 WL 1435970 (Mo. App. W.D. April 12, 2016):
Holding: Where Appellant filed a petition for writ of mandamus in the trial court, but the trial court issued a summons rather than a preliminary order in mandamus before ultimately granting a motion to dismiss the case, the appellate court lacks authority to hear an appeal; the remedy is to file a new writ in the appellate court.
Discussion: Generally, when the circuit court denies a petition for mandamus, the petitioner's proper course of action is not to appeal the denial, but to file the writ in a higher court. But where a preliminary order in mandamus is granted and the circuit court then determines on the merits whether the writ should be made permanent or quashed, then appeal is the proper remedy. Here, the circuit court issued a *summons*, not a preliminary order in mandamus, before it ruled on the merits; this did not comply with Rule 94. Courts and litigants must follow the procedures set forth in Rule 94. Appeal dismissed.

U.S. v. Sember, 99 Crim. L. Rep. 345 (S.D. Ohio 5/27/16):
Holding: Gov't cannot destroy a hard driving allegedly containing contraband that may be subject to future civil litigation; here, after Defendant was found not guilty of theft of gov't property, he planned to bring a civil action that could involve the data on the hard drive.

Guthrie-Nail v. State, 2015 WL l5449642 (Tex. App. 2015):
Holding: Where (1) Defendant had pleaded guilty to a conspiracy "exactly as charged in the indictment," and (2) at the time of the plea, the judge had written "N/A" on a form asking whether a weapon was used, a later entry of a nunc pro tunc judgment, without notice to Defendant, stating that a weapon was used violated due process; this was not a mere clerical error, since the plea record did not conclusively establish that a weapon was used.

Civil Rights

Daniels v. Terranova, 2020 WL 4758599 (Mo. App. W.D. Aug. 18, 2020):
Holding: Western District holds that under Missouri law, the existence of probable cause to prosecute one criminal offense does not preclude a civil claim of malicious prosecution for other charged offenses (disagreeing with the federal court in *Ciesla v. Christian*, 2016 WL 1245197 (E.D. Mo. March 20, 2016)).
Discussion: We agree with Plaintiff that a holding that an underlying criminal proceeding gives rise to only one malicious prosecution claim would violate public policy. Suspects could be charged with multiple offenses and be unable to assert a claim of malicious prosecution, so long as there is probable cause to prosecute on one of the offenses charged. The majority of courts that have addressed this issue nationally have required probable cause for all offenses charged, before denying a claim for malicious prosecution for lack of probable cause.

*** Hernandez v. Mesa, ___ U.S. ___, 140 S.Ct. 735 (U.S. Feb. 25, 2020):**
Holding: A *Bivens* cause of action does not extend to cross-border shootings, because such incidents involve foreign relations and national security implications, and Congress has been hesitant to create claims based on tortious conduct abroad; thus, family members of Victim (who was shot by U.S. Border Officer across U.S.-Mexican border) cannot bring *Bivens* civil damages action against Officer for violation of Fourth and Fifth Amendment rights of Victim.

*** Taylor v. Riojas, ___ U.S. ___, 141 S.Ct. 52 (U.S. Nov. 2, 2020):**
Holding: Prison Officials who confined Plaintff-Prisoner in "shockingly unsanitary cell" were not entitled to qualified immunity, because any reasonable Officer should have realized that the conditions of confinement violated 8th Amendment.

*** City of Escondido v. Emmons, ___ U.S. ___, 139 S.Ct. 500 (U.S. Jan. 7, 2019):**
Holding: The Ninth Circuit defined the right to be free from excessive force too generally to deny an officer qualified immunity in §1983 suit.

* **McDonough v. Smith, 2019 WL 2527474, ___ U.S. ___ (U.S. June 20, 2019):**
Holding: The statute of limitations for a §1983 suit against a prosecutor for fabricating evidence begins to run when the plaintiff's prosecution is terminated in plaintiff's favor by acquittal or invalidation of conviction.

*** Kisela v. Hughes, ___ U.S. ___, 138 S.Ct. 1148 (U.S. April 2, 2018):**
Holding: Lower courts must not define "clearly established" law with a high level of generality in deciding whether police officers are entitled to qualified immunity from suit in Sec. 1983 actions.

*** Lozman v. Riviera Beach, ___ U.S. ___, 138 S.Ct. 1945 (U.S. June 18, 2018):**
Holding: A Sec. 1983 Plaintiff-Citizen who alleged that Defendant-City had an official policy to arrest him for criticizing the City could maintain a First Amendment retaliatory arrest claim even though there was probable cause to arrest him for not obeying a lawful order to leave, when he failed to leave a podium at a public City meeting when asked to stop speaking; the Court distinguished the case from a prior retaliatory prosecution case which held that a Plaintiff must show the absence of probable cause for the underlying criminal charge; this was not a retaliatory prosecution case, but a suit against the City regarding an official policy.

*** Sause v. Bauer, ___ U.S. ___, 138 S.Ct. 2561 (U.S. June 28, 2018):**
Holding: Even though Sec. 1983 Plaintiff-Citizen raised only a First Amendment free-exercise of religion claim after Defendant-Police Officers told her to stop praying during an arrest, the First Amendment issue was inextricably linked with Fourth Amendment issues regarding why Officers were at her residence to arrest her in the first instance and any legitimate law enforcement interests which might apply, which required remand to determine if Officers were entitled to qualified immunity.

*** Murphy v. Smith, ___ U.S. ___, 138 S.Ct. 784 (U.S. Feb. 21, 2018):**
Holding: When prisoners win civil rights cases for unconstitutional conditions in prison, the Prison Litigation Reform Act requires that 25% of the judgment be used to pay their attorney's fees before the defendants can be required to pay any excess attorney's fees; district courts do not have discretion under the PLRA to allow prisoners to pay less than 25% of the judgment before requiring the defendants to also pay.

* **Manuel v. City of Joliet, ___ U.S. ___, 137 S.Ct. 911 (U.S. March 21, 2017):**
Holding: Even though a judge found probable cause to detain criminal defendant for trial, where that probable cause was based on false evidence submitted by police, the defendant is entitled to bring a Sec. 1983 action against police challenging his pretrial detention on Fourth Amendment grounds. Pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process. The Fourth Amendment applies not only to "arrests" but also "detention." Because the judge's determination of probable cause was based on the false evidence, it did not expunge the Fourth Amendment claim.

*** County of Los Angeles v. Mendez, ___ U.S. ___, 137 S.Ct. 1539 (U.S. May 30, 2017):**
Holding: In Sec. 1983 action alleging use of excessive force, the Ninth Circuit's "provocation rule" --- which makes an officer's otherwise reasonable use of force unreasonable if the officer intentionally or recklessly provoked a violent confrontation and the provocation is an independent Fourth Amendment violation – is incompatible with proper standard of totality of circumstances set forth in *Graham v. Connor*; when an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim.

*** Ziglar v. Abbasi, ___ U.S. ___, 137 S.Ct. 1843 (U.S. June 19, 2017):**
Holding: Plaintiffs, who were illegal aliens detained for terrorism investigation following September 11 terrorist attacks, and who sought damages for various alleged constitutional violations resulting from their detention, were not entitled to an implied damages remedy under *Bivens*. *Bivens* is well-settled law in its own context, but expanding it is disfavored. If a case differs in a meaningful way from previous *Bivens* cases decided by the Supreme Court, the context is new, and courts must consider a variety of "special factors" to determine whether Congress or the Judiciary should be the branch of government to authorize a damages action. Here, Congress, not the courts, should decide whether a damages action should be allowed.

*** Ross v. Blake, ___ U.S. ___, 136 S.Ct. 1850 (U.S. June 6, 2016):**
Holding: The Prison Litigation Reform Act (PLRA) mandates that prisoners exhaust "available" administrative remedies before bringing a lawsuit to challenge prison conditions; there are no "special circumstance" exceptions to this rule. However, the administrative remedies must actually be "available." Administrative remedies may be unavailable when they operate as a "dead end," such as when prison officials are "unable or consistently unwilling to provide any relief;" when the procedures are so confusing or opaque that no reasonable prisoner could use them; or when prison officials thwart prisoners from pursing administrative remedies through "machination, misrepresentation, or intimidation."

Closing Argument & Prosecutor's Remarks

State v. Rice, 2019 WL 1446931 (Mo. banc April 2, 2019):
(1) Trial court erred in first-degree murder case in not giving voluntary manslaughter instruction because there was evidence from which jury could find Defendant acted from sudden passion, in that Victims had told Defendant he would not see his son again and had assaulted Defendant; (2) Defendant's right to silence was violated where, after Miranda, Officer continued to interrogate Defendant after he said "I don't wanna talk no more" and "I got nothing to say," and "I don't wanna talk"; (3) Prosecutor improperly commented on Defendant's post-Miranda silence when he asked Officer if Defendant had answered questions and Officer said he did not, and introduced Defendant's statements that he did not want to talk; and (4) Prosecutor's closing penalty phase argument that Defendant was "the 13th juror and if I'd been allowed to ask him those questions last week, he would have told us…" and that Defendant had not apologized for the crime were improper direct references to Defendant's right not to testify.
Facts: Defendant killed two Victims – his former Girlfriend and her boyfriend, after Girlfriend told Defendant he would not see his son again. Defendant went to Victims' house. Victims attacked Defendant. Defendant shot them. Defendant fled and was chased by police. Defendant had a shootout with police, and was himself shot. He was taken to hospital and questioned by police. Defendant, after *Miranda*, said "I don't wanna talk no more," and "I don't wanna talk," but police continued to question him.

The trial court refused Defendant's requested voluntary manslaughter and accompanying second-degree murder instruction.
Discussion: (1) The refused voluntary manslaughter instruction and second-degree murder instruction properly tracked MAI-CR3d 314.08 and 314.04. A voluntary manslaughter instruction must be given when a party timely requests it; there is a basis for acquitting of the charged offense; and there is a basis for convicting of the lesser. Here, Defendant requested the instruction, and there is always a basis for acquitting of the greater since a jury never has to believe the State's evidence. The issue is whether there was a basis for convicting of the lesser. Here, there was because Victims told Defendant he would never see his son again, and Victims assaulted Defendant; this was sufficient evidence for a jury to find sudden passion arising from adequate cause. (2) Defendant's statements that he did not want to talk were unequivocal invocations of his right to silence. Even though Officer did stop interrogation for 20-30 minutes, this was not passage of a significant period of time to be able to resume interrogation. Defendant's statements should have been suppressed. (3) The trial court violated *Doyle v. Ohio* by admitting evidence of Defendant's silence and that he didn't want to talk. Silence does not only mean muteness; it includes a statement that Defendant wants to remain silent. (4) The Prosecutor's closing argument that Defendant was a "13th juror and if I'd been allowed to ask him those questions last week, he would have told us…" and that Defendant had not apologized for the crime were direct references to Defendant's failure to testify. The State's claim that the comments referred to voir dire are far-fetched because a Defendant never testifies on voir dire.

State v. Walter, 2016 WL 316868 (Mo. banc Jan. 26, 2016):
Prosecutor's use of Defendant's photo in slideshow during closing argument which displayed the word "GUILTY" superimposed over Defendant's face was unduly inflammatory, and violated presumption of innocence and Defendant's right to fair trial.
Facts: Defendant was charged with a drug crime. During trial, the State admitted booking records which showed a booking photo of Defendant. During closing argument, the State showed a slideshow which contained the booking photo with the word "GUILTY" superimposed over the Defendant's face.
Holding: Although Defendant included this claim in his new trial motion, he failed to contemporaneously object at trial, so the issue is reviewed as plain error. Closing argument should not go beyond the evidence presented, and courts should exclude statements that misrepresent the evidence or introduce irrelevant prejudicial matters. Prosecutors must refrain from ad hominem attacks designed to inflame the jury. Even though the photo here was admitted during trial, parties are not allowed to alter evidence to support their theory of the case. The State's modification of the photo to superimpose the word "GUILTY" on it was an altered form of evidence; the photo in this form would not have been admissible at trial. Defendant was prejudiced because, taken as a whole, the evidence of guilt was not overwhelming. Visual arguments (photos) manipulate audiences by harnessing rapid unconscious and emotional reasoning processes, and by exploiting the fact that people do not generally question the rapid conclusions they reach based on visual information. The altered photo infringed on Defendant's presumption of innocence and the fairness of the fact-finding process. New trial ordered.

Stermer v. Warren, 2018 WL 6696720 (E.D. Mich. 2018):
Holding: Habeas relief granted where Prosecutor repeatedly argued his personal belief that Defendant was lying and State's witnesses were trustworthy.

State v. Emerson, 2019 WL 1442356 (Mo. App. E.D. April 2, 2019):
Holding: (1) Even though Sec. 491.120 provides that a subpoena may be served by reading a subpoena aloud to the witness being served, this conflicts with Rule 26.02, which requires that a subpoena be delivered to the witness, and the Rule controls because it is procedural; thus, trial court did not err in refusing to issue writ of body attachment to Witness because Witness was not properly served under Rule 26.02; and (2) Prosecutor's closing argument in guilt phase that jury should convict of first-degree assault and not third-degree assault because that's a "misdemeanor" was improper because it informed the jury of sentencing matters that weren't at issue in guilt phase (but not prejudicial here).
Discussion: Arguments which suggest that a jury determine guilt on the basis of a desired punishment are improper. The argument may have dissuaded the jury from considering the lesser-included third-degree assault because a lay person generally understands that the punishment for misdemeanors is less than for felonies. The classification of offenses directs jurors' attention to sentencing matters not properly before them in guilt phase.

State v. Billings, 2016 WL 6945937 (Mo. App. S.D. Nov. 28, 2016):
Holding: Prosecutor committed *Doyle* violation in closing argument in urging jury to use as evidence of guilt the fact that Defendant invoked his right to remain silent after *Miranda* warnings (but not plain error); Prosecutor said Defendant had not answered questions, and "Why not? … I think that's one of the most important questions you guys can ask yourselves when you're going back there to deliberate. Why not? Why not cooperate? Why not answer any of these questions."

State v. Johnson, 2020 WL 420746 (Mo. App. W.D. Jan. 28, 2020):
Holding: (1) Where Prosecutor, in first-degree murder trial, argued that "you are only going to get to these [lesser-included offenses] if you find he is not guilty of murder first degree," this was an improper "acquittal-first" argument which misstated the law, because lesser-included instructions do not require jurors to acquit of the greater offense before considering the lesser, but this wasn't plain error here; and (2) a claim of "prosecutorial misconduct" can only be raised on direct appeal, but it is not a "freestanding claim;" instead, it must be framed in terms of trial court error.
Discussion: (1) Lesser-included offenses do not require a defendant first be acquitted of the greater offense before the jury can consider the lesser. MAI-CR3d 313.04 provides juries can consider the lesser if they "do not find the defendant guilty" of the greater. The State contends telling a jury they must find a defendant "not guilty" of the greater is the same as telling them they can only consider the lesser if they "do not find the defendant guilty." We disagree. MAI-CR4th 402.05 provides the jury's "verdict, whether guilty or not guilty, must be agreed to by each juror." A finding of "not guilty" thus requires a

jury to unanimously acquit a defendant. As a result, the State's argument the jury had to find Defendant "not guilty" of first-degree murder before going to the lessers was an improper "acquittal first" argument, but not plain error under the facts here. (2) Defendant also raises the prosecutor's argument as a "freestanding claim" of prosecutorial misconduct, which he claims requires reversal. We agree that prosecutorial misconduct which is apparent at trial (such as in closing argument) must be raised, if at all, only on direct appeal. We do not agree, however, that it is a "freestanding" claim independent of trial court error. The claim must raise that the trial court erred in some way, such as overruling preserved error or failing to *sua sponte* intervene.

State v. Brown, 2019 WL 2656164 (Mo. App. W.D. June 28, 2019):
Holding: Prosecutor's closing argument which referred to statutes and case law not in the jury instructions was improper, because this improperly referred to external sources of law not in the instructions (but not prejudicial for conviction on different count that wasn't the subject of the statute or case law).

U.S. v. Centeno, 2015 WL 4231582 (3d Cir. 2015):
Holding: Prosecutor's rebuttal argument that Defendant could be convicted merely for driving the getaway car, which was incorrect statement of law and contrary to the jury instructions, was a constructive amendment of the grand jury indictment and required reversal.

U.S. v. Welshans, 103 Crim. L. Rep. 306 (3d Cri. 6/14/18):
Holding: Prosecutor's remarks about child pornography in case went too far in repeatedly referring to violent nature of the child porn which Defendant possessed, and in presenting inadmissible evidence with no other value other than to depict Defendant as a bad person (but harmless because evidence of guilt overwhelming).

Bennett v. Stirling, 100 Crim. L. Rep. 188 (4th Cir. 11/21/16):
Holding: Prosecutor's argument calling murder Defendant "King Kong" in killing of white woman was "racially coded" comment designed to incite all-white jury; this is true even though State claimed the remarks were to rebut defense argument that Defendant was a tall, 300-pound "gentle giant."

U.S. v. Smith, 98 Crim. L. Rep. 459 (5th Cir. 2/10/16):
Holding: Prosecutor improperly vouched for his case by telling jurors that he was convinced State's witnesses were telling the truth, and assured jurors he wouldn't prosecute someone who was innocent.

Deck v. Jenkins, 2016 WL 518819 (9th Cir. 2016):
Holding: Defendant was entitled to habeas relief where Prosecutor's closing argument misstated State law on attempt, by arguing that Defendant's intent to attempt a crime need not be immediate, but could be "next week" or "just some point in the future."

U.S. v. Williams, 99 Crim. L. Rep. 677 (D.C. Cir. 9/2/16):
Holding: Where Victim had consented to participate in a hazing incident in which he died, Prosecutor's remarks that jury could not consider Victim's "intent" and jury instruction that "consent is not a defense" to second-degree murder improperly misled jurors to believe they could not consider Victim's consent at all, which was relevant to the malice element of second-degree murder.

Spence v. State, 98 Crim. L. Rep. 165, 2015 WL 7168159 (Del. 11/13/15):
Holding: Prosecutor's closing argument PowerPoint was unduly inflammatory where it showed photos of murder Victim's body with words "terror," "fear" and "murder" superimposed in red lettering on the photos (but harmless here).

Kansas v. McBride, 102 Crim. L. Rep. 234 (Kan. 12/1/17):
Holding: Prosecutor's argument to grant Victim a "presumption of credibility" similar to the presumption of innocence for the Defendant misstated the law, and was not harmless where case turned on Victim's credibility.

Com. v. Montalvo, 2019 WL 1338433 (Pa. 2019):
Holding: Prosecutor's argument that jury only "recommends" death sentence violated 8th Amendment by lowering jury's sense of responsibility for imposing death.

Black v. State, 102 Crim. L. Rep. 204 (Wyo. 11/17/17):
Holding: Defendant entitled to new trial under "cumulative error" doctrine where Prosecutor failed to get victim's internet records for defense despite being ordered to do so; Prosecutor argued defense lawyer's arguments were "offensive;" and Defendant forced to wear leg restraints during trial without a hearing on their necessity.

People v. Manyik, 2016 WL 1165332 (Colo. App. 2016):
Holding: Where Prosecutor in murder case "'channeled" the Victim in his opening statement and spoke to the jury in the first person as the murdered Victim, this was unduly prejudicial and inflammatory, misstated the evidence, and improperly expressed the Prosecutor's belief in Defendant's guilt.

People v. Mpulamasaka, 2016 WL 90748 (Ill. App. 2016):
Holding: Prosecutor's closing argument, during which he sat in the witness stand and argued about the Victim's courage in testifying, improperly vouched for Victim's credibility.

People v. Jones, 2015 WL 423598 (N.Y. App. 2015):
Holding: Prosecutor's closing that every person who'd been convicted of a crime since the nation's founding was found guilty beyond a reasonable doubt was improper, because it linked Defendant to every person who'd been found guilty and invited jury to consider his status as a defendant in considering guilt.

State v. Zisa, 99 Crim. L. Rep. 671 (N.J. Super. Ct. 8/23/16):
Holding: Prosecutor's unprofessional conduct in making improper remarks and suggesting, without evidence, that Defendant was tampering with witnesses created a double-jeopardy bar to retrial of Defendant.

Confrontation and Hearsay

State v. Hartman, 2016 WL 1019271 (Mo. banc March 15, 2016):
(1) Where the State alleged that only one person shot Victim, trial court abused discretion in excluding testimony that a person other than Defendant said he (the other person) did the shooting; this was an out-of-court statement that would have exonerated Defendant and it had indicia of reliability; and (2) even though Defendant-Juvenile was convicted of second-degree murder during a "Hart procedure" penalty phase where the jury found LWOP to be inappropriate, Defendant can be tried again for first-degree murder on remand under the "Hart procedure" again.
Facts: Defendant-Juvenile was charged with first-degree murder. He was not charged as an accomplice. He was alleged to have committed the shooting. The evidence at trial was somewhat conflicting, but was that a group of people went to Victim's house and Victim was shot. Various witnesses made plea agreements to testify against Defendant. The trial court precluded Defendant from calling a Witness to testify that one of the other people who went to the house ("Other Person") said he (the Other Person) shot Victim. Defendant was convicted of first-degree murder. Pursuant to the "*Hart* procedure," a penalty phase was held, during which the jury found that life without parole was not appropriate; thus, the trial court vacated the first-degree murder verdict and found Defendant guilty of second-degree murder.
Holding: Hearsay statements, or out-of-court statements used to prove the truth of the matter asserted, are generally inadmissible. However, due process requires that such statements be admitted where they exonerate the accused and are made under circumstances providing assurance of reliability. To meet this test, the statement must be made spontaneously to a close acquaintance shortly after the crime occurred, be corroborated by some evidence in the case, and be self-incriminatory and against interest. The Other Person's statements to Witness meet this test. Other Person made the statements to a friend (Witness) on the night of the murder. Other witnesses placed Other Person at the scene of the crime. Other Person's statements implicate only him (the Other Person). Defendant denied any participation in the crime. Had Witness' testimony been admitted, the jury could have exonerated Defendant. A new trial is ordered. On retrial, Defendant can be tried for first-degree murder, but the court must again use the "*Hart* procedure" because Defendant was a juvenile at the time of the crime, even though he is now an adult.

State v. Robinson, 2017 WL 6029043 (Mo. App. E.D. Dec. 5, 2017):
Even though Witness called 911 to report that Defendant had pointed a gun at her, where Witness reported this event calmly and only became upset at police questioning her, the 911 call was hearsay and not admissible under excited utterance exception, after Witness refused to testify at trial.

Facts: Witness called 911 to report that Defendant had pointed a gun at her. She calmly reported this, but became upset when police questioned her. When police went to Defendant's house, his car hood was warm and he had a gun at house. Defendant was charged with unlawful use of a weapon for exhibiting the gun in a threatening manner. At trial, Witness refused to testify and invoked right against self-incrimination. The trial court admitted Witness' 911 call as an "excited utterance."
Holding: The statements on the 911 call were hearsay because the State was using them to prove that Defendant brandished the gun. The excited utterance exception to hearsay applies to statements made following a startling or unusual occurrence sufficient to overcome normal reflection, such that the ensuing statement is a spontaneous reaction to the startling event. The essential test for admissibility of an excited utterance is neither the time nor place of its utterance but whether it was made under circumstances indicating trustworthiness. Here, Witness gave her statement calmly. She was not under the immediate and uncontrolled domination of the senses. Further, no independent evidence of the startling event exists. It is circular to admit evidence of a statement only because it arises from a startling event as proof also that the startling event occurred. Though police found a warm car and gun at Defendant's house, that's not evidence of brandishing. Reversed and remanded for new trial.

Richey v. State Farm Mutual Ins. Co., 2016 WL 402264 (Mo. App. E.D. Feb. 2, 2016):
(1) A prior consistent statement is not hearsay and is admissible if offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and (2) a police officer cannot offer an opinion as to the fault of a party to an accident, where officer did not personally witness accident; this is because a jury likely will give undue weight to police testimony; this rule applies regardless of whether officer is testifying as an expert or not.
Facts: Driver suffered injuries in an accident, and sued Insurer for uninsured motorist coverage. Driver claimed he was run off the road by an unknown other vehicle. Insurer's theory was that Driver made up the claim about the unknown vehicle. Insurer's opening statement said that no one ever brought up a "phantom" car until Driver's lawyer got involved, and then "the phantom gets created." The trial court prevented Driver from calling Witnesses to testify that Driver had told them about the unknown car. Also during trial, a police officer testified that Driver was at fault for the accident.
Holding: (1) Generally, a witness' corroborative extrajudicial statements are not admissible, because this would give one party an unfair advantage by presenting the same testimony in multiple forms. However, where a witness is impeached by acts or statements, prior consistent statements of the witness may be admissible for rehabilitation. Insurer claims that the trial court correctly excluded Witnesses from testifying because Driver sought to call them before Driver testified. Insurer argues that Driver's credibility had yet to be brought into question. However, a charge of recent fabrication made in opening statement is sufficient to warrant introduction of evidence otherwise classified as hearsay to rebut the fabrication charge. Whether Appellant personally had yet been impeached was irrelevant. Trial court abused discretion in excluding Witnesses. (2) Missouri courts have uniformly held that a police officer cannot offer an opinion as to who is at fault for an accident that the officer did not

witness. This is because a jury will likely give undue weight to police testimony. This rule applies regardless of whether the officer is testifying as an expert witness or not.

State v. Cole, 2016 WL 1085823 (Mo. App. E.D. March 15, 2016):
Holding: (1) Although an exception to the hearsay rule allows out-of-court statements that are necessary to explain subsequent police conduct in order to provide background and continuity for police actions, where an Officer is allowed to testify to details of an investigation in a way that unnecessarily puts incrimination information before the jury, the testimony violates the Confrontation Clause; (2) even though the State sought to justify Officer's testimony in drug distribution case that police received information that Defendant was getting one to 10 pounds of marijuana per week, on grounds that this explained why police sought a search warrant, the testimony exceeded the scope necessary to provide background and continuity because the jury could have been informed only that Officer applied for a warrant "upon information received from an informant;" but (3) even though there is a presumption of prejudice when the Confrontation Clause is violated, here, the error was harmless because there was overwhelming evidence of guilt.

State v. Cooper, 2017 WL 476766 (Mo. App. S.D. Feb. 6, 2017):
Defendant's Confrontation Clause rights were violated in domestic assault case by Officer's testimony was to what Victim told him; Victim's statements to Officer were "testimonial" since the primary purpose of Officer's interview of Victim was to establish or prove past event relevant to criminal prosecution.
Facts: Defendant was charged with domestic assault. At trial, Officer testified that when he was called to Victim's residence Victim was crying and injured. Officer asked "what happened" to her, and Victim accused Defendant. Officer testified at trial to what Victim said. Victim did not testify. Defendant objected to Officer's testimony as violating Sixth Amendment Confrontation Clause and Art. I, Sec. 18(a) Mo. Const.
Holding: Whether Officer's testimony violates the Confrontation Clause depends on whether it is "testimonial." Statements are nontestimonial if objectively elicited to meet an ongoing emergency. Statements are testimonial if objectively elicited when there is no ongoing emergency, and the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. Here, objective circumstances indicate there was no ongoing emergency. Defendant had already been identified and arrested by police before Officer interviewed Victim. Officer's questions were designed to investigate a crime.

State ex rel. Jackson v. Parker, 2016 WL 1211326 (Mo. App. S.D. March 28, 2016):
(1) Even though Sec. 492.304 provides that a recording of an alleged child sex victim shall not be admissible if the Interviewer does not testify, the statute contains an exception that the recording is admissible if it qualifies for admission under Sec. 491.075; thus (2) even though Interviewer of child was not available to testify, trial court erred in excluding the video of the interview, because although the video was not admissible under 492.034, it was admissible under 491.075 because the child's statements had sufficient indicia of reliability.

Facts: In child sex case, Child was interviewed by a Forensic Interviewer at a Child Advocacy Center. The interview was video recorded, and observed by other CAC Witnesses. Subsequently, the Interviewer herself became unavailable. The trial court held a 491 hearing, and determined that there was sufficient indicia of reliability in the statements made by Child so that the CAC Witnesses to the interview would be able to testify. However, the court ruled that the video itself would not be admitted due to noncompliance with Sec. 492.304, in that Forensic Interviewer was unavailable to testify. Sec. 492.304.1(6) provides that a recording of an alleged sex victim under age 14 is admissible if the "person conducting the interview … in the recording is present at the proceeding and available to testify or be cross-examined by either party." The State sought a writ of prohibition to allow the video to be admitted at trial.
Holding: The trial court did not properly apply Secs. 491.075 and 492.304. Sec. 492.304 provides an *alternative*, rather than exclusive, procedure for determining admissibility of a recording. Sec. 492.304.2 provides that if the child does not testify, the recording shall not be admissible "unless the recording qualifies for admission under section 491.075." Thus, recordings that do not meet the criteria for admission under Sec. 492.304 may still be admissible if they qualify under 491.075. Here, the recording was found to be admissible under 491.075. Writ granted.

Nappi v. Yelich, 97 Crim. L. Rep. 527 (2d Cir. 7/15/15):
Holding: Where, in felon-in-possession case, Defendant's defense theory was that his Wife planted gun because she was having an affair with another man, State court unreasonably applied federal law in prohibiting Defendant from cross-examining Wife about that; this denied him right to confront Wife under 6th Amendment.

Washington v. Sec'y Pa. Dept. of Corrections, 97 Crim. L. Rep. 691 (3d Cir. 9/1/15):
Holding: State court unreasonably applied federal law in refusing to look beyond the four corners of a nontestifying co-defendant's redacted confession in determining whether Confrontation Clause was violated.

U.S. v. Jimison, 2016 WL 3199735 (5th Cir. 2016):
Holding: District court violated Defendant's confrontation rights by allowing Officer to testify at revocation to hearsay statements of confidential informant; the hearsay was the only evidence that Defendant violated his supervised release.

McCarley v. Kelly, 2015 WL 5255206 (6th Cir. 2015):
Holding: Murder Defendant's confrontation rights were violated by admission of statements a child made to a psychologist about events on the night of the murder.

Jensen v. Clements, 97 Crim. L. Rep. 690, 2015 WL 5210824 (7th Cir. 9/8/15):
Holding: (1) Forfeiture by wrongdoing exception requires that Defendant kill victim to prevent her from testifying; thus, even though Wife-Victim wrote letter saying Husband-Defendant wanted to kill her, admission of letter violated Confrontation Clause since Husband did not kill Wife to prevent her from testifying; (2) state court unreasonably applied federal law in deciding admission of letter was harmless because State's evidence

was sufficient to convict without it; harmless error analysis requires consideration of the defense evidence, too, and how the verdict was impacted by admission of the letter.

U.S. v. Torres, 2015 WL 4478073 (9th Cir. 2015):
Holding: Where a declarant intends a question to communicate an implied assertion and the proponent offers it for the intended message, the question is hearsay.

People v. Hopson, 101 Crim. L. Rep. 451 (Cal. 7/3/17):
Holding: Even though Defendant testified that deceased co-Defendant was to blame for the charged murder, Defendant's right to confront witnesses was violated when State then introduced statements of co-Defendant ostensibly for the sole purpose of describing manner of victim's death (not impeachment purposes), where jury was never informed of the limited purpose of the co-Defendant's statement.

People v. Rangel, 2016 WL 1176584 (Cal. 2016):
Holding: In cases tried before *Crawford v. Washington,* a Defendant need not have made a Confrontation Clause objection at trial to be able to raise a "*Crawford* claim" on appeal.

State v. Smith, 98 Crim. L. Rep. 545 (Iowa 3/4/16):
Holding: An adult domestic violence victim's statement to a medical person identifying her attacker is inadmissible hearsay, unless the State proves why the identification of the abuser was necessary for effective medical treatment so as to qualify under the medical treatment exception.

State v. Norton, 97 Crim. L. Rep. 528, 2015 WL 4130230 (Md. 7/9/15):
Holding: A forensic DNA report that stated its conclusion "within a reasonable degree of scientific certainty," is "testimonial" for confrontation purposes.

Com. v. Adonsoto, 99 Crim. L. Rep. 722 (Mass. 9/16/16):
Holding: Police must record all police station interrogations of non-English speaking Defendants conducted through an interpreter; recordings are necessary to gauge reliability and also provide an independent basis to evaluate the truth of the police testimony for confrontation clause purposes.

Com. v. Drayton, 98 Crim. L. Rep. 9 (Mass. 10/1/15):
Holding: Mass. adopts constitutionally-based hearsay exception that applies whenever an inadmissible statement is "critical to the defense and bears persuasive guarantees of trustworthiness;" court allows Defendant to introduce an affidavit from a dead witness who knew she had terminal cancer, but whose hearsay statement was not admissible under traditional dying declaration exception because witness was not addressing circumstances of her death.

Hartfield v. State, 2015 WL 926972 (Miss. 2015):
Holding: Even though declarant's letter said she assisted in disposing of Victim's body because she was afraid she'd be killed if she didn't assist, the letter was not admissible

under the hearsay exception for statement against penal interest, because the letter was exonerating declarant and placing blame on someone else.

State v. Schiller-Munneman, 99 Crim. L. Rep. 526 (Ore. 6/30/16):
Holding: Texts sent by police from rape victim's phone in an attempt to trick Defendant into making incriminating statements were inadmissible hearsay.

State v. Alers, 2015 WL 2431796 (Vt. 2015):
Holding: Officer's testimony about statements assault Victim made to him violated Defendant's Confrontation rights where there was no ongoing emergency when Officer had interviewed Victim and Officer was seeking information about past events.

Acosta v. State, 2015 WL 3448864 (Ala. App. 2015):
Holding: Defendant was denied right to present complete defense when trial court applied hearsay rule to prohibit Officer from testifying to another person's statement that the other person committed the charged crime; if the other person had been on trial, the statement would have been admissible, so should be admissible in Defendant's trial.

State ex rel. Montgomery v. Padilla, 2016 WL 1063284 (Ariz. App. 2016):
Holding: Defendant's constitutional right to confront Child-Victim face-to-face means State must meet a heightened standard of clear and convincing evidence to show the need to make a different accommodation for Child.

People v. Giron-Chamul, 2016 WL 1072994 (Cal. App. 2016):
Holding: Where Defendant was charged with child sex crime, and during trial, Child-Victim refused to answer 150 questions on critical issues cross-examination, Defendant was denied a full and fair opportunity to confront and cross-examine her.

People v. Denard, 2015 WL 7774288 (Cal. App. 2015):
Holding: Trial court could not rely on the facts stated in probable cause affidavit from Florida to find a prior conviction for "strike" purposes, because the affidavit contained multiple hearsay, Defendant was not ultimately convicted of that offense, and reliance of the affidavit constituted judicial fact-finding in violation of 6th Amendment right to jury trial.

Rosario v. State, 2015 WL 5051187 (Fla. App. 2015):
Holding: Autopsy report prepared by nontestifying medical examiner was testimonial.

State v. Carmona, 2016 WL 1078163 (N.M. App. 2016):
Holding: Statements made by now-deceased sexual assault nurse examiner (SANE) on envelopes labeled "vagina" and "anus," in which she placed swabs she collected, were "testimonial," because they were made with the purpose of establishing facts for future criminal proceedings against Defendant.

State v. McKiver, 2016 WL 2864818 (N.C. App. 2016):
Holding: Statements made in an anonymous 911 call were "testimonial" because the call showed there was no ongoing emergency since the caller didn't feel the need to remain on the line until help could arrive and made clear she wasn't facing any immediate threats, she was describing past events, and the officer who arrived at the scene testified it was "pretty calm."

People v. M.F., 2016 WL 236160 (N.Y. Sup. 2016):
Holding: The initial analysist, not the supervisor, was required to testify about DNA report; portion of DNA report by initial analyst was "testimonial" where initial analyst received the rape kit, and could testify how the lab profile was derived, and what decision-making and judgment was used.

Com. v. Brown, 2016 WL 2732086 (Pa. Super. 2016):
Holding: Autopsy report is "testimonial" and cannot be admitted without testimony of doctor who performed autopsy.

Continuance

In the Interest of T.M.L., 2020 WL 7502308 (Mo. App. E.D. Dec. 22, 2020):
Holding: (1) In termination of parental rights case, where Father (whose rights were being terminated) unexpectedly did not show for trial, trial court did not discretion in denying oral motion for continuance because Rule 65.03 requires a continuance motion be in writing and accompanied by an affidavit setting forth the facts upon which the motion is based, unless the adverse party consents to oral motion; but (2) where, immediately after trial, counsel filed a Motion to Reopen and to present evidence (on grounds Father's illness prevented him from attending trial), trial court abused discretion in not granting Motion to Reopen without a hearing on the Motion.
Discussion: When

there is no inconvenience to the court nor unfair advantage to one of he parties, it is an abuse of discretion to refuse to permit introduction of material evidence which might affect merits of case. Here, trial did not conduct a hearing on the Motion to Reopen and merely entered a judgment terminating Father's parental rights. There is nothing to suggest that reopening to allow Father to present evidence would have created inconvenience or given Father unfair advantage. Termination of parental rights is an "awesome power" that should not be done "lightly." Remanded for hearing on Motion to Reopen, so trial court can make credibility determination as to reasons for Father's failure to appear.

State v. Gray, 2018 WL 5538761 (Mo. App. E.D. Oct. 30, 2018):
Holding: (1) Where appellate court had remanded for hearing on whether new trial should be granted due to newly discovered evidence, trial court abused discretion in not granting a continuance to allow Defendant more time to subpoena necessary and critical witness who was the subject of the new evidence; and (2) where appellate court had

remanded for hearing on newly discovered evidence, trial court was without authority to do anything other than follow the appellate mandate, and failed to reasonably follow it here when it denied a continuance for the necessary and critical witness who was the subject of the newly discovered evidence motion.

State v. Dierks, 564 S.W.3d 354 (Mo. App. E.D. Nov. 20, 2018):
Holding: Motions for continuance for inability to locate a witness must confirm to Rule 24.10, which requires a statement of all of the following: (1) the materiality of the evidence sought and due diligence to obtain the witness; (2) the name and address of the witness or diligence to obtain the same, and facts showing reasonable grounds that the witness will be procured within a reasonable time; (3) the facts that the witness will prove and that there are no other witnesses who be present at trial to testify to such facts; and (4) good faith in seeking the continuance for purposes of obtaining a fair trial. Even though Defendant's continuance motion alleged the materiality of the witness, it failed to allege the additional required information, so trial court did not err in denying it.

State v. Brown, 2017 WL 410237 (Mo. App. E.D. Jan. 31, 2017):
Even though Defendant had repeatedly refused to meet with counsel before trial and said he wanted to proceed to trial, trial court abused discretion in denying counsel's request for a continuance of trial where (1) Defendant had at times been ruled incompetent; (2) counsel believed, and expert testimony indicated, that Defendant's refusal to meet with counsel was due to mental illness which was being alleviated by medication; and (3) counsel believed, and expert testimony indicated, that the medication would continue to work, and allow counsel to meet with Defendant and develop a viable defense of mental disease or defect.
Facts: Defendant was charged with murdering his grandmother. Defendant had been acting strangely before the murder. Defendant was initially found incompetent to stand trial, but later was deemed competent. Despite this finding, Defendant repeatedly refused to meet with defense counsel before
trial. Counsel filed a motion to continue the trial date based on her belief that Defendant was incompetent, that his refusal to meet with his attorneys was due to incompetency, and that the defense was unable to prepare a defense of mental disease or defect to the charge because Defendant would not meet with his counsel or experts. Defendant was found guilty at trial. Before sentencing, counsel moved for a competency examination and claimed that Defendant was not competent at trial. The court ordered an evaluation, which occurred. Various experts found that Defendant suffered from delusional disorder, which caused him not to meet with his attorneys before trial. However, Defendant had also begun antipsychotic medication before trial which was improving his condition over time. Some experts believed Defendant was incompetent at trial because he was unable to understand the proceedings or rationally assist counsel due to his delusional disorder. The trial court found that Defendant was competent and sentenced him.
Holding: The crux of the motion for continuance was that counsel needed more time to develop a defense of mental disease or defect. Defendant's mental state was repeatedly questioned by his attorneys and several trial judges who presided over Defendant's case at various times. Even though Defendant personally wanted to proceed to trial, Defendant was deprived of his right to adequately prepare a defense of mental disease or

defect by the refusal to grant a continuance. Defendant was prejudiced because the evidence presented after trial supports such a defense, and showed that Defendant was improving on medication and would be able to cooperate with counsel in preparing such a defense, if a continuance had been granted.

State ex rel. Scherrer v. Martinez, 2016 WL 145511 (Mo. App. E.D. Jan. 12, 2016):
Even though (1) the Interstate Agreement on Detainers (IAD) applied because Defendant was transferred from federal to state custody for trial, and (2) Defendant personally did not want a continuance, the trial court erred in failing to grant defense counsel a continuance to prepare for death penalty trial; the IAD's time limits allow a continuance "for good cause shown" and do not require the personal consent of Defendant.
Facts: Defendant, who was in federal custody, was charged in 2013 with first degree murder. In August 2015, his then-attorney filed a motion for speedy trial. In October 2015, Defendant was brought from federal to state custody. In October 2015, the State indicated it would seek the death penalty. Current counsel entered the case in late October 2015. The trial court set a trial date for January 2016. Counsel moved for a continuance, which the court denied. Counsel sought a writ of prohibition to order trial court to grant a continuance.
Holding: Sec. 217.490.3 (the IAD) provides that when a defendant has been transferred from federal to state custody, trial must start within 120 days, but a continuance may be granted "for good cause shown." Sec. 217.490.5 provides that if the trial is not held within 120 days, the case must be dismissed with prejudice. Here, the trial court denied a continuance because it believed it was required to try the case within 120 days. However, the court ignored the plain language allowing a continuance "for good cause shown." The statute does not require Defendant to personally consent. Here, counsel showed good cause for a continuance because she had only recently received discovery, she had six other first-degree murder cases pending, and her investigator and mitigation specialist were working on the other cases. Writ granted.

Com. v. Herp, 99 Crim. L. Rep. 396 (Ky. 6/16/16):
Holding: Where in child sex case the State on day of trial amended the time-frame in which the offense occurred, Defendant should have been granted a 2-day continuance to investigate.

Costs

State v. Richey, 2019 WL 1247089 (Mo. banc March 19, 2019):
Holding: (1) A jail board bill may not be taxed as "court costs" in criminal cases because there is no statutory authority to make a jail board bill a "court cost"; (2) a jail board bill may be collected only through OSCA's collection method set out in Sec. 221.070.2, i.e., an intercept (setoff) of a defendant's income tax refund or lottery prize winnings.

Goldsby v. State, 2018 WL 3626507 (Mo. banc July 31, 2018):
Holding: (1) The docket fee required by Rule 81.04(e) is not a jurisdictional prerequisite for appeal; (2) where an appellant timely files a notice of appeal but fails to pay the

docket fee at that time, the appellant must be given notice of the procedural defect under Rule 84.08 and given 15 days to remedy the defect by paying the fee; thus (3) where appellant timely filed his notice of appeal, but paid his docket fee after the time for notice of appeal had expired, appellant cured his procedural defect and appellate court has jurisdiction to hear the appeal.

Discussion: To interpret Rule 81.04(e)'s requirement of a docket fee as a necessary for the notice of appeal to be valid would violate Mo. Const. Ar t. V, Sec. 5's prohibition on the Supreme Court establishing rules affecting the statutory *right* to appeal. Under Art. V, Sec. 5, it is for the legislature to set the requirements for the right to appeal. Sec. 512.050 requires only the filing of notice of appeal, and while the statute specifically allows the Supreme Court to impose additional requirements for an appeal, those requirements do not affect "the validity of the appeal." Since Sec. 512.050 no longer requires the filing of a docket fee for a notice of appeal to be effective, the Supreme Court may not so require either. Cases to the contrary should no longer be followed.

State ex rel. Fleming v. Mo. Bd. Probation and Parole, 515 S.W.3d 224 (Mo. banc April 4, 2017):

(1) Where Defendant claimed he could not pay all his court costs due to unemployment and mental health issues, but court revoked his probation for failure to pay without determining whether he had the ability to pay and had willfully failed to pay, the revocation violated due process; and (2) habeas relief is available to a person on parole because that is a restraint on liberty.

Facts: (1) Defendant was placed on probation and ordered to pay about $4,000 in court costs (about $3,700 of which were jail board bills). Defendant repeatedly had trouble paying due to unemployment and mental health problems. However, Defendant made periodic small payments. Eventually, revocation was sought due to failure to pay. At the time of the revocation hearing, Defendant had paid about $1,000 but still owed $3,000. Defendant claimed he could not be revoked because he couldn't afford to pay the remaining costs. The court revoked his probation on grounds that he had not paid. He sought a writ of habeas corpus.

Holding: *Bearden v. Georgia*, 461 U.S. 660 (1983), generally prohibits a court from revoking probation solely because of inability to pay. *Bearden* requires that a court inquire as to whether a defendant has the ability to pay, and if so, whether defendant willfully refused to pay. *Bearden* also requires a court to consider alternatives to incarceration where defendant cannot pay. Although the court here said people should not "be sent to prison because they can't pay their court costs," the court did not comply with the requirements of *Bearden*. The court revoked solely because costs weren't paid. The court made no findings about inability to pay or willfulness. Thus, the revocation was invalid. However, while the habeas case was pending, Defendant was released on parole. Thus, the court imposes as a remedy that the State elect either to have a new revocation hearing within 60 days or discharge Defendant. (2) On a procedural matter, the majority finds that habeas proceedings may be brought by someone on parole because that is a restraint of liberty. Actual confinement is not required.

Dissenting opinion: Judge Fischer would hold that habeas corpus is limited to persons who are physically confined by the State. Since Defendant had been released on parole, he would hold that habeas relief is not available and the case is moot.

State ex rel. Merrell v. Carter, 518 S.W.3d 798 (Mo. banc May 30, 2017):
Holding: Trial court lacked authority in criminal case to order the county to pay costs of a Special Master who was appointed to hear certain issues in the case, because no statute or Rule provides for the assessment of such costs.
Discussion: Costs are a creature of statute. Courts have no inherent power to award costs. No statute or Rule applies here. Sec. 550.030 requires the county to pay costs "when the defendant is sentenced to imprisonment in the county jail … and is unable to pay the costs," but the defendant here is still pretrial. Moreover, if he is convicted of the felony charge pending against him and sentenced to state prison, any costs Defendant is unable to pay would be taxable to the *state*, not the county, under Sec. 550.020.1.

State v. Bertrand, 2020 WL 6278732 (Mo. App. E.D. Oct. 27, 2020):
Holding: (1) Trial court's imposition of $760 in "Jury Fees" on Defendant as court costs was not statutorily authorized, because Secs. 550.280, 550.010, and 494.455.2 authorize jury fees of only $6.00 per day per petit juror and alternates (of whom there were 14) and mileage of .07 cents per mile for these jurors – the total of which would be far lower than $760 for the one-day trial; and (2) Even though Defendant objected to any court costs being imposed (even authorized court costs distinct from the "Jury Fees") because she was indigent and represented by the Public Defender and Sec. 550.030 requires a county to pay court costs when a Defendant is unable to pay, the issue was not ripe for appeal because Defendant did not present evidence (by testimony, affidavit or otherwise that she was unable to pay) and the trial court never ruled whether Defendant was able or unable to pay. Case remanded for redetermination of correct statutorily authorized "Jury Fees," and Defendant can again raise claim – and present evidence -- that she is unable to pay any costs due to indigence.

State v. Thomas, 2019 WL 6482428 (Mo. App. E.D. Dec. 3, 2019):
Holding: When a criminal case is transferred on change of venue from County One to County Two, (1) County Two lacks statutory authority to collect costs directly from Defendant, but can collect costs from County One, Secs. 550.120.1 and 550.130, and (2) County One can collect costs from Defendant, Secs. 550.120.1, 550.010, 550.130.

State v. Boston, 572 S.W.3d 160 (Mo. App. E.D. April 23, 2019):
Holding: Where venue was changed from Warren County to Montgomery County, Montgomery County had no authority to assess costs against Defendant or the State, because Sec. 550.120.1 provides that costs must be paid by the County in which the case was originally filed; costs ordered refunded.

Bosworth v. State, 2018 WL 3977035 (Mo. App. E.D. Aug. 21, 2018):
Holding: Where (1) the trial court sentenced Movant/Defendant to prison and a written sentence and judgment was entered in accord with this oral pronouncement, and (2) the trial court later entered restitution orders which ordered Movant/Defendant to pay restitution regarding the crimes, the court exceeded its authority in ordering the

restitution because its judgment was final upon sentencing, and the 24.035 motion court clearly erred in not vacating the restitution orders.
Discussion: In a criminal case, a final judgment occurs when sentence is entered. Once judgment and sentencing occur, the trial court has exhausted its jurisdiction and can take no further action except when provided by statute or rule. The trial court was without authority to later order restitution.

State v. Banderman, 2019 WL 1434389 (Mo. App. S.D. April 1, 2019):
Holding: (1) A defendant in a criminal case can challenge the taxation of costs via a post-judgment motion, and if the motion is denied, can pursue a direct appeal; and (2) under *State v. Richey*, 2019 WL 1247089 (Mo. banc March 19, 2019), there is no statutory authorization for a court to make a jail board bill a "court cost" in a criminal case.

Graves v. Mo. Dept. of Corr., 2020 WL 1522627 (Mo. App. W.D. March 31, 2020):
Holding: Even though (1) Petitioner-Probationer was ordered to pay $30 per month in "intervention fees" as a standard probation condition; (2) Petitioner's sole source of income was Social Security disability; and (3) 42 U.S.C. Sec. 407(a) prohibits attachment of Social Security payments to pay "other legal process," Petitioner's declaratory judgment claim that the intervention fee violated Sec. 407(a) was not ripe, because a probation violation for failure to pay requires a "willful" failure to pay, and DOC had not made such a determination or claimed Petitioner violated his probation; case dismissed without prejudice.

Bey v. Precythe, 2019 WL 5699935 (Mo. App. W.D. Nov. 5, 2019):
Holding: Secs. 482.365 and 506.366 do not require a *pro se* inmate to file an *in forma pauperis* motion or an inmate account statement to file a request for a trial *de novo* from small claims court; circuit courts cannot create additional "jurisdictional requirements" not set out in the statutes.

State v. Savage, 2019 WL 5874663 (Mo. App. W.D. Nov. 12, 2019):
Holding: (1) Even though a Defendant may challenge *the amount* of an assessment of costs against him via a motion to retax costs (which can be filed after the time a trial court usually loses jurisdiction), such a motion cannot be used to challenge the *inter-party allocation* of costs; here, Defendant was contending the State should be required to pay costs, not him; but (2) Defendant may object to allocation of costs at sentencing and raise the allocation of costs in a timely direct appeal, because the costs are part of the final judgment.

Barnes v. Uhlich, 2019 WL 5874669 (Mo. App. W.D. Nov. 12, 2019):
Holding: Even though County Two Clerk was statutorily required to collect costs from County One (where criminal case originated) and not from Defendant, trial court did not err in dismissing Defendant's petition for Writ of Mandamus to compel County Two Clerk to collect costs from County One, since a right to mandamus exists only when a party doesn't have any other relief available, but here, Defendant can seek relief via a motion to retax costs.

State v. Garcia, 2019 WL 4615239 (Mo. App. W.D. September 24, 2019):
Holding: Where the evidence did not support the amount of restitution ordered, appellate court, under Rule 30.23's authority to "dispose finally of the case," can correct the judgment to the lower amount supported by the evidence.

*** Lomax v. Ortiz-Marquez, ___ U.S. ___, 140 S.Ct. 1721 (U.S. June 8, 2020):**
Holding: A prior lawsuit dismissed without prejudice for failure to state a claim counts as a "third strike" under the Prison Litigation Reform Act, thus barring *in forma pauperis* status for plaintiff-prisoner in a later suit; a dismissal of a prior suit for failure to state a claim counts as a strike, whether or not with prejudice.

* **Timbs v. Indiana, ___ U.S. ___, 139 S.Ct. 682 (U.S. Feb. 20, 2019):**
Holding: The 8th Amendment's excessive fines clause applies to the States through the 14th Amendment's due process clause; thus, drug Defendant can challenge the civil forfeiture of his vehicle under 8th Amendment as grossly disproportionate to his offense.

*** Lagos v. U.S., ___ U.S. ___, 138 S.Ct. 1684 (U.S. May 29, 2018):**
Holding: The Mandatory Victims Restitution Act (MVRA) does not require defendants to reimburse victims for expenses incurred in private investigations or civil proceedings arising out of the criminal offense.

*** Nelson v. Colorado, ___ U.S. ___, 137 S.Ct. 1249 (U.S. April 19, 2017):**
Holding: Where has a defendant has a conviction set aside, procedural due process requires the government to refund restitution and court costs paid by the defendant, without the defendant having to prove actual innocence. Absent conviction of a crime, the defendant is presumed innocent, and is entitled to a refund.

*** Manrique v. U.S., ___ U.S. ___, 137 S.Ct. 1266 (U.S. April 19, 2017):**
Holding: In order to appeal an order imposing restitution in a deferred restitution case, a defendant must file a notice of appeal following that order. A prior notice appealing the conviction and sentence was not effective to also cover the restitution order.

State v. Anzalone, 102 Crim. L. Rep. 514 (Haw. 2/14/18):
Holding: Where a statute provided that court could not order defendants to pay for extradition costs unless they are "nonindigent," then once Defendant sustains her burden of producing some evidence of her poverty, the State must show the Defendant is not, in fact, indigent.

State v. Covel, 2019 WL 1302388 (Iowa 2019):
Holding: Trial court erred in finding that Defendant was reasonably able to pay restitution when court didn't know full amount of restitution or other costs.

People v. Hakes, 2019 WL 238196 (N.Y. App. 2019):
Holding: Evidence did not prove that Defendant willfully failed to pay the costs of his alcohol monitor where the evidence was that his Mother was his sole source of support, and she was on social security and couldn't afford to make payments toward the monitor.

State v. Stump, 2016 WL 1696754 (Wash. 2016):
Holding: Where defense counsel was permitted to withdraw after filing an *Anders* motion to withdraw, the State was not a "prevailing party" allowed to collect appellate costs; an *Anders* motion alerts the court to the lack of meritorious issues, so that a case may be decided without adversary presentation.

Rubio v. Superior Court, 2016 WL 344515 (Cal. App. 2016):
Holding: Discovery statute which requires Defendant to pay for cost of "copying" discovery requires paying the wages and benefits paid to the employee who does the actual copying, but does not require paying for costs related to locating, redacting or preparing the documents for copying.

State v. Diaz-Farias, 2015 WL 7734279 (Wash. App. 2015):
Holding: With the exception of the $250 statutory jury fee, additional juror costs imposed on Defendant infringed on the constitutionally guaranteed right to a jury trial.

Counsel – Right To – Conflict of Interest

Roesing v. Dir. of Revenue, 2019 WL 1912818 (Mo. banc April 30, 2019):
Holding: As matter of first impression, Sec. 577.041.1, which gives Drivers 20-mintues to contact an attorney, includes the right to have the attorney conversation be private; thus, where Officer stood by, listened to, and recorded Driver's telephone conversation with his attorney, Driver's subsequent refusal to take breath test was not voluntary; Director has burden to show Driver wasn't prejudiced, which Director failed to do.
Discussion: A driver who contacts an attorney can make an informed decision about whether to take a BAC test only if the driver is able to candidly disclose all information necessary to receive appropriate advice from an attorney. A driver is not free to speak candidly about incriminating evidence if police are listening to or recording the conversation because a prosecutor could use the information to decide whether to bring charges. Privacy is inherent in a driver's statutory right to counsel. Judgment revoking license for refusal to take BAC test reversed.

State ex rel. Gardner v. Boyer, 2018 WL 6321238 (Mo. banc Dec. 4, 2018):
Holding: Even though Prosecutor was investigating Officer-Witness for possible illegal use of force in Defendant's case, this was not a conflict of interest in Defendant's case and did not create an appearance of impropriety for Defendant's case, so trial court should not have disqualified Prosecutor or the entire Prosecutor's Office from prosecuting Defendant's case.
Facts: Defendant was charged with unlawful use of a weapon and resisting arrest in an incident involving Officer-Witness. Prosecutor's Office had a policy that any use of

force by police would be investigated for possible illegal use of force, so Prosecutor's Office was conducting a routine investigation of Officer-Witness. Thus, Officer was both a witness in Defendant's case, and a person under investigation. Officer-Witness moved to disqualify Prosecutor and Prosecutor's Office from Defendant's case on grounds that there was an "appearance of impropriety" and that statements Officer made in the criminal case could be used against him in the investigation. The trial court disqualified Prosecutor's Officer.

Holding: An entire Prosecutor's Office can be disqualified from a case if, first, a particular attorney in the office has a conflict of interest, and second, that conflict is imputed to the entire officer either through the Rules of Professional Conduct, or because it creates an "appearance of impropriety." Here, there was no finding that any attorney in Prosecutor's Office even had a conflict of interest. Absent a finding of a conflict, the trial court's disqualification inquiry should have ended. Nevertheless, when applying the "appearance of impropriety" test, a court should look at the fairness of the trial for the *defendant*, not to a third party. It is the fairness of Defendant's trial which the court should have been concerned with, not an appearance of fairness toward Witness.

State ex rel. Peters-Baker v. Round, 2018 WL 6320826 (Mo. banc Dec. 4, 2018):

Holding: Even though postconviction Movant's former Public Defender on direct appeal had joined Prosecutor's Office, where the Prosecutor's Office screened former Public Defender off from postconviction case and there was no claim that the screening was inadequate, trial court erred in disqualifying entire Prosecutor's Office from postconviction case.

Discussion: An entire Prosecutor's Office can be disqualified from a case if, first, a particular attorney in the office has a conflict of interest, and second, that conflict is imputed to the entire officer either through the Rules of Professional Conduct, or because it creates an "appearance of impropriety." Here, former Public Defender had a conflict of interest because she previously represented Movant. But the Rules of Professional Conduct do not impute that conflict to the entire office, and there is no "appearance of impropriety" where former Public Defender was screened from the postconviction case. This does not mean that screening will always suffice to prevent disqualification. E.g., where the "boss" of the Prosecutor's Office is the attorney who has the conflict, an entire Office may need to be disqualified. But courts should be cautious in disqualifying entire Prosecutor's Offices because the elected Prosecutor represents the people who elected her to make prosecutorial decisions for their county.

State v. DePriest, 2017 WL 770975 (Mo. banc Feb. 28, 2017):

(1) Movants (Brother and Sister) were entitled to evidentiary hearing on claim that plea counsel (who had represented both of them) operated under an actual conflict of interest which adversely affected his representation where (a) counsel knew the evidence against Brother was strong, but the evidence against Sister was weaker, (b) counsel advised rejecting various plea offers that would have benefited one over the other, and (c) counsel eventually recommended accepting a plea offer that required both of them to plead guilty together, even though the offer appeared to favor Sister. (2) Prejudice is presumed in a guilty plea case where a Movant shows that a conflict of interest actually

affected the adequacy of representation. (3) "Group guilty pleas" are disfavored and should be "consigned to judicial history."

Facts: Brother and Sister were charged with various drug offenses. They were jointly represented by Attorney. Attorney recognized that the evidence against Brother was stronger, and the evidence against Sister weaker. The State initially offered both Brother and Sister a 10-year deal. Attorney told them to reject it. Later, the State made other plea offers, including one in which Sister would be required to testify against Brother; Attorney told Sister not to accept that offer. Later, Sister was jailed on an unrelated charge. The State offered to let Sister bond out on that charge *only if both* she and Brother pleaded guilty in the drug cases. Attorney told them both to plead guilty. Brother's plea was an "open" plea but was relying on Sister being able to bond out on the unrelated charge. Sister's plea dismissed certain charges and allowed her to bond out on the other charge, but was also open. The plea was at a "group guilty plea" with numerous other defendants also pleading guilty at the same time and being questioned by the judge as a group. Brother and Sister later filed separate 24.035 motions, alleging Attorney was operating under an actual conflict of interest in representing both of them. The motion court denied the claim without an evidentiary hearing.

Holding: The motion court denied a hearing on grounds that Movants had not shown prejudice, in that they had not shown that there is a reasonable probability that but for counsel's errors they would rejected pleading guilty and insisted on going to trial. But this is the wrong standard for conflict of interest claims in a guilty plea. A movant who shows that a conflict of interest actually affected the adequacy of representation need not show prejudice. Prejudice is presumed because the right to unconflicted counsel is an essential aspect of the Sixth Amendment right to counsel. Actual conflicts of interest in guilty plea proceedings cause counsel to refrain from doing things, such as in pretrial negotiations. To assess the impact of such a conflict on the attorney's options, tactics and decisions in plea negotiations would be impossible. (The standard for conflict of interest at trial is that counsel must have done something or foregone doing something at trial, which was detrimental to the movant and advantageous to the one with antagonistic interests.) Here, Movants pleaded facts alleging that counsel was acting under an actual conflict of interest that adversely affected his performance. Case remanded for an evidentiary hearing.

Concurring Opinion: Judge Wilson questions the adequacy of the amended motions, and expresses his view that the civil pleading requirements of Rule 55 should apply to Rule 24.035 and 29.15 amended motions. "[E]ven if Rule 55 does not compel postconviction counsel to take this approach, postconviction clients would be better served if their counsel did so."

State v. Chambers, 2016 WL 503030 (Mo. banc Feb. 9, 2016):

(1) Even though Defendant timely filed his application for change of venue, where he failed to pursue it for nine months and affirmatively told the trial court there were no pending motions in the case until the day before trial, Defendant waived his right to change of venue; and (2) where pro se Defendant voluntarily chose not to attend the trial, he has no 6th Amendment right to be protected from the prejudice that results, but where a pro se Defendant is removed from the courtroom due to disruptive behavior, a different

standard may apply, because if the trial continues without counsel, neither Defendant's nor the Gov't's interest will be adequately protected.
Facts: Defendant, through counsel, filed a timely application for change of venue as of right under Rule 32.03. Defendant then changed counsel. For nine months thereafter new counsel, unaware of the venue application, told the court there were no pending motions. After a continuance motion was denied shortly before trial, counsel then discovered the venue application and sought to invoke it the day before trial. The trial court found Defendant waived the venue motion by not bringing it to the court's attention in a timely fashion. Defendant then discharged counsel, and absented himself from the trial.
Holding: (1) Even though Defendant timely filed his change of venue application, a defendant may waive constitutional or statutory rights by implied conduct. Here, Defendant waived his right to change of venue by not pursuing it for nine months, and affirmatively telling the court there were no pending motions. This is true even though the second counsel did not know the motion had been filed; it was defense counsel's responsibility to know the file. Asserting the change of venue the day before trial was an attempt to circumvent the denial of a continuance; Defendant should not be rewarded for that. (2) Regarding whether another of Defendant's claims is preserved for appeal, Defendant is held to the same standard as an attorney, even though he proceeded pro se and absented himself from the trial. Where a pro se Defendant voluntarily absents himself from trial, he has no 6th Amendment right to be protected from the prejudice that may result; that's the case here. A different standard may apply, however, where a pro se defendant is removed from the courtroom for disruptive behavior. There, if the trial continues and if counsel is not appointed, neither the Defendant's nor Gov't's interests may be protected.

Bonds v. State, 2020 WL 5524529 (Mo. App. E.D. Sept. 15, 2020):
Holding: Even though Movant's pro se Rule 24.035 motion was untimely filed, the court was required to appoint counsel under Rule 24.035(e) to determine if an applicable exception to timeliness applied.

Randolph v. State, 2020 WL 5524203 (Mo. App. E.D. Sept. 15, 2020):
Holding: Even though Movant's *pro se* 24.035 motion was facially untimely, Rule 24.035(e) requires court to appoint counsel because Movant may be unaware of an applicable exception to timeliness in the absence of the expertise of postconviction counsel, who can plead an exception in an amended motion.

Giles v. State, 572 S.W.3d 137 (Mo. App. E.D. April 16, 2019):
Holding: Motion court clearly erred in failing to appoint counsel for indigent Movant, because Rule 29.15(e) makes appointment of counsel mandatory.

State v. McEntire, 2018 WL 1278311 (Mo. App. E.D. March 13, 2018):
Trial court erred in denying Public Defender Attorney's motion to withdraw on conflict of interest grounds where Attorney's Supervisor represented the Confidential Informant against Attorney's client, even though Supervisor's representation was in an unrelated

case that was going to be dismissed; the relationship of counsel to the parties creates the conflict, not the relationship of the offenses.
Facts: Public Defender Attorney represented Defendant in drug case. Attorney learned that his Supervisor at the public defender office was representing the Confidential Informant (CI) in Defendant's case. Supervisor's representation was of CI in an unrelated case that was going to be dismissed. Attorney moved to withdraw from Defendant's case on grounds of conflict of interest. The trial court denied the motion to withdraw on grounds that Defendant's case was unrelated to Supervisor's case. After conviction at trial, Defendant appealed.
Holding: Defendant has a 6th Amendment right to conflict-free counsel. An attorney who represents both a defendant and a prosecution witness against that defendant has a conflict. Usually, that conflict would be imputed to attorneys from the same firm under Rule 4-1.10. But given the special nature of government entities such as a public defender's office, Rule 4-1.11 does not impute the conflict, though the comments state it would be "prudent to screen such lawyers." Thus, Missouri's ethics rules do not technically prohibit the representation here. However, a trial court has a duty not only to enforce the ethical rules, but to ensure that the criminal justice process appears fair. If a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial, the trial court should disqualify counsel. Here, the trial court abused discretion in not allowing counsel to withdraw because there is an appearance of impropriety. The fact that Defendant's and CI's cases were unrelated does not remove the conflict because it is the relationship of counsel to the parties that creates the conflict, not the relationship of the offenses. Reversed for new trial.

State ex rel. Healea v. Tucker, 2017 WL 2451869 (Mo. App. E.D. June 6, 2017):
Holding: (1) Where Police Dept. secretly recorded an attorney-client visit between defense counsel and defendant, this violated the 6th Amendment right to counsel, attorney-client privilege, due process, and 600.048.3, which requires police to provide a private attorney-client visiting place; appellate court grants writ limiting public access to report which contains substance of the attorney-client conversation; (2) Where Attorney General's Office had copy of secretly taped attorney-client conversation for two years before disclosing it, never logged the evidence as is customary, and never explained the non-customary handling of the evidence, there is an appearance of impropriety for Attorney General's Office to continue to prosecute case, and Office is disqualified and Special Prosecutor appointed; Defendant need not show actual prejudice to disqualify the Attorney General's Office; appearance of impropriety is standard; but (3) Defendant's request to exclude all evidence obtained *after* the secret recording is not subject to writ of prohibition; Defendant's remedy is to object to this evidence at trial and pursue issue on direct appeal.

State v. Bolden, 2016 WL 7106291 (Mo. App. E.D. Dec. 6, 2016):
Even though Defendant wanted to represent himself, trial court deprived him of his 6th Amendment right to counsel by allowing him to waive counsel, without representation of an attorney, before determining his competency.
Facts: Defendant, who did not have any counsel, wanted to proceed *pro se*. The trial court granted the request, but because it did not find Defendant's behavior to be

"particularly rational" in rejecting counsel, ordered a mental examination. The exam found Defendant to be competent. The trial proceeded with Defendant representing himself. After conviction, he appealed. He claimed he was denied his 6th Amendment right to counsel during his competency determination.
Holding: The trial court plainly erred in allowing Defendant to waive counsel without representation of an attorney before determining competency. A person choosing self-representation must be competent to do so. When competency is at issue, the 6th Amendment requires that Defendant be represented by counsel whose duty it is to assure that the evidence supporting competency is closely examined. Here, the trial court believed Defendant's competency was in question; it should have appointed counsel at least until that issue was resolved. Nevertheless, a new trial is not required, at least at this stage. Because there is a contemporaneous competency report, case is remanded for a competency hearing with counsel, and finding on whether Defendant was competent. If he was not, he shall receive a new trial.

In the Interest of N.R.W., 2016 WL 720634 (Mo. App. E.D. Feb. 23, 2016):
(1) Even though Juvenile turned 18 before appeal of his adjudication of delinquency was filed, appeal is not moot because his act was a felony and he may be subject to collateral consequences during adulthood from the adjudication; (2) where trial court did not offer counsel to Juvenile or his parents during adjudication hearing, and never obtained a waiver of counsel on the record, Juvenile and parents were denied right to counsel, even though the court appointed an attorney for Juvenile at a later, post-adjudication stage before sending Juvenile to DYS.
Facts: Juvenile was charged with felony drug possession. An adjudication hearing was held, at which Juvenile was represented by his Father, who was not an attorney. No record was made regarding the right to counsel, or waiver of counsel. Juvenile was found guilty. Later, when juvenile violated terms of his post-adjudication supervision, the court held a hearing and ordered Juvenile to DYS. The court appointed counsel for Juvenile at that hearing, but did not appoint counsel for Father, who requested counsel.
Holding: Juvenile is entitled to counsel in all juvenile court proceedings under Sec. 211.211.1. After a petition is filed, 211.211.3 requires appointment of counsel unless counsel is knowingly and intelligently waived. If the record does not disclose a knowing waiver, the presumption arises that it was not. The State has the burden of showing a valid waiver. A waiver must be made with an understanding of the nature of the charges, the range of punishment, possible defenses and mitigation, and other relevant circumstances. Also, there must be a *record* demonstrating a knowing and intelligent waiver *before* the waiver takes place. None of that occurred at the adjudication hearing; thus, reversal is required. The court also erred in not appointing counsel for Father. Sec. 211.211.4 allows a child's custodian to be appointed counsel where the custodian is indigent and requests counsel.

State v. Campanella, 609 S.W.3d 526 (Mo. App. S.D. Oct. 29, 2020):
Holding: Even though Defendant apparently fired her retained defense counsel shortly before trial because counsel was having memory problems and the trial court told her she'd have to hire new counsel, the trial court record did not establish that Defendant knowingly, voluntarily and intelligently waived counsel for trial where Defendant never

said she wanted to represent herself; did not sign a waiver of counsel; and the court failed to inquire into her indigency or conduct a *Faretta* hearing; trial where Defendant represented herself reversed.

Haynes v. State, 2018 WL 3342685 (Mo. App. S.D. July 9, 2018):
Holding: Even though the motion court granted Movant's *pro se* 24.035 motion which asked for relief to order DOC to run Movant's sentences concurrently (as he had been actually sentenced), the motion court clearly erred in deciding the case without appointing counsel; appointment of counsel is mandatory under Rule 24.035(e) to ensure that Movant has pleaded all possible claims.

In re: Area 5 Pub. Def. Off. v. Kellogg, 2020 WL 5901195 (Mo. App. W.D. Oct. 6, 2020):
Holding: Sec. 600.063.1 allows a Presiding Judge to discuss and grant relief to all individual attorneys in a Public Defender Office at a caseload conference; Sec. 600.063.1's "not the entire office" language means an "office" itself cannot be used the unit of measurement for excessive caseload, but the caseloads of each individual attorney in an office can be used and considered.

In re: Area 16 Pub. Def. Office III v. Jackson Cnty. Prosecuting Attorney's Office, No. WD82962 (Mo. App. W.D. June 9, 2020):
Holding: (1) The standard of review for Sec. 600.063 caseload conference appeals is abuse of discretion; the Presiding Judge's findings are presumed correct, reviewed for abuse of discretion, and the burden of showing abuse is on the appellant; (2) Sec. 600.063 did not create the power for a Presiding Judge to grant caseload remedies; that power comes from the court's "inherent authority" over its dockets as discussed in *Waters*; Sec. 600.063 regulates the exercise of "inherent authority" which is permissible so long as the statute is not "hostile" to the "inherent power"; (3) District Defender cannot challenge constitutionality of Sec. 600.063 or Sec. 600.062 in a conference proceeding; this should be done via a declaratory judgment action; (4) per Sec. 600.063.6, the Public Defender Commission or Supreme Court can promulgate rules addressing Sec. 600.063's implementation; and (5) on facts presented, trial court did not abuse its discretion in finding that caseloads did not prevent attorneys from providing effective assistance; while some of the procedures the attorneys wanted to use to improve the quality of representation were "worthy goals," Sec. 600.063 speaks only to "effective counsel" which "need not be perfect."

Clunie v. State, 2019 WL 4022039 (Mo. App. W.D. Aug. 27, 2019):
Holding: Where motion court denied indigent Movant's timely pro se 29.15 motion without appointing counsel on grounds that Movant was "not entitled to relief as a matter of law," motion court clearly erred in failing to appoint counsel as required by Rule 29.15(e).

Coy v. State, 2019 WL 2650243 (Mo. App. W.D. June 28, 2019):
Holding: Even though Movant's 24.035 pro se motion was filed late, motion court erred in denying motion without appointing counsel because an attorney may be able to plead an exception to timeliness (of which Movant may be unaware) in an amended motion.

Bishop v. State, 566 S.W.3d 269 (Mo. App. W.D. Jan. 29, 2019):
Holding: (1) Where motion court dismissed Movant's *pro se* 24.035 motion without appointing counsel, this violated Rule 24.035(e) which requires appointment of counsel; (2) even though Movant answered "yes" on his pro se motion as to whether he was seeking to proceed in forma pauperis, but did not write anything in the forma pauperis affidavit, where he had been represented by the Public Defender at his guilty plea, it was clear from the record that he was indigent and counsel should have been appointed; and (3) even though motion court dismissed Movant's case "without prejudice" and this would usually be non-appealable, where a dismissal has the effect of terminating the litigation (which this did), the dismissal is appealable.

Naylor v. State, 2018 WL 6047971 (Mo. App. W.D. Nov. 20, 2018):
Holding: Motion court must appoint counsel even in untimely 24.035 case, because Movant himself may be unaware of applicable exception to timeliness, which could be pleaded in an amended motion filed by counsel.
Discussion: A Movant may proceed in an untimely 24.035 case if he alleges and proves a recognized exception to the time limits. Movant's counsel may raise an exception for the first time in an amended motion, because Movant himself may be unaware of an applicable exception. A court's failure to appoint counsel under 24.035(e) deprives Movant of his opportunity to allege and prove timeliness.

Jamison v. State, 2018 WL 6611477 (Mo. App. W.D. Dec. 18, 2018):
Holding: Even though Movant's pro se 24.035 motion was filed late, motion court is required to appoint counsel and allow for the filing of an amended motion (which might allege a recognized exception to timeliness).
Discussion: Rule 24.035(e) requires appointment of counsel for indigent movants. The Rule does not distinguish between timely and untimely filed motions. The Rule does not include the word "timely."

State v. Marchbanks, 2018 WL 2407605 (Mo. App. W.D. May 29, 2018):
Holding: (1) Even though Defendant was represented by counsel in a drug case and tampering case, and counsel had filed an Assertion of Rights form saying that Defendant was asserting his right to silence, where Officers then questioned Defendant about a murder case while he was in jail, the trial court erred in suppressing those statements because *Miranda* rights cannot be anticipatorily invoked in anticipation of potential future questioning; and (2) even though the Officers' questioning of Defendant may have violated Rule 4-4.2 (which prohibits lawyers from communicating with represented persons and the Prosecutor was ultimately responsible for the Officers' conduct), Defendant makes no argument that Rule 4-4.2 provides a basis to exclude the statements independent of *Miranda*, so court does not decide that issue.

Discussion: Even though Defendant's *Miranda* claims fails because *Miranda* rights cannot be anticipatorily invoked, "[t]his Court is nonetheless sympathetic to [Defendant's] situation." Officers should have known that Defendant was represented by counsel in both the drug and tampering cases. The Assertion of Rights form was filed with both the jail and on Case.net in the drug and tampering cases. When a party is known to be presented by counsel, that party should only be contacted through their counsel, per Rule 4-4.2. The Prosecutor is responsible for the actions of Officers, even if the Prosecutor didn't actually know that the Officers were going to question Defendant about the murder. There was a responsibility upon the Prosecutor not to sanction or take advantage of statements taken by Officers from a person represented by counsel in the absence of his counsel. However, the case law on this is not based on constitutional protections, and Defendant makes no argument that Rule 4-4.2 may provide a basis to exclude the statements, so we do not reach that issue.

Roesing v. Director of Revenue, No. WD80585 (Mo. App. W.D. March 13, 2018):
Sec. 577.041.1 does not require that Drivers be given the opportunity to consult with an attorney in private; thus, even though Officer listened in on Driver's attorney-client phone call – after which Driver refused to consent to a breath test – Driver's right to consult with an attorney was not violated and his refusal counts as a valid refusal resulting in license suspension.
Facts: Driver was arrested for DWI. Officer read Driver the implied consent law. Driver asked to call his attorney, and reached him by phone. Driver and attorney asked to speak privately, but Officer said that wasn't possible because all rooms in the jail were audio and video recorded. Driver ended up talking to attorney with Officer standing nearby, listening in. Driver ultimately refused to take a breath test, after consulting with his attorney. At his license suspension hearing, Driver contended his refusal was not valid because he was denied the opportunity to consult with his attorney in private.
Holding: Sec. 577.041.1 provides a statutory right to speak to an attorney before deciding to submit to a breath test. However, there is no constitutional right to speak with an attorney before deciding whether to submit to a breath test. The statute's purpose is solely to provide a reasonable opportunity to contact an attorney. Here, Driver was given that opportunity and, in fact, actually spoke to his attorney. Nothing in the plain language of Sec. 577.041.1 requires that Driver be given the right to confer privately with his attorney. If it is sufficient under the statute to give a person 20 minutes to unsuccessfully contact an attorney, then it is certainly sufficient to give them 20 minutes to successfully contact an attorney, regardless of whether the ensuing conversation is private or not. Driver argues that a non-private communication risks him making inculpatory statements that could be used against him either in the civil license proceeding or at a criminal trial. But here the State is not seeking to use his statements against him. Moreover, attorney-client privilege can be waived, but such waiver must be voluntary. The privilege that attaches to attorney-client communication after exercising the limited statutory right to contact counsel in Sec. 577.041.1 is not waived merely because a driver is required to involuntarily conduct the conversation in the presence of a police officer. Regardless, the attorney-client privilege implicates whether privileged communications can be admitted at trial. The attorney-client privilege does not implicate whether Driver was afforded the limited statutory right to attempt to contact counsel.

Dissenting opinion: When an arrested driver talks to an attorney, the purpose is to discuss both civil issues regarding a driver's license, and potential criminal charges. An arrested driver has a Fifth Amendment right to consult counsel regarding criminal charges. The most widely accepted understanding of an attorney consultation is that it is done privately, and this is the only definition that makes sense in the context of Sec. 577.041. Sec. 600.048.3 requires police stations and jails to have places available for private consultation with attorneys. It does not make logical sense that the legislature would grant a right to speak privately with an attorney when under suspicion of a crime, but not for those in custody suspected of a crime (DWI) who are also at risk of civil penalties (license suspension).

* **McCoy v. Louisiana, ___ U.S. ___, 138 S.Ct. 1500 (U.S. May 14, 2018):**
Holding: The Sixth Amendment right to the assistance of counsel precludes defense attorneys from conceding their clients' guilt against the clients' wishes.

*** United States v. Bryant, ___ U.S. ___, 136 S.Ct. 1954 (U.S. June 13, 2016):**
Holding: Prior uncounseled tribal court convictions can be used as predicate offenses to prosecute domestic violence cases involving Native American defendants in federal court under 18 U.S.C. Sec. 117(a), provided that the right-to-counsel provisions of the Indian Civil Rights Act (ICRA) were followed in the prior cases.

*** Luis v. U.S., 2016 WL 1228690, ___ U.S. ___ (U.S. March 30, 2016):**
Holding: Even though a federal statute allows the Gov't to seize a defendant's assets before trial in order to ensure that restitution and other criminal penalties can be paid, the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.

Taylor v. U.S., 2016 WL 2783449 (2d Cir. 2016):
Holding: (1) Indigent defendants are entitled to CJA counsel when seeking rehearing on appeal; (2) where CJA counsel failed to seek rehearing, court of appeals can recall its mandate to allow filing of petition for rehearing.

In re Com.'s Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia, 2015 WL 3634888 (3d Cir. 2015):
Holding: Proceedings brought by State to disqualify federal public defender from representing persons in state postconviction proceedings was preempted by federal law, regardless of whether the public defender was authorized to use Criminal Justice Act grants for state postconviction.

U.S. v. Duncan, 97 Crim. L. Rep. 693 (4th Cir. 9/2/15):
Holding: Appellate review of trial court's finding that Defendant forfeited his right to counsel by his conduct is de novo, even if Defendant failed to object.

Battaglia v. Stephens, 2016 WL 3084272 (5th Cir. 2016):
Holding: Capital defendant was entitled to stay of execution to make appointment of federally-funded substitute counsel meaningful; counsel was needed to develop evidence to show Defendant was incompetent.

Schmidt v. Foster, 103 Crim. L. Rep. 245 (7th Cir. 5/29/18):
Holding: Defendant's right to counsel was violated when Judge questioned Defendant about mitigating circumstances in his case outside the presence of his counsel; the conversation in the Judge's chambers was a critical stage at which the right to counsel attached.

Schmid v. McCauley, 2016 WL 3190670 (7th Cir. 2016):
Holding: Where state prisoner suffered from mental problems, this warranted appointment of counsel to determine whether his mental disability equitably tolled the limitations period for filing a federal habeas.

U.S. v. Cisneros-Rodriguez, 98 Crim. L. Rep. 287 (9th Cir. 12/23/15):
Holding: Alien's conviction for illegal re-entry vacated because customs agent misled her into waiving her right to counsel at the original removal proceeding by telling her that an attorney would not be able to help her.

U.S. v. Kahn, 103 Crim. L. Rep. 199 (10th Cir. 5/17/18):
Holding: Where a Defendant's assets have been seized leaving him with insufficient assets to hire "counsel of choice," a hearing is required on the matter; a hearing is required even if Defendant still has some assets that would allow him to hire some attorney.

U.S. v. Jimenez-Antunez, 99 Crim. L. Rep. 168, 2016 WL 1622438 (11th Cir. 4/25/16):
Holding: Even though Defendant said he wanted to discharge private counsel so he could obtain a public defender, trial court could not deny withdrawal of private counsel because this would impinge on Defendant's right to counsel of choice; the right to counsel of choice allows a defendant to discharge counsel, regardless of the type of counsel defendant wishes to obtain later.

U.S. v. Cavallo, 2015 WL 3827099 (11th Cir. 2015):
Holding: Defendant was denied 6th Amendment right to counsel during critical stage where trial court refused to allow him to consult with counsel during overnight recesses in the course of his multi-day testimony.

U.S. v. Avant, 100 Crim. L. Rep. 147 (N.D. Miss. 10/28/16):
Holding: Defense counsel who was married to Officer who investigated crime at issue had an actual conflict of interest because there was a serious risk of broken confidentiality and impaired loyalty, and this was a conflict which Defendant cannot waive; Rule 1.7(a) says a conflict exists when a lawyer's personal interest or

responsibilities to a third person pose a significant risk of limiting the lawyer's representation of a client.

U.S. v. Mulero-Vargas, 2019 WL 522595 (D.P.R. 2019):
Holding: Attorney's invocation of 5th Amendment when questioned about how he was being paid showed that Attorney's interests were potentially in conflict with Defendant's interests.

Gardner v. App. Div. of Superior Ct. of San Bernadino Cnty, 245 Cal. Rptr. 3d 58 (Cal. 2019):
Holding: State's interlocutory appeal of grant of motion to suppress is a critical stage at which Defendant-Respondent is entitled to appointed counsel to defend suppression.

Ronquillo v. People, 102 Crim. L. Rep. 67 (Colo. 10/16/17):
Holding: The right to retain counsel of choice also includes Defendant's right to fire retained counsel without proof of "good cause" for doing so, but in deciding whether to allow change of counsel, court can consider procedural matters such as whether new counsel would have time to prepare before trial.

Akau v. State, 2019 WL 140385 (Haw. 2019):
Holding: Defendant was denied right to counsel where he never had either appointed or private counsel, and requested continuance of trial to obtain counsel was denied.

People v. Cole, 102 Crim. L. Rep. 231 (Ill. 11/30/17):
Holding: A Public Defender Office is not the same as a law firm under conflict of interest ethics rules, so different attorneys in the same Office can represent co-defendants; in order to show a conflict for an Office representing co-defendants, there must be unique facts such as a supervisor representing one co-defendant and supervising a lawyer representing another, or the size, structure or organization of the Office precludes representing co-defendants.

Editor's note: Missouri does not follow this approach. *See State ex rel. Pub. Def. Comm'n v. Bonacker*, 706 S.W.2d 449 (Mo. banc 1986).

People v. Cotto, 2016 WL 2926359 (Ill. 2016):
Holding: Postconviction Movants are entitled to counsel who provide reasonable level of assistance, regardless of whether counsel is appointed or retained.

People v. Poole, 2015 WL 5440240 (Ill. 2015):
Holding: Counsel had per se conflict of interest in simultaneously representing Defendant on one charge and Defendant's girlfriend on an unrelated charge, where State called girlfriend as hostile witness against Defendant.

Ayers v. Hall, 103 Crim. L. Rep. 539 (Ky. 8/22/18):
Holding: Even though Defendant was an experienced criminal defense lawyer, trial court erred in failing to get a valid waiver of counsel from him before requiring him to proceed without counsel in criminal charges against him.

Com. v. Tigue, 2015 WL 2266252 (Ky. 2015):
Holding: A pre-sentence motion to withdraw guilty plea is a "critical stage" where constitutional right to counsel attaches.

Dykes v. State, 2015 WL 5052674 (Md. 2015):
Holding: After discharging Defendant's public defender for good cause, trial court was required to take some action to ensure Defendant obtained new counsel, such as referring him back to the public defender's office or appointing an attorney for him.

State v. Bain, 2016 WL 93872 (Neb. 2016):
Holding: Where the State becomes privy to Defendant's confidential trial strategy, a presumption of prejudice to the 6th Amendment right to counsel arises.

People v. Ortiz, 2015 WL 8787119 (N.Y. 2015):
Holding: Trial court erred in allowing Prosecutor to use a statement made by defense counsel at Defendant's arraignment to attack Defendant's credibility at trial (trial counsel had stated a fact differently than Defendant did at trial), and then refusing to allow trial counsel to withdraw or declare a mistrial; the Prosecutor caused defense counsel to become an adversary of Defendant, and made it impossible for counsel to admit to the jury that counsel was wrong, moments before she was going to argue for Defendant's innocence in closing argument.

People v. Dekraai, 100 Crim. L. Rep. 186 (Cal. App. 11/22/16):
Holding: Trial judge did not abuse discretion in disqualifying entire Orange County Prosecutor's Office from prosecution of Defendant based on conflict of interest stemming from widespread jail-house snitch scandal involving the prosecutor's office.

People v. Buchanan, 100 Crim. L. Rep. 8 (Ill. App. 9/27/16):
Holding: Even though evidence of guilt was strong, Defendant entitled to new trial where trial court removed his counsel of choice for speculative and remote conflict of interest reasons; State had sought removal of counsel because counsel's father (who was also a lawyer) represented a State's witness and scenarios could be hypothesized where counsel might have to call his father as a witness to testify about the State's witness.

State v. Singleton, 2016 WL 3012793 (La. App. 2016):
Holding: Public Defender had good cause under rules of professional conduct to avoid appointment in a private capacity to represent indigent prisoner in postconvction case; Public Defender had extensive duties as head of public defender office, had high caseloads and shrinking budget, and was contractually prohibited from having a private practice.

Death Penalty

State ex rel. Becker v. Wood, 2020 WL 6438925 (Mo. banc Nov. 3, 2020):
Writ of prohibition issues to quash trial court order requiring Prosecutor to testify about reason for seeking death penalty, because State seeking death penalty four years after filing initial charge did not show prosecutorial vindictiveness, and trial court's order would require Prosecutor divulge privileged work product as to charging decision.
Facts: State charged Defendant with first degree murder. About three years later, after Defendant rejected plea offers and filed a notice to assert an NGRI defense shortly before trial, a new prosecutor filed notice of intent to seek death penalty. Defendant filed a motion to strike death penalty on grounds of prosecutorial vindictiveness. Trial court ordered Prosecutor to testify about why he was seeking death penalty. Prosecutor sought writ of prohibition.
Holding: The issue is whether defense counsel can call Prosecutor to testify about seeking a particular sentence. The work product doctrine includes an attorney's mental impressions, conclusions, opinions and legal theories, which would include Prosecutor's reasons for seeking death penalty. The mere seeking of death penalty under circumstances here does not show objective evidence of prosecutorial vindictiveness. First-degree murder and capital murder are not different charges. When the State seeks the death penalty, the State is not augmenting the charge or adding a new charge. Vindictiveness usually arises when a prosecutor seeks a greater sentence after a successful appeal and grant of new trial; vindictiveness is rarely found at a pretrial stage. Prosecutors have broad discretion regarding charging, even shortly before trial.

Wood v. State, 2019 WL 3144027 (Mo. banc July 16, 2019):
Holding: Where Jury found aggravating circumstances but hung on whether to impose death penalty, the Sixth Amendment right to have all facts found by a jury beyond a reasonable doubt was not violated when Judge imposed death, because whether mitigating factors outweigh aggravating factors and whether death is an appropriate sentence are not factual elements that must be found by a jury; to the extent *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), presumes the weighing step is a factual finding constitutionally reserved for the jury, it should no longer be followed.
Editor's Note: Three judges dissented from this holding.

Bray v. Lombardi, 2017 WL 574909 (Mo. App. W.D. Feb. 14, 2017):
Holding: Sec. 546.720.2 authorizes the DOC to keep members of its "execution team," as defined by DOC in its execution protocol, confidential; this includes the identity of pharmacists who supply execution drugs; thus, pharmacists' identity was exempt from disclosure under Sunshine Law.

* **Barr v. Lee, ___ U.S. ___, 140 S.Ct. 2590 (July 14, 2020):**
Holding: Court lifts stay of federal execution regarding Defendant's claim that execution by single-drug (pentobarbital sodium) would be cruel and unusual; this drug is commonly used in executions, and Defendant has not made required showing to justify "last-minute" intervention by federal court.

*** Andrus v. Texas, 2020 WL 3146872, ___ U.S. ___ (U.S. June 15, 2020):**
Holding: Capital counsel ineffective in penalty phase for not investigation mitigation and rebutting aggravation; mitigating evidence would have included defendant's childhood was marked by neglect, privation, violence, abuse and mental illness; counsel could have rebutted State's aggravating evidence that defendant had committed a prior robbery by showing that the sole witness to the robbery later recanted.

*** McKinney v. Arizona, ___ U.S. ____, 140 S.Ct. 702 (Feb. 25, 2020):**
Holding: A state court may itself reweigh aggravating and mitigating circumstances without a jury after a death-sentenced defendant is granted relief on collateral review for failure to consider a mitigating circumstance.

* **Shinn v. Kayer, ___ U.S. ___, 141 S.Ct. 517 (U.S. Dec. 14, 2020):**
Holding: Under AEDPA, 9th Circuit impermissibly substituted its own judgment for State court's and was not deferential to State court judgment (which denied claim that death penalty counsel was ineffective in failing to investigate mitigation), where fair-minded jurists could disagree as to whether *Strickland* standard was met; AEDPA precludes granting relief on any claim adjudicated in State court on the merits unless the adjudication resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law as decided by U.S. Supreme Court.

*** Bucklew v. Precythe, ___ U.S. ___, 139 S.Ct. 1112 (U.S. April 1, 2019):**
Holding: An inmate sentenced to death who seeks to raise an "as-applied" challenge to his method of execution must show that the State's chosen method adds pain, and that there is a readily-implementable alternative method that would significantly reduce a substantial risk of severe pain.

* **Shoop v. Hill, ___ U.S. ___, 139 S.Ct. 504 (U.S. Jan. 7, 2019):**
Holding: A habeas court cannot apply the U.S. Supreme Court's 2017 opinion in *Moore v. Texas*, 137 S.Ct. 1039, to claims of intellectual disability which arose before *Moore*.

*** Moore v. Texas, ___ U.S. ___, 139 S.Ct. 666 (U.S. Feb. 19, 2019):**
Holding: Where (1) in *Moore I*, 137 S.Ct. 1039 (2017), the Supreme Court had reversed and remanded a Texas appellate court's determination that Petitioner was not intellectually disabled on grounds that the Texas court had relied on factors that were not medically-based and had overemphasized adaptive strengths instead of deficits, and (2) on remand the Texas appellate court essentially engaged in the same improper analysis of the issue and again found Petitioner was not intellectually disabled, Supreme Court holds that Petitioner is intellectually disabled on the basis of the record.

*** Madison v. Alabama, ___ U.S. ___, 139 S.Ct. 718 (U.S. Feb. 27, 2019):**
Holding: (1) Even though Defendant may not remember his crime due to memory loss from strokes and dementia, that does not preclude execution if he understands why the State is seeking to execute him; and (2) the 8th Amendment may prohibit executing a person who meets the *Ford* and *Panetti* tests due to dementia or another disorder, not just

psychotic delusions; the legal standard focuses on whether a mental disorder has a particular *effect*, not the cause of the effect.

* **Dunn v. Madison**, **___ U.S. ___, 138 S.Ct. 9 (U.S. Nov. 6, 2017):**
Holding: State court's ruling that Petitioner was not incompetent to be executed merely because he could no longer remember the crime (due to a series of strokes) was not contrary to any prior holding of U.S. Supreme Court, so Petitioner not entitled to habeas relief. Neither *Panetti* nor *Ford* clearly established that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case; "[t]he state court did not unreasonably apply *Panetti* and *Ford* when it determined that Madison is competent to be executed because – notwithstanding his memory loss – he recognizes that he will be put to death as punishment for the murder he was found to have committed."
Concurring opinion: Ginsburg, joined by Breyer and Sotomayor, wrote separately to say that the issue of whether a state can execute someone who does not remember the crime is a "substantial question not yet addressed by this Court" and would warrant a "full airing" in an appropriate case. But given the "restraints imposed" by 28 U.S.C. 2254(d), they must defer to the state court on habeas review.

*** Buck v. Davis, 2017 WL 685534, ___ U.S. ____ (U.S. Feb. 22, 2017):**
Holding: (1) Death penalty counsel was ineffective in calling an expert who testified that the defendant's race made him statistically more likely to be dangerous in the future, even though the expert's principal testimony was that the particular defendant probably would not be dangerous; race cannot be a factor in assessing a death sentence; (2) appellate court erred in essentially deciding merits of case in denying a certificate of appealability because that imposes too high a standard for COA's; the statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then – if it is – an appeal in the normal course.

*** Moore v. Texas, 2017 WL 1136278, ___ U.S. ____ (U.S. March 28, 2017):**
Holding: Use of outdated medical standards and legal standards, not tied to current medical standards, to determine whether a capital defendant has intellectual disability under *Atkins* violates 8th Amendment.

* **Elmore v. Holbrook, 100 Crim. L. Rep. 79, 137 S.Ct. 3 (U.S. 10/17/16)(Sotomayor, J., dissenting from denial of cert.):**
Justice Sotomayor writes opinion dissenting from denial of cert. in ineffective assistance of counsel case in which she reviews SCOTUS law on ineffective assistance. Case involved death penalty counsel failing to present any mental health expert in penalty phase. Opinion is useful summary of major SCOTUS holdings, and Sotomayor cites numerous cases to support the following principles: (1) Effective counsel must thoroughly investigate the defense he chooses to present; (2) Strategic choices made after less than complete investigation are only reasonable to the extent that reasonable professional judgment supports the limitation on investigation; (3) while fear of prosecutor rebuttal may justify a decision not to present certain mitigating evidence, it

can rarely justify failing to investigate the evidence in the first instance; (4) even though death penalty defendant may not want matters investigated and may actively obstruct investigation, counsel has an obligation to investigate anyway; (5) key inquiry in prejudice is to compare what was presented at trial and what competent counsel could have presented; (6) inquiry into prejudice should not presume that a defense expert's opinion would be rendered meaningless by the State's presentation of a contrary expert; it was not reasonable to discount entirely the testimony of Movant's three postconviciton mental health experts, particularly where jury might have been convinced that the crime was the direct result of Movant's cognitive impairments; and (7) even a petitioner who commits a heinous crime can be prejudiced by failing to investigate mitigation.

*** Bosse v. Oklahoma, ___ U.S. ___, 137 S.Ct. 1 (U.S. Oct. 11, 2016):**
Holding: Lower courts are not free to assume that the Supreme Court has "implicitly overruled" its holding in *Booth* that the Eighth Amendment bars admission of victims' family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence; only the Supreme Court itself can overrule its precedents.

*** Lynch v. Arizona, ___ U.S. ___, 136 S.Ct. 1818 (U.S. May 31, 2016):**
Holding: Where capital Defendant's future dangerousness is at issue, and the only sentencing alternative to death is life in prison without parole, due process entitles Defendant to inform the jury of his parole ineligibility, either by jury instruction or arguments by counsel; the jury must be informed that LWOP is the only alternative to death even though Defendant could be granted executive clemency in the future or legislative changes could allow parole in the future.

* **Tucker v. Louisiana, ___ U.S. ____, 136 S.Ct. 1801 (cert. denied May 31, 2016):**
Justices Breyer and Ginsburg wrote dissenting opinion from denial of cert. in death penalty case questioning constitutionality of death penalty in light of arbitrary factor of geography. "Tucker was sentenced to death in a Louisiana County (Caddo Parish) that imposes almost half the death sentences in Louisiana even though it accounts for only 5% of that State's population and 5% of its homicides." Given that Tucker was only 18 years old at the time of the offense, and also had a low IQ, "Tucker may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography."

*** Hurst v. Florida, 2016 WL 112683, ___ U.S. ___ (U.S. Jan. 12, 2016):**
Holding: The Sixth Amendment requires that a jury, not a judge, find each fact necessary to impose a death sentence; capital sentencing scheme which authorized an advisory sentencing recommendation by a jury, followed by independent fact-finding by a judge, violated *Ring*.

*** Kansas v. Carr, 2016 WL 228342, ___ U.S. ___ (U.S. Jan. 20, 2016):**
Holding: (1) The Eighth Amendment does not require that jurors in death penalty cases be instructed that mitigating circumstances need not be proven beyond a reasonable doubt; (2) capital codefendants' penalty phases need not be severed.

Abdul-Salaam v. Penn. Dept. of Corr., 103 Crim. L. Rep. 377 (3d Cir. 7/12/18):
Holding: Death penalty counsel ineffective in failing to investigate childhood abuse and behavioral problems, and educational and juvenile records.

Rhoades v. Davis, 2019 WL 334890 (5th Cir. 2019):
Holding: Photographs from Defendant's childhood are relevant mitigation in death penalty case.

Battaglia v. Stephens, 2016 WL 3084272 (5th Cir. 2016):
Holding: Capital defendant was entitled to stay of execution to make appointment of federally-funded substitute counsel meaningful; counsel was needed to develop evidence to show Defendant was incompetent.

In re Chase, 98 Crim. L. Rep. 123 (5th Cir. 10/26/15):
Holding: Even though Petitioner's pre-*Atkins* petition alleged that counsel was ineffective in failing to raise certain intellectual disability claims, Petitioner was not precluded from filing a second post-*Atkins* petition to allege he cannot be executed due to intellectual disability; the pre-*Atkins* petition was not the same claim.

Brumfield v. Cain, 2015 WL 9213235 (5th Cir. 2015):
Holding: Even though one IQ test indicated Defendant had IQ of 80-89, Defendant was intellectually disabled under *Atkins* because four other IQ tests showed scores below 70.

Williams v. Mitchell, 97 Crim. L. Rep. 504 (6th Cir. 7/7/15):
Holding: State court unreasonably applied federal law in refusing to consider evidence that death-sentenced Defendant was intellectually disabled before the age of 21, when deciding whether he was currently intellectually disabled.

Stephenson v. Neal, 101 Crim. L. Rep. 514 (7th Cir. 8/4/17):
Holding: New penalty phase ordered where jurors saw that Defendant wore a stun belt during penalty phase.

Baer v. Neal, 102 Crim. L. Rep. 359 (7th Cir. 1/11/18):
Holding: Counsel was ineffective in death penalty case in failing to object to Prosecutor telling jury that victim's family wanted Defendant to get death, and in failing to object to jury instructions which prevented proper consideration of mitigating evidence.

Balogh v. Lombardi, 98 Crim. L. Rep. 568 (8th Cir. 3/11/16):
Holding: Even though the DOC Director designates the "execution team" members, the Director does not control the team members' right to sue under Sec. 546.720.3, which gives team members the right to sue anyone who reveals their identity; thus, court cannot grant injunctive relief to allow ACLU to publicly reveal the pharmacy team member which supplies the execution drugs and shield ACLU from suit because of that.

Petrocelli v. Baker, 101 Crim. L. Rep. 453 (9th Cir. 7/5/17):
Holding: Where State doctor saw Defendant without the consent of his lawyer and without Miranda warnings and then testified in penalty phase that Defendant was "psychopathic," this violated Defendant's Fifth and Sixth Amendment rights against self-incrimination and to counsel.

Poyson v. Ryan, 102 Crim. L. Rep. 359 (9th Cir. 1/12/18):
Holding: State court applied wrong standard in death penalty case requiring that there be a "causal link" between the crime and the mitigation.

Washington v. Ryan, 99 Crim. L. Rep. 622 (9th Cir. 8/15/16):
Holding: Even though death penalty defense counsel filed notice of appeal one day late, appellate court allows this to be corrected under Rule 60(b) by ordering district court to vacate and reenter judgment so the appeal could be considered timely; this relief was warranted because both defendant's co-defendants' had received relief from their death sentences, and tremendous disparity would result if defendant's death sentence were denied review.

Smith v. Schriro, 2016 WL 454337 (9th Cir. 2016):
Holding: Presumption of correctness did not apply to state court's factual determination that Defendant was not intellectually disabled; even though Defendant had an IQ score above 70 after incarceration, he had an Otis score of 62 before age 18, and numerous adaptive difficulties.

Hedlund v. Ryan, 20116 WL 851821 (9th Cir. 2016):
Holding: State court applied unconstitutional causal nexus between mitigating evidence and the crime; trial court had held that none of the mitigation had affected Defendant's ability to control his behavior at time of crime.

Bemore v. Chapell, 2015 WL 3559153 (9th Cir. 2015):
Holding: Counsel was ineffective in failing to investigate mitigating mental health evidence, and Defendant was prejudiced since judge had sentenced Defendant to death but not sentenced a co-Defendant to death because co-Defendant had suffered head trauma.

Pensinger v. Chappell, 2015 WL 3461989 (9th Cir. 2015):
Holding: Felony-murder aggravator for death penalty requires a narrowing construction of proof that the felony was committed for an independent felonious purpose and not merely incidentally to the murder.

Hardwick v. Sec'y, Fla. Dept. of Corrections, 2015 WL 5474275 (11th Cir. 2015):
Holding: Capital counsel ineffective in failing to investigate turbulent family history, mental/physical abuse, alcohol/drug addiction, and seek evidence to support statutory mitigator that at time of crime, Defendant's capacity to confirm his conduct to requirements of law was substantially impaired.

First Amendment Coal. Of Ariz. Inc. v. Ryan, 99 Crim. L. Rep. 217 (D. Ariz. 5/18/16):
Holding: Death-sentenced Petitioners made facial claim that use of midazolam violated 8th Amendment because it does not render inmates unconscious; *Glossip v. Gross* not control here because inmates identified an alternative execution method that would lessen severe risk of pain.

First Amendment Coalition of Ariz. v. Ryan, 2016 WL 2893413 (D. Ariz. 2016):
Holding: Capital plaintiff made facially valid claim that execution drugs violated 8th Amendment where he alleged that the protocol was very likely to cause extreme pain and suffering, and presented an alternative execution method that was feasible and had reduced risk of pain and suffering.

Kelley v. Johnson, 99 Crim. L. Rep. 569 (Ark. 7/21/16):
Holding: Capital defendants granted stay of execution to file cert. petitions regarding their constitutional claim about disclosure of lethal injection drugs.

Estopellan v. Mroz, 98 Crim. L. Rep. 284 (Ariz. 12/31/15):
Holding: Capital Defendant must be allowed in penalty phase to present as mitigation that he took responsibility for his actions by offering to plead guilty in return for a life sentence.

People v. Woodruff, 103 Crim. L. Rep. 402 (Cal. 7/19/18):
Holding: Death penalty venireperson should not have been automatically dismissed because he said he opposed death penalty on written questionnaire; venireperson should have been questioned on voir dire to see if can set aside views; new penalty phase ordered.

People v. Covarrubias, 99 Crim. L. Rep. 693 (Cal. 9/8/16):
Holding: Even though potential death penalty juror wrote on pretrial questionnaire that he "strongly" opposed death penalty and would "probably" refuse to impose it, trial court erred in striking him from panel based on the questionnaire without calling him in for actual voir dire.

People v. Townsel, 368 P.3d 569 (Cal. 2016):
Holding: Jury instruction which told jurors that Defendant's intellectual disability could only be considered for whether he had mental state for first degree murder was erroneous; this disability should also have been considered for whether Defendant had the mental state for the aggravating factor of specific intent to kill a witness prevent witness from testifying.

People v. Leon, 2015 WL 3937629 (Cal. 2015):
Holding: Even though capital venirepersons wrote on their questionnaires that they would automatically give life, where they also wrote that they would consider both punishments if instructed to do so, trial court erred in striking the venirepersons without questioning them during voir dire.

Rauf v. State, 99 Crim. L. Rep. 603 (Del. 8/2/16):
Holding: Delaware's death penalty scheme violates 6th Amendment right to have jury determine facts necessary to impose death.

Perry v. State, 100 Crim. L. Rep. 69 (Fla. 10/14/16):
Holding: Death penalty statute which allowed jurors to impose death penalty based on 10-2 vote as long as they were unanimous on aggravating factors was unconstitutional because jurors must be unanimous in every respect before death can be imposed.

Hurst v. State, 100 Crim. L. Rep. 69 (Fla. 10/14/16):
Holding: Jury's vote in death penalty case must be unanimous in every respect before death can be imposed.

Walls v. State, 100 Crim. L. Rep. 92 (Fla. 10/20/16):
Holding: *Hall v. Florida*, which declared unconstitutional a categorical bar on intellectual disability if IQ is above 70, is retroactive.

Oats v. State, 2015 WL 9169766 (Fla. 2015):
Holding: Even though Defendant had not been diagnoses with intellectual disability before age 18, this did not preclude a finding of intellectual disability under *Atkins*.

Campbell v. State, 2015 WL 919802 (Fla. 2015):
Holding: Even though Defendant killed his father-Victim with a hatchet, evidence did not support a finding that the murder was heinous, atrocious or cruel, where Victim was asleep when Defendant hit him and Victim's immediate response, "What was that?," did not indicate he was aware of impending death; further, Victim's movement of his hand after he was killed could have been involuntary.

White v. Com., 100 Crim. L. Rep. 92 (Ky. 10/20/16):
Holding: *Hall v. Florida*, which declared unconstitutional a categorical bar on intellectual disability if IQ is above 70, is retroactive.

State v. Coleman, 2016 WL 765557 (La. 2016):
Holding: Where State gave numerous assurances that its penalty phase evidence would be the same as at a prior trial, State failed to provide notice that its expert had changed his opinion as to who had shot victim.

Hollie v. State, 2015 WL 5608239 (Miss. 2015):
Holding: Where trial court had ordered a competency evaluation for capital Defendant, there was reason to believe such an evaluation was warranted and court should not have accepted Defendant's guilty plea without doing the evaluation.

State v. Adams, 98 Crim. L. Rep. 48 (Ohio 10/1/15):
Holding: Court cannot impose death sentence where jury returns general verdict for felony-murder based on several alternative means of commission, but fails to determine which felony Defendant committed (disagreeing with *Griffin v. U.S.*, 502 U.S. 46 (1991)).

State v. Johnson, 98 Crim. L. Rep. 200, 2015 WL 7766547 (Ohio 12/1/15):
Holding: Death sentence was disproportionate where Defendant had "corrosive upbringing" where he "was not taught difference between right and wrong," mental illness, addiction and limited intellectual ability.

Com. v. Cox, 2019 WL 1338435 (Pa. 2019):
Holding: Court relied on impermissible factors in deciding death Defendant was not intellectually disabled; court discounted IQ scores because Defendant didn't wear glasses and test was given at night; discounted family's information because they didn't seek treatment for Defendant; and focused on Defendant's strengths, not deficits.

Com. v. Montalvo, 2019 WL 1338433 (Pa. 2019):
Holding: Prosecutor's argument that jury only "recommends" death sentence violated 8th Amendment by lowering jury's sense of responsibility for imposing death.

Com. v. Mason, 2015 WL 9485173 (Pa. 2015):
Holding: Defendant cannot preclude capital counsel from seeking an *Atkins* hearing to prove his intellectual disability, because this does not conflict with the overarching objective of Defendant's postconviction challenge.

Com. v. Solano, 2015 WL 9283031 (Pa. 2015):
Holding: Death penalty counsel ineffective in failing to present mitigation regarding abusive childhood and neuropsychological impact on Defendant.

Allen v. Sanders, 2016 WL 3030136 (Ariz. App. 2016):
Holding: In capital cases, a trial court must independently determine if probable cause exists as to concurrently charged child abuse allegations that are also aggravating factors, and cannot rely on grand jury's determination of probable cause.

Mays v. State, 2015 WL 9261311 (Tex. App. 2015):
Holding: Defendant was incompetent to be executed where various lay witnesses described him as mentally ill, and experts found him incompetent.

Detainer Law & Speedy Trial

State ex rel. Scherrer v. Martinez, 2016 WL 145511 (Mo. App. E.D. Jan. 12, 2016):
Even though (1) the Interstate Agreement on Detainers (IAD) applied because Defendant was transferred from federal to state custody for trial, and (2) Defendant personally did not want a continuance, the trial court erred in failing to grant defense counsel a continuance to prepare for death penalty trial; the IAD's time limits allow a continuance "for good cause shown" and do not require the personal consent of Defendant.
Facts: Defendant, who was in federal custody, was charged in 2013 with first degree murder. In August 2015, his then-attorney filed a motion for speedy trial. In October 2015, Defendant was brought from federal to state custody. In October 2015, the State indicated it would seek the death penalty. Current counsel entered the case in late October 2015. The trial court set a trial date for January 2016. Counsel moved for a continuance, which the court denied. Counsel sought a writ of prohibition to order trial court to grant a continuance.
Holding: Sec. 217.490.3 (the IAD) provides that when a defendant has been transferred from federal to state custody, trial must start within 120 days, but a continuance may be granted "for good cause shown." Sec. 217.490.5 provides that if the trial is not held within 120 days, the case must be dismissed with prejudice. Here, the trial court denied a continuance because it believed it was required to try the case within 120 days. However, the court ignored the plain language allowing a continuance "for good cause shown." The statute does not require Defendant to personally consent. Here, counsel showed good cause for a continuance because she had only recently received discovery, she had six other first-degree murder cases pending, and her investigator and mitigation specialist were working on the other cases. Writ granted.

State v. James, 2018 WL 1276977 (Mo. App. W.D. March 13, 2018):
Even though State had dismissed and refiled a DWI charge after Defendant requested disposition of detainer under Sec. 217.460 on the charge, where the dismissal and refiling occurred 405 days after the original charge was filed, and trial did not occur until 10 months after the new charge, trial court erred in not dismissing the charge with prejudice.
Facts: In July 2014, Defendant was charged with misdemeanor DWI. Shortly thereafter, Defendant was sent to DOC on an unrelated offense, and the State placed a detainer on Defendant for the DWI. In September 2014, he filed a request for disposition of detainer regarding the DWI. More than a year later, in November 2015, the State dismissed (nolle prossed) the misdemeanor DWI, and on the same day, filed an enhanced felony DWI based on the same facts. In December 2015, Defendant moved to dismiss based on Sec. 217.460, the Uniform Mandatory Disposition of Detainer Law (UMDDL). The trial court overruled the motion. Before trial in September 2016, Defendant again renewed the motion to dismiss, which was overruled.
Holding: Under Sec. 217.460, if the Defendant has filed for disposition of detainer and has not been brought to trial within 180 days, and if the Defendant's 6th Amendment right to a speedy trial has been violated, the case must be dismissed with prejudice. Here, the 180 days expired in March 2015. Thus, the appellate court must determine if Defendant's speedy trial rights were violated. The court considers: (1) the lengthy of

delay; (2) reason for delay; (3) assertion of the right; and (4) prejudice. A delay of more than 8 months is presumptively prejudicial. Here, it is reasonable to infer that the State's conduct in dismissing the first DWI case and refiling the second was done to try to circumvent the UMDDL. The State did not dismiss and refile until 405 days after the request for disposition of detainer was filed, and an additional 10 months occurred after the new case was filed until trial. Defendant asserted his right to a speedy trial. Finally, although Defendant did not lose any witnesses, affirmative proof of particularized prejudice is not essential to every speedy trial claim, and excessive delay presumptively compromises the reliability of trial. Case dismissed with prejudice.

State v. Fisher, 2016 WL 6871563 (Mo. App. W.D. Nov. 22, 2016):
Even though (1) some of the delay in case was due to Defendant seeking to plead guilty but the court not accepting the plea when Defendant denied "remembering" the offense at sentencing and (2) Defendant had sought one continuance, where Defendant had been jailed for six years without trial, Defendant was denied his 6th Amendment right to a speedy trial warranting dismissal.
Facts: Defendant was charged with a sex offense in 2009 and taken into custody. Subsequently, the case was set for trial at various times, but then stricken, often for unexplained reasons. In 2011, Defendant requested his only continuance. Trial was reset, but again stricken for unexplained reasons. In 2014, Defendant pleaded guilty, but the court vacated the plea when Defendant denied "remembering" the offense in the Sentencing Assessment Report. In 2014, the judge recused himself and a new judge was assigned. In late 2015, Defendant moved to dismiss on speedy trial grounds. The new judge granted the motion. The State appealed.
Holding: The four-part test of *Barker v. Wingo* is used to determine if speedy trial rights were violated. Courts consider: (1) the length of delay, (2) the reason for delay, (3) Defendant's assertion of his right, and (4) prejudice. Delay of more than 8 months is presumptively prejudicial. Sec. 545.780.2 sets a 180 day window within which a defendant must be brought to trial after a plea of not guilty at arraignment. If there is delay, it becomes incumbent on the State to show reasons which justify the delay. The court looks to whether the State or Defendant is "more to blame" for the delay. Here, the trial was set five different times over a six-year period. The State never provided any adequate reasons or justifications for the delay. The burden was on the State to establish reasons. Defendant asserted his speedy trial rights twice. While there has been no specific showing of prejudice here, the inexplicable delay of six years compromised the reliability of his trial, thus prejudicing him. Affirmative proof of particularized prejudice is not essential to every speedy trial claim.

*** Betterman v. Montana, ___ U.S. ___, 136 S.Ct. 1609 (U.S. May 19, 2016):**
Holding: The Sixth Amendment's speedy trial guarantee does not apply to sentencing; however, defendants harmed by lengthy delays in sentencing may seek relief under the due process clauses of the Fifth and Fourteenth Amendments.

U.S. v. Handa, 103 Crim. L. Rep. 283 (1st Cir. 6/8/18):
Holding: Even though the Gov't obtained a new indictment adding a new charge against Defendant, which arose out of the same facts as the original indictment, this did not restart the speedy trial clock, since the Gov't had no valid reason for not bringing the new charge earlier.

U.S. v. Tigano, 102 Crim. L. Rep. 403 (2d Cir. 1/23/18):
Holding: Even though defense counsel had not pushed for a trial, Defendant was denied right to speedy trial where trial was delayed 7 years because of unnecessary competency exams, the Gov't's failure to produce a written plea offer, and the trial court's failure to prioritize the case.

U.S. v. Black, 2019 WL 1233214 (2d Cir. 2019):
Holding: Pretrial delay for 6th Amendment speeding trial purposes is measured from date original indictment is filed, not date a superseding indictment is filed.

U.S. v. Reese, 2019 WL 1030064 (3d Cir. 2019):
Holding: District court's sua sponte continuance did not validly exclude time under the Speedy Trial Act, where neither the transcript nor continuance order invoked the Act or used any language suggesting exclusion of time.

U.S. v. Williams, 2019 WL 10300069 (3d Cir. 2019):
Holding: Where Defendant requests a competency exam, only 10 days is excludable under the Speedy Trial Act for transport of Defendant to the exam; any delay in excess of 10 days is presumed unreasonable and non-excludable.

U.S. v. Brown, 2016 WL 1161266 (6th Cir. 2016):
Holding: An objection to a Speedy Trial Act violation can be made orally.

State v. Rosenbaum, 2019 WL 1103719 (Ga. 2019):
Holding: 539-day delay between State's seizure of Defendant's electronics, and the issuance of a warrant to search them violated Fourth Amendment.

Tunnell v. State, 2020 WL 241002 (Md. 2020):
Holding: A continuance to seek DNA testing does not "automatically" toll the 180-day deadline for bringing a defendant to trial, though it may constitute "good cause" for an extension.

Com. v. Wallace, 32 N.E.3d 1223 (Mass. 2015):
Holding: 10-year delay between issuance of complaint and arraignment violated Defendant's constitutional right to speedy trial, where most of the delay occurred while Defendant was in federal custody and State failed to obtain custody of Defendant from the federal Gov't.

Rowsey v. State, 2015 WL 7770771 (Miss. 2015):
Holding: Even though Defendant failed to obtain a ruling from the trial court on his denial of speedy trial claim, this did not mean the issue was waived or could only be reviewed for plain error on appeal; rather, Defendant's failure was a merely "factor" to be considered as part of the speedy trial factors in *Barker v. Wingo.*

City of Grand Forks v. Gale, 98 Crim. L. Rep. 591 (N.D. 3/15/16):
Holding: Even though Defendant failed to appear at a court appearance in 1995, State violated Defendant's speedy trial rights in misdemeanor DWI case by waiting 20 years to find Defendant and bring him to trial; although Defendant's failure to appear counts against him some, this did not excuse the State's lack of diligence in trying to find Defendant and prosecuting the case.

State v. Black, 2015 WL 687488 (Ohio 2015):
Holding: The term "penal or correctional institution" in Interstate Agreement on Detainers includes county jail, so long as prisoner has begun serving his or her sentence.

People v. Moody, 2015 WL 6594570 (Ill. App. 2015):
Holding: State violated Speedy Trial Act by charging Defendant with murder 18 months after the initial indictment.

Discovery

State ex rel. Becker v. Wood, 2020 WL 6438925 (Mo. banc Nov. 3, 2020):
Writ of prohibition issues to quash trial court order requiring Prosecutor to testify about reason for seeking death penalty, because State seeking death penalty four years after filing initial charge did not show prosecutorial vindictiveness, and trial court's order would require Prosecutor divulge privileged work product as to charging decision.
Facts: State charged Defendant with first degree murder. About three years later, after Defendant rejected plea offers and filed a notice to assert an NGRI defense shortly before trial, a new prosecutor filed notice of intent to seek death penalty. Defendant filed a motion to strike death penalty on grounds of prosecutorial vindictiveness. Trial court ordered Prosecutor to testify about why he was seeking death penalty. Prosecutor sought writ of prohibition.
Holding: The issue is whether defense counsel can call Prosecutor to testify about seeking a particular sentence. The work product doctrine includes an attorney's mental impressions, conclusions, opinions and legal theories, which would include Prosecutor's reasons for seeking death penalty. The mere seeking of death penalty under circumstances here does not show objective evidence of prosecutorial vindictiveness. First-degree murder and capital murder are not different charges. When the State seeks the death penalty, the State is not augmenting the charge or adding a new charge. Vindictiveness usually arises when a prosecutor seeks a greater sentence after a successful appeal and grant of new trial; vindictiveness is rarely found at a pretrial stage. Prosecutors have broad discretion regarding charging, even shortly before trial.

State v. Zuroweste, 2019 WL 1446943 (Mo. banc April 2, 2019):
Holding: (1) The State violated Rule 25.03(C) by not timely disclosing until four days before trial inculpatory recorded jail phone calls made by Defendant because such recordings were "in the possession or control of other governmental personnel" and the Rule requires the State to use diligence and make good faith efforts to provide such material to Defendant; but (2) the trial court did not abuse discretion in not excluding the recordings because the discovery violation did not warrant the drastic sanction of exclusion and could have been remedied by granting a continuance; and (3) since Defendant did not request a continuance, the judgment of conviction is affirmed.
Discussion: (1) Rule 25.03(A)(2) requires the State to disclose recorded statements of a defendant. Rule 25.02 requires such disclosure be made within 10 days of Defendant's discovery request. Rule 25.03(C) provides that if the defense requests discovery of information that would be discoverable under the Rule if in possession or control of the State but which is "in the possession or control of other governmental entities," the State must use diligence and make good faith efforts to cause the material to be disclosed. Here, the State waited months after Defendant filed her discovery request to disclose the jail recordings, and did so only four days before trial. The State argues that Defendant could have obtained the recordings on her own. But the State's attempt to put responsibility on Defendant ignores the fundamental nature of a criminal prosecution. If the State seeks to deprive Defendant of her liberty, the State must fulfill its discovery obligations. The State clearly violated Rule 25.03(C) and the 10-day deadline mandated by Rule 25.02 for disclosure. (2) Rule 25.18 sets for the sanctions and remedies for a discovery violation. The Rule provides a court "may" grant a continuance, exclude the evidence, or order other appropriate relief. Here, Defendant asked only for exclusion of the evidence. She did not ask for a continuance. But the drastic remedy of exclusion is warranted only to prevent fundamental unfairness. Before ordering exclusion, a court must consider employing less severe remedies to address the prejudice, and achieve fundamental fairness for the Defendant and State. If Defendant truly needed additional time to investigate the recordings, a continuance would have remedied those concerns and any unfairness. Significantly, Defendant was out of custody and had requested continuances before. Another continuance would not have prejudiced her. Since she didn't ask for a continuance, the judgment of conviction is affirmed.

Caruthers v. Wexler-Horn, 2019 WL 1911892 (Mo. banc April 30, 2019):
Holding: (1) Even though Defendant planned to use a diminished capacity defense to first degree murder, the trial court lacked authority under Chapter 552 to order a mental evaluation of Defendant, because such evaluations are authorized only for competency or where Defendant has pleaded NGRI, which is not the same as diminished capacity; but (2) court takes no position on whether the criminal rules of discovery would authorize an evaluation in this circumstance.
Discussion: The State sought a mental exam of Defendant under Chapter 552 after Defendant endorsed an expert who would testify Defendant had a diminished capacity at time of the charged murder. However, Chapter 552 authorizes a mental exam only for competency to stand trial or NGRI. NGRI and diminished capacity aren't the same.

NGRI is an affirmative defense that absolves of all responsibility. Diminished capacity merely contests the element of deliberation for first degree murder; Defendant would still be guilty of second degree murder. The court exceeded its authority under Chapter 552 in ordering a mental exam under these circumstances. But court takes no position on whether the State can obtain a mental exam under the criminal discovery rules.

Holm v. Wells Fargo Home Mortgage, 2017 WL 7700979 (Mo. banc Feb. 28, 2017):
Holding: (1) Where Defendant had engaged in repeated obstructive discovery tactics, trial court did not abuse discretion in ordering as sanctions that Defendant would be precluded from presenting any evidence at trial, objecting to Plaintiff's evidence, and cross-examining Plaintiff's witnesses; but (2) even though Defendant waited until day of trial to demand a jury trial, trial court erred in denying one because Defendant had a constitutional right to have a jury determine the extent of actual and punitive damages.
Discussion: (1) Rule 61.01 gives trial courts significant discretion to impose "just" sanctions for discovery violations. Here, despite warnings by the trial court that sanctions could result, Defendant repeatedly failed to produce requested documents, misled the court and opposing counsel about the existence of documents, and repeatedly failed to produce witnesses for deposition. Sanctions were not an abuse of discretion. (2) The trial court denied a jury trial because Defendant had never requested one until day of trial, and did not submit jury instructions. Mo. Const. Art. I, Sec. 22(a) states that the right to a jury trial "as heretofore enjoyed shall remain inviolate." Sec. 510.190.2 provides that a party may waive a jury trial by not appearing at trial; filing a written waiver; giving oral consent to a bench trial; or proceeding to bench trial without objection. These are the *exclusive* ways to waive a jury trial. A party need not demand a jury trial to preserve its right to a jury trial. Failing to affirmatively request a jury trial until the day of trial or submit jury instructions are not among the ways in which a jury trial can be waived. Even though the sanctions here effectively amounted to a judgment that Defendant was liable at trial, the right to a jury trial includes the right to have a jury determine damages. Imposition of sanctions does not strip a party of the right to have a jury determine damages. Case remanded for a jury trial on damages.

State ex rel. Malashock v. Jamison, 2016 WL 6441285 (Mo. banc Nov. 1, 2016):
Even though Plaintiff had designated Expert as witness Plaintiff intended to call at trial and the general subject matter of Expert's testimony, where Plaintiff never revealed the Expert's analysis, opinions or conclusions, Rule 56.01 allowed Plaintiff to later rescind the endorsement of Expert; thus, Plaintiff did not irrevocably waive the work-product protections surrounding Expert, and Defendant could not depose Expert.
Facts: Plaintiff designated Expert as a witness expected to testify at trial regarding the "performance and factors" of a vehicle. Later, Plaintiff "de-endorsed" Expert. Defendant then sought to depose Expert. The trial court ordered the deposition on grounds that Plaintiff waived the work-product doctrine by designating Expert as a witness. Plaintiff sought a writ of prohibition.
Holding: An expert's knowledge, opinions and conclusions are the work product of the attorney retaining the expert. The designation of an expert before trial begins the process of waiving work-product, but the waiver is not complete until there has been a "disclosing event," which is the actual disclosure of the expert's opinions and

conclusions. Here, Expert's opinions and conclusions were never disclosed. Plaintiff "de-endorsed" Expert before trial without disclosing Expert's opinions and conclusions. Expert is no longer expected to testify at trial. Thus, Plaintiff did not waive the work product doctrine. Writ granted.

City of Byrnes Mill v. Limesand, 2020 WL 543937 (Mo. App. E.D. Feb. 4, 2020):
Holding: (1) Sunshine Law, Sec. 610.027.6, authorizes gov't body to seek judicial guidance as to what must be disclosed by filing declaratory judgment action, but gov't body is liable for reasonable attorney's fees to requester; and (2) even though a record is closed under Sunshine Law, it may still be available under criminal or civil discovery rules, because the Sunshine Law exemptions do not apply in non-Sunshine Law contexts.

State ex rel. Headrick v. Lewis, 2019 WL 7341480 (Mo. App. E.D. Dec. 31, 2019):
Holding: Where, in medical malpractice case, trial judge ordered Plaintiff to submit to a medical test using an injectable dye without specifying the "manner, conditions, scope of, or identity" of the expert to conduct the exam, or that the testing would be reliably conducted or produce reliable results, this violated Rule 60.01(a)(3) and was beyond the trial court's authority to order.
Discussion: Rule 60.01 allows a trial court to order a physical exam of a party where the party's physical condition is in controversy. In general, the pleadings in a medical malpractice case are sufficient to place Plaintiff's condition in controversy. But Rule 60.01(a)(3) contains important procedural safeguards to protect a person's due process rights to bodily integrity. Here, the trial court ordered Plaintiff be injected with a dye. The trial court didn't comply with specifying the "manner, conditions, [and] scope of" testing since the record contains no identification of the dye. This vitiated the due process protections of the Rule. Also, there was a paucity of evidence that the test would produce reliable results, or that the ordered testing will be administered according to reliable principles and methods. Writ of prohibition to stop testing granted.

State ex rel. Becker v. Lamke, 2019 WL 3294563 (Mo. App. E.D. July 23, 2019):
In child sex case, trial court cannot, *sua sponte*, order pretrial that the State file a memorandum stating the corpus delecti of the charges independent of Defendant's confession, because this would require the State to disclose its privileged work product, opinions, theories, conclusions and mental impressions of the case.
Facts: The trial court, *sua sponte*, ordered the State to file a memorandum stating the corpus delicti of the case. The defense did not request this. The State sought a writ of prohibition. The defense, on appeal, again did not request this memorandum.
Holding: Appellate court notes the unusual posture of this case, since the defense is not requesting the memo at issue. Judge argues his pretrial order was intended to promote a fair and expeditious trial. But the fact that Defendant isn't asking for the memo and isn't contesting corpus delecti indicates that this will not likely be an issue at trial. Meanwhile, the State will suffer irreparable harm if it has to file the memo, because it will require the State to disclose privileged work product, opinions, theories, conclusions and mental impressions of the case. Writ granted.

State ex rel. Dept. of Social Services Children's Division v. Dougherty, 563 S.W.3d 153 (Mo. App. E.D. Oct. 30, 2018):
Holding: (1) Sec. 210.150 does not authorize release of child "hotline" reporter information to people who are not parent of the child at issue or alleged perpetrator of a reported act; and (2) even where Sec. 210.150 does authorize release of information, it requires that "the names of the reporters shall not be furnished."

State ex rel. Hayes v. Dierker, 535 S.W.3d 372 (Mo. App. E.D. Dec. 12, 2017):
Holding: (1) Mandamus is appropriate to review trial court's sustaining of discovery objections because trial court has no discretion to deny discovery which is relevant and reasonably likely to lead to discovery of admissible evidence when the matters are neither work product nor privileged; (2) party objecting to discovery must produce a privilege log to enable opposing party to identify and show a substantial need for discoverable work product that it cannot, without undue hardship, obtain by other means, as provided in Rule 56.01(b).

State ex rel. Joyce v. Mullen, 2016 WL 6750530 (Mo. App. E.D. Nov. 15, 2016):
(1) Rule 25.03, which requires disclosure of the names and last known addresses of persons the State intends to call as witnesses, does not violate the constitutional rights of crime victims under Art. I, Sec. 32(1)(6), Mo.Const.; (2) Prosecutor must make specific evidentiary showing of good cause to obtain protective order prohibiting disclosure of last known addresses of victims and witnesses; the mere filing of criminal charges does not create good cause; (3) Rule 25.03 requires disclosure of the last known addresses of persons whom the State intends to call; it does not require disclosure of phone numbers, social security numbers, dates of birth, or other identifying information; but (4) a defendant has the right to petition the court for disclosure of personal identifying information of any witness for good cause under Rule 25.04.
Facts: Prosecutor withheld identifying information about victims and witnesses on grounds that this violated the rights of crime victims. Alternatively, Prosecutor sought protective orders to prevent disclosing this information. The defense sought additional identification information beyond last known address. Prosecutor brought writ action.
Holding: (1) Art. I, Sec. 32(1)(6) recognizes that crime victims have the right to "reasonable protection" from a defendant. However, Rule 25.03 provides protections because it allows for protective orders under Rule 25.11 for good cause. (2) Prosecutor sought protective orders in all cases without any case-specific facts showing good cause. The mere filing of a criminal charge does not create good cause. A trial court has discretion to issue protective orders, but must have evidence presented to it before exercising discretion. (3) Rule 25.03 by its express terms applies only to last known addresses. It does not require disclosure of other identifying information. Such information is not a "statement" of a witness; a "statement" is a narrative, recital, report or account. Thus, Prosecutor can withhold phone numbers, dates of birth and social security numbers but must redact this in a way that is "obvious" so that defense counsel can know that something has been redacted. (4) Finally, defense counsel is not without remedy if the defense needs redacted information. Rule 25.04 allows the defense to seek disclosure upon good cause.

State ex rel. Joyce v. Mullen, 2016 WL 7108571 (Mo. App. E.D. Dec. 6, 2016):
Holding: (1) Rule 25.03, which requires disclosure of the names and last known addresses of persons the State intends to call as witnesses, does not violate the constitutional rights of crime victims under Art. I, Sec. 32(1)(6), Mo.Const.; (2) Rule 25.03 requires disclosure of the last known addresses of persons whom the State intends to call; it does not require disclosure of phone numbers, social security numbers, dates of birth, or other identifying information; but (3) a defendant has the right to petition the court for disclosure of personal identifying information of any witness for good cause under Rule 25.04 should the Defendant deem such information important to the defense.

State v. Johnson, 2016 WL 7388617 (Mo. App. E.D. Dec. 20, 2016):
(1) Prosecutor violated Rule 25.03 when he intentionally failed to disclose recorded jail phone conversations of Defendant until shortly before trial, which recordings were used to impeach Defendant at trial; (2) even though Defendant did not mention Rule 25.03 in his objection at trial, his discovery claim is preserved for appeal because he clearly informed the trial court of his discovery violation objection to introduction of the tapes.
Facts: Defendant was charged with infecting other persons with HIV. The critical issue in the case was whether Defendant had informed the other persons that he had HIV. The defense had filed a discovery motion under Rule 25.03. Trial began on a Monday. On the prior Friday, which was a state holiday, the Prosecutor delivered to defense counsel's office jail calls Defendant made in which he implied he had not informed people that he had HIV. The Prosecutor said he had not disclosed them earlier because they don't want defense attorneys to tell clients to stop talking on the phone. Defendant testified at trial. The tapes were used to impeach him.
Holding: Rule 25.03 requires the State to disclose recorded statements of a defendant. The State argues that there is no evidence it possessed or controlled the jail recordings before it disclosed them. But 25.03 imposes an affirmative duty of diligence and good faith on the State to locate records in control of other government personnel. The State intentionally delayed disclosing the recordings, because it said it didn't want defense attorneys to tell their clients not to talk on the jail phones. The State argues that Defendant should have known the recordings existed. But the issue is not whether Defendant knew recordings existed, but whether he reasonably expected them to be introduced at trial. Defendant was forced to make critical decisions on plea bargaining, whether to testify, and what defenses to raise without the properly-requested discovery. The tapes went to a critical issue in the case, and were prejudicial.

Harper v. Mo. State Hwy. Patrol, 2019 WL 5699937 (Mo. App. W.D. Nov. 5, 2019):
Holding: Trial court erred in finding that the federal FOIA preempts the Sunshine Law, Sec. 610.010, and exempts FBI reports in the possession of the Mo. Highway Patrol from disclosure under Sunshine Law.

Wyrick v. Henry, 2019 WL 5874668 (Mo. App. W.D. Nov. 12, 2019):
Holding: Even though the requestor of certain street safety records from City had filed a complaint against City and might bring litigation against City, this did not render the otherwise-public records "closed" under the litigation exemption of the Sunshine Law, Sec. 610.021(1); a record that is not inherently "related to" litigation does not become so

because it could be used in litigation (i.e., could be discoverable or admissible), or because of the identity of the requestor; the Sunshine Law focusses on the nature of the document, not who is making the request.

Malin v. Cole County Prosecuting Attorney, 565 S.W.3d 748 (Mo. App. W.D. January 15, 2019):
Holding: Where a circuit court ordered Prosecutor under Sunshine Law to produce "open" records between the Prosecutor and a drug task force, the Prosecutor is only required to produce "open" records; if Prosecutor believes an exemption applies, Prosecutor shall cite the specific provision of law allowing an exemption and produce an objection log of what is being withheld.

Bray v. Lombardi, 2017 WL 574909 (Mo. App. W.D. Feb. 14, 2017):
Holding: Sec. 546.720.2 authorizes the DOC to keep members of its "execution team," as defined by DOC in its execution protocol, confidential; this includes the identity of pharmacists who supply execution drugs; thus, pharmacists' identity was exempt from disclosure under Sunshine Law.

*** Trump v. Vance, ___ U.S. ___, 140 S.Ct. 2412 (July 9, 2020):**
Holding: Article II and Supremacy Clause do not categorically preclude or require a heightened standard for issuance of a state criminal subpoena to a sitting President.

Bartko v. DOJ, 103 Crim. L. Rep. 460 (D.C. Cir. 8/3/18):
Holding: DOJ is not entitled to blanket law enforcement exemption from disclosure under Freedom of Information Act of ethical violations by US Attorney.

U.S. v. Washington, 101 Crim. L. Rep. 601 (3d Cir. 8/28/17):
Holding: Defendant seeking to prove that police selectively enforced set-ups against minorities was entitled to discovery of law enforcement records to prove the claim.

U.S. v. Mackin, 97 Crim. L. Rep. 528, 2015 WL 4190212 (7th Cir. 7/13/15):
Holding: Defendant granted new trial in felon-in-possession case where before trial Gov't failed to disclose complete chain of custody information regarding the gun, and Defendant based his defense on the Gov't not following proper chain of custody; during trial, the Gov't disclosed the complete chain of custody, but the Gov't's error had misled Defendant to believe he had a viable defense.

U.S. v. Soto-Zuniga, 99 Crim. L. Rep. 722 (9th Cir. 9/16/16):
Holding: Even though (1) immigration checkpoints are a legal exception to suspicionless stops of vehicles, and (2) Officer testified that 90% of arrests at Defendant's checkpoint were for immigration offenses, drug-Defendant should've been allowed discovery to prove that the checkpoint he was stopped at was being used as an unconstitutional pretext to search for drugs; he should be given access to data on the number and types of arrests and searches at the checkpoint.

U.S. v. Binh Tang Vo, 2015 WL 222318 (D.D.C. 2015):
Holding: Rule 17 that gave Government right to use subpoena duces tecum to obtain certain documents pretrial did not authorize Government to obtain them without court approval and did authorize Government to tell subpoenaed party to send documents directly to U.S. Attorney in lieu of appearing in court.

U.S. v. Perez, 2018 WL 6619747 (D. Mass. 2018):
Holding: Even though providing unredacted copies of affidavits in support a wiretap application would reveal a confidential informant, Title III of the Omnibus Crime Control and Safe Streets Act required the Gov't to disclose the entire contents of a wiretap application and order; it does not allow for redaction.

U.S. v. Sember, 99 Crim. L. Rep. 345 (S.D. Ohio 5/27/16):
Holding: Gov't cannot destroy a hard driving allegedly containing contraband that may be subject to future civil litigation; here, after Defendant was found not guilty of theft of gov't property, he planned to bring a civil action that could involve the data on the hard drive.

U.S. v. Whitehead, 2016 WL 233631 (E.D. Pa. 2016):
Holding: Co-defendant's statements contained in Bureau of Prison records in Gov't's possession were subject to disclosure to Defendant under Jencks Act; Gov't's decision not to review the records did not relieve it of the obligation to disclose.

Facebook Inc. v. Superior Court of City of S.F. ex rel. Hunter, 103 Crim. L. Rep. 225 (Cal. 5/24/18):
Holding: Facebook and Twitter are required to comply with Defendant's subpoena to turn over deleted public social media posts by Victim and State's Witness necessary for Defendant to prepare a defense; the Stored Communications Act did not shield Facebook and Twitter from disclosing the data.

People v. Kilgore, 455 P.3d 746 (Colo. 2020):
Holding: Trial court lacked authority to require Defendant to disclose his exhibits to prosecutor before trial, where nothing in the discovery rules required or permitted this.

Beville v. State, 100 Crim. L. Rep. 564 (Ind. 3/17/17):
Holding: Even though state law generally prohibited disclosing identity of an informant, Defendant was entitled to a video of his alleged drug sale to aid his defense.

Powers v. State, 103 Crim. L. Rep. 173 (Iowa 5/11/18):
Holding: Postconviction Movant is entitled to discovery of police reports that his alleged child sex Victim may (after Movant's trial) have made false similar sexual abuse allegations against others.

Com. v. Kostka, 31 N.E.3d 1116 (Mass. 2015):
Holding: State could not compel non-party twin brother of Defendant to submit to DNA test to determine if he was a fraternal twin or identical twin; twin brother's DNA did not

bear on Defendant's guilt in a substantial or direct manner, and the absence of twin's DNA did not impact State's ability to present its case.

Caleb Corrothers v. State, 2015 WL 5667468 (Miss. 2015):
Holding: State was not entitled to reciprocal discovery from Petitioner before Petitioner's postconviction motion was filed; the State may obtain discovery only after a postconviction petition.

State v. Laux, 2015 WL 2437858 (N.H. 2015):
Holding: Circuit court had inherent authority to order State to disclose police reports prior to preliminary hearing; even though the purpose of a preliminary hearing is not to provide discovery to a defendant, a defendant must be given an opportunity to contest the existence of probable cause, which may require discovery.

Black v. State, 102 Crim. L. Rep. 204 (Wyo. 11/17/17):
Holding: Defendant entitled to new trial under "cumulative error" doctrine where Prosecutor failed to get victim's internet records for defense despite being ordered to do so; Prosecutor argued defense lawyer's arguments were "offensive;" and Defendant forced to wear leg restraints during trial without a hearing on their necessity.

Traffanstead v. State, 2019 WL 7242228 (Fla. App. 2019):
Holding: Where Defendant was charged with sexual battery of their Child, Defendant was entitled to obtain Child's psychological assessment records in order to cross-examine Child; in camera review had found that information in records was relevant, and could explain prior incidents of untruthfulness by Child.

State v. Bray, 100 Crim. L. Rep. 70 (Or. App. 10/12/16):
Holding: Rape Defendant was entitled to discovery of victim's hard drive to look for exculpatory evidence; defense theory was that victim had surfed internet looking for wealthy men to falsely accuse of rape.

DNA Statute & DNA Issues

Mercer v. State, 2017 WL 986109 (Mo. banc March 14, 2017):
(1) Where Petitioner filed a motion under Sec. 547.035 claiming that DNA testing would prove actual innocence, trial court erred in dismissing the motion by docket entry without entering findings of fact and conclusions of law to allow meaningful appellate review; (2) the 12-month window for seeking late notice of appeal under Rule 30.03 applies to Sec. 547.035 motions, not the shorter 6-month window for civil cases under Rule 81.07(a); (3) even though the trial court's docket entry was not denominated a "judgment," it was appealable because Rule 74.01(a)'s requirement for use of the word "judgment" does not apply to postconviction cases.
Facts: In October 2013, Petitioner filed a motion for postconviction DNA testing under Sec. 547.035. In April 2014, the trial court dismissed the motion by docket entry which said the motion was "overruled and denied." In August 2014, Petitioner wrote the trial

court a letter saying that the court had failed to issue required findings. In March 2015, Petitioner filed a 30.03 motion seeking late notice of appeal, which the Southern District granted.
Holding: As an initial matter, the 12-month window for seeking a late notice of appeal (Rule 30.03) rather than the 6-month window for a civil case (Rule 81.07(a)) applies to postconviction cases, so there is jurisdiction for the appeal under Rule 30.03. Also, even though the docket entry was not denominated a "judgment," as required by Rule 74.01(a), that Rule is inapplicable to postconviction cases because it would delay processing of postconviction claims. Rule 78.07(c) requires a petitioner who claims error relating to the failure to make findings to bring this to the attention of the trial court, but here, Petitioner did that by sending his letter telling the trial court it had to make findings. Sec. 547.035 requires findings sufficient for meaningful appellate review. Reversed and remanded for findings.

State v. Buckner, 566 S.W.3d 261 (Mo. App. W.D. Dec. 26, 2018):
Holding: Even though (1) appointed counsel voluntarily dismissed without prejudice Movant's DNA testing case under Sec. 547.035; and (2) the trial court later denied Movant's *pro se* motion to reinstate his DNA testing case and appoint new counsel, the appellate court looks to the substance of a "judgment" (not how it is denominated), and the trial court's denial of the motion to reinstate was not a final judgment from which an appeal can be taken because it does not resolve all issues in the case leaving nothing for future determination; Movant can cure the voluntary dismissal by filing a new DNA testing case.

U.S. v. Cowley, 2016 WL 771142 (4th Cir. 2016):
Holding: An appeal of denial of motion for DNA testing under Innocence Protection Act is not subject to a certificate of appealability.

U.S. v. Watson, 2015 WL 4153859 (9th Cir. 2015):
Holding: Even though underwear had been seized at time of crime, the fact that new DNA technology would now allow testing of tiny amounts of semen on the underwear (which was not possible at time of trial) made the semen "newly discovered evidence" under Innocence Protection Act, and rebutted a presumption of untimeliness for a motion for DNA testing.

State v. Hernandez, 2016 WL 181722 (Kan. 2016):
Holding: Even though Victim testified that the person who raped her had used a condom, Defendant was entitled to DNA testing of the bed sheets because the perpetrator may have left exculpatory DNA evidence other than semen.

Com. v. Kostka, 31 N.E.3d 1116 (Mass. 2015):
Holding: State could not compel non-party twin brother of Defendant to submit to DNA test to determine if he was a fraternal twin or identical twin; twin brother's DNA did not bear on Defendant's guilt in a substantial or direct manner, and the absence of twin's DNA did not impact State's ability to present its case.

Com. v. Cowels, 24 N.E.3d 1034 (Mass. 2015):
Holding: DNA testing, conducted on a previously-tested towel, which showed that blood on the towel did not belong to Defendant, was newly-discovered evidence warranting new trial.

State v. Johnson, 862 N.W.2d 757 (Neb. 2015):
Holding: DNA testing is not admissible without evidence of statistical significance of the findings; State expert's testimony that Defendant "cannot be excluded" is irrelevant without evidence of statistical significance; because of the weight jurors will likely give DNA evidence, the value of inconclusive testing is substantially outweighed by the danger that jurors will be unfairly misled.

Phillips v. State, 2015 WL 6472286 (Md. Ct. Spec. App. 2015):
Holding: DNA analysis conducted per the FBI Quality Assurance Standards may be admissible, but is not automatically admissible.

People v. Addison, 2016 WL 266158 (N.Y. Sup. 2016):
Holding: Where a statute required the State to take a saliva sample within 45 days of arraignment in order to test for DNA, the State's untimely motion for taking a sample a year later implicated 4th Amendment rights and should be denied; the fact that it might yield evidence of crime did not excuse the late filing.

People v. Collins, 2015 WL 4077176 (N.Y. Supp. 2015):
Holding: "High sensitivity" DNA analysis was not generally accepted as reliable in the forensic community to analyze small DNA deposits; thus, this type of DNA test is not admissible under *Frye*.

In re Payne, 2015 WL. 9646651 (Pa. Super. 2015):
Holding: Even though it was unlikely that DNA testing would exculpate Defendant (and was likely to simply confirm that he did the crime), Defendant should be granted DNA testing because the purpose of the DNA statute is to allow a defendant the opportunity to demonstrate the unlikely.

Double Jeopardy

State v. Ward, 2019 WL 1247070 (Mo. banc March 19, 2019):
Holding: Where, after bench trial, a trial court entered a judgment finding a statute "unconstitutionally overbroad" as applied to Defendant and also finding Defendant "not guilty," case is remanded to trial court to clarify the nature of the court's ruling, because the State cannot appeal a factual verdict of "not guilty" since that would be barred by Double Jeopardy, but could appeal a dismissal on grounds that the statute was overbroad.

State v. Wright, 2020 WL 5524269 (Mo. App. E.D. Sept. 15, 2020):
Holding: Under the new (post-2017) Criminal Code, third-degree assault, Sec. 565.054, is not a lesser-included offense of second-degree robbery, Sec. 570.025 (distinguishing *State v. Whitely*, 184 S.W.3d 620 (Mo. App. S.D. 2006) which was decided under the old criminal code which had different language for the offenses); thus, no double jeopardy violation to convict of both.
Discussion: Defendant claims third-degree assault is a lesser of second-degree robbery because the same or less than all the facts are required to prove third-degree assault as required to prove second-degree robbery. 575.025.1 states a person commits second-degree robbery is he "forcibly steals property and in the course thereof causes physical injury to another person." 565.054 states a person commits third-degree assault if he "knowingly causes physical injury to another person." However, the stealing element of second-degree robbery assigns a mental state of purposefully to it, but no mental state is required for the injury element of second-degree robbery. A person can commit second-degree robbery by forcibly stealing property and injuring a person recklessly or with criminal negligence. But this would not fulfill the knowingly mental state required for third-degree assault. Thus, it is possible to commit second-degree robbery without necessarily committing third-degree assault.

State v. Jones, 2020 WL 890999 (Mo. App. E.D. Feb. 25, 2020):
Holding: Offense of abuse of child resulting in death can serve as predicate offense to support second-degree felony murder; Defendant's conviction for both offenses does not violate felony-murder statute, the merger doctrine, or Double Jeopardy.

State v. Feldt, 2107 WL 900082 (Mo. App. E.D. March 7, 2017):
Holding: (1) Even though (a) counsel filed a motion with the court indicating the parties had agreed to waive a jury trial; (b) Defendant said after he was found guilty and sentenced that he and counsel had "discussed" whether to have a jury trial; and (c) Defendant never objected to a bench trial, trial court plainly erred in conducting bench trial because the record did not reflect with unmistakable clarity that Defendant *personally* understood and voluntarily waived his right to a jury trial; and (2) even though appellate court is granting new trial, it must first consider Defendant's sufficiency of evidence claim on appeal because to fail to do so would possibly subject Defendant to double jeopardy, if State had presented insufficient evidence to convict (but evidence was sufficient here).

State v. Brandon, 2016 WL 1319382 (Mo. App. E.D. April 5, 2016):
Even though there was a continuous use of force against Victim for several hours during which she was driven around in a car, where Defendant stole money from her earlier in the night and then stole jewelry later in the night, Double Jeopardy did not bar conviction for two counts of first-degree robbery; first-degree robbery is not a continuing course of conduct, and each instance of forcible stealing constitutes a different robbery.
Facts: Defendant and co-defendants forced Victim into a car at gunpoint. Earlier in the night, they stole money from her. They then continued to drive her around. Later, they stole jewelry from her. Eventually, she was able to escape. Defendant was convicted of two counts of first-degree robbery.
Holding: Defendant contends his conviction for two counts of first-degree robbery violated Double Jeopardy. Because the Legislature did not specify in the robbery statute, Sec. 569.020, the allowable unit of prosecution, the court looks to the general cumulative punishment statute, Sec. 566.041. Sec. 566.041 prohibits conviction for more than one offense if the offense is a "continuing course of conduct." First-degree robbery is not defined as a "continuing course of conduct." It is defined as forcibly stealing. Thus, when the act of forcible stealing ends, the crime ends, regardless of whether the underlying threat of harm continues. Each separate instance of forcible stealing constitutes a different robbery. Where the counts are based on different acts or a separate *mens rea* is formed for each act, the crimes are different. There was no Double Jeopardy violation here.

State v. Johnson, 2020 WL 7584948 (Mo. App. S.D. Dec. 22, 2020):
(1) Sec. 575.150.5 does not enhance resisting arrest for a parole violation to a felony, even if the underlying offense is a felony; thus, trial court did not err in granting Defendant's motion for judgment notwithstanding the verdict (JNOV) when jury found Defendant guilty of felony resisting, and convicting Defendant of misdemeanor resisting arrest; and (2) the State could appeal the grant of JNOV, because when a jury returns a verdict of guilty and a trial judge sets aside the verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not prevent the State from appealing to reinstate the jury's verdict.
Facts: Defendant was on parole for a felony offense. He failed to report to his Parole Officer, who then issued a warrant for his arrest. When he was arrested, he resisted arrest. He was charged with felony resisting arrest, 575.150, on grounds that he resisted arrest for a felony. Defendant was found guilty by a jury. Later, the judge granted Defendant's motion for JNOV on grounds that 575.150 doesn't enhance resisting arrest for a parole violation to a felony. The trial court entered a misdemeanor conviction. The State appealed.
Holding: As relevant here, Sec. 575.150.5 makes resisting arrest a misdemeanor unless the State proves the arrest was for a (1) felony; (2) a warrant for failure to appear on a felony case; or (3) a warrant issued for a *probation* violation on a felony case. Defendant's arrest didn't fall into any of these categories Under the statute's plain language, resisting an arrest on a parole warrant is not a felony. We presume the omission of parole warrants from the statute was intentional. And the fact that the offense underlying the parole was a felony does not make Defendant's arrest be one for a

felony. He was not being arrested "because of" or "an account of" the underlying felony. He was arrested for violating conditions of parole.

State v. Green, 2019 WL 6481423 (Mo. App. W.D. Dec. 3, 2019):
Holding: (1) Where Defendant was charged with kidnapping, Sec. 565.110, trial court plainly erred in submitting instruction for felonious restraint, because this is not a lesser-included offense of kidnapping, in that it requires proof of an element -- exposure to a substantial risk of harm -- which not included in kidnapping; manifest injustice resulted because Defendant was convicted of a crime for which he was not charged; (2) on remand, Double Jeopardy precludes retrial on kidnapping because the felonious restraint conviction (though not a lesser-included offense) served as an implicit acquittal of the charge of kidnapping; but because the jury was also given a lesser offense instruction on false imprisonment (though it did not find it), Defendant can be tried for false imprisonment on remand; and (3) even though Sec. 558.026 requires that offenses of "sodomy in the first degree, forcible sodomy, or sodomy" run consecutively, trial court plainly erred in ruling that conviction for second degree sodomy had to be consecutive to the felonious restraint conviction; the plain language of Sec. 558.026 does not include second-degree sodomy as one of the sentences which must run consecutively.

State v. Basnight, 2020 WL 7214152 (Mo. App. W.D. Dec. 8, 2020):
Where trial court had polled and dismissed jury without objection, the State cannot later appeal allegedly inconsistent verdict, because Sec. 547.200.2 does not allow State to appeal if the outcome would subject Defendant to Double Jeopardy; State's appeal dismissed.
Facts: A jury returned a verdict on "Count I" finding Defendant guilty of a lesser-included offense and "not guilty." Neither the State nor defense objected to the verdict. The jury was polled and then discharged. A month after trial, the State moved to set aside the judgment on the lesser-included offense on grounds that it was an inconsistent verdict, and retry Defendant. After the trial court denied the request and sentenced Defendant, the State appealed.
Holding: The State argues the verdict violates MAI-CR 4th 404.12, which instructs jurors to return only one verdict for each charge. Sec. 547.200.2 authorizes the State to appeal certain cases, "except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant." Here, the State is seeking an outcome that would retry Defendant on the greater charge. This would violate the federal Double Jeopardy Clause by subjecting Defendant to prosecution for the same offense after acquittal, or prosecuting him for the same offense after conviction. Although *State v. Zimmerman*, 941 S.W.2d 821 (Mo. App. W.D. 1997), would appear to allow this outcome, *Zimmerman* was decided under the Missouri constitution's Double Jeopardy provision, which provides less protection than the federal Double Jeopardy provision. Here, Defendant relies on the Fifth Amendment's Double Jeopardy provision. Because remanding for a retrial would place Defendant in jeopardy a second time under the Fifth Amendment, Sec. 574.200.2 does not authorize the State's appeal. Appeal dismissed.

State v. Foster, 2019 WL 7157177 (Mo. App. W.D. Dec. 24, 2019):
Holding: Possession of child pornography, Sec. 573.037.1, is not a lesser-included offense of sexual exploitation of a minor, Sec. 573.023.1, so Defendant's conviction for both offenses for making a video of a minor is did not violate Double Jeopardy; each offense requires proof of an element that the other does not

State v. Seymour, 570 S.W.3d 638 (Mo. App. W.D. March 26, 2019):
Holding: (1) Even though, at the conclusion of trial, court grant judgment of acquittal on grounds that the statute of limitations had expired, State could appeal without violating Double Jeopardy because the acquittal was not based on Defendant's factual guilt or innocence; and (2) where (a) the Labor and Industrial Relations' Fraud and Noncompliance Unit began investigating Defendant's lack of worker's comp insurance in February 2014 but then inexplicably stopped the investigation for months before referring the matter to the Attorney General in June 2014, and (b) the Attorney General filed the charge of failure to maintain worker's comp insurance in May 2017, the charge was barred by the three-year statute of limitations in Sec. 287.128.11 which requires a charge be brought within three years of "discovery of the offense."
Discussion: This case turns on the meaning of "discovery of the offense." This is determined by an objective standard. So long as an ongoing investigation is objectively reasonable, the statute of limitations will not begin to run until the investigation is complete. But here the Fraud Unit discovered the violation in February 2014 and inexplicably stopped the investigation for several months. Thus, the time taken to complete the investigation was not objectively reasonable. Thus, the accrual period began in February 2014, and the charge filed in May 2017 was more than three years later.

State v. Thompson, 2019 WL 1768418 (Mo. App. W.D. April 23, 2019):
Defendant's pretrial claim that he was being subjected to Double Jeopardy by being charged with both possession of a controlled substance, §195.202, and unlawful use of a weapon for being in possession of a gun with a controlled substance, §571.030.1(11) was not yet ripe, because he had not yet been put in jeopardy (since trial hadn't occurred) and the Double Jeopardy issue was one of multiple punishments for the same offense, which issue isn't ripe until sentencing; trial court should not have dismissed one of the counts before trial.
Facts: Defendant moved before trial to dismiss one of his counts on Double Jeopardy grounds. The trial court dismissed one count. The State appealed.
Holding: Double Jeopardy protects (1) against successive prosecutions for the same offense after acquittal or conviction, and (2) against multiple punishments for the same offense. This is a multiple punishment case, since Defendant hasn't been acquitted or convicted yet. The test for multiple punishments is whether the total punishment exceeds that authorized by the legislature. But the Double Jeopardy clause only applies when a person has been subjected to jeopardy, which Defendant has not been since he hasn't been put to trial yet. A pretrial motion raising a multiple punishments issue is premature (in contrast to a pretrial motion on successive prosecutions where a defendant has previously been acquitted or convicted). A multiple punishments issue doesn't arise until sentencing.

Treta v. State, 559 S.W.3d 406 (Mo. App. W.D. Oct. 16, 2018):
Holding: Rule 24.035 Movant's convictions for forcible rape, Sec. 566.030, and statutory rape, Sec. 566.032, arising from a single act did not violate Double Jeopardy, because forcible rape and statutory rape are separate, independent crimes with different elements and punishments; age is the essential element of statutory rape, while forcible compulsion is the essential element of forcible rape.

Johnson v. State, 2017 WL 4242031 (Mo. App. W.D. Sept. 26, 2017):
Holding: Even though (1) plea court set aside Defendant's guilty plea after he said in his SAR that he did not commit the offense; (2) jeopardy generally attaches after a plea has been unconditionally accepted; and (3) Defendant later pleaded guilty to a less favorable plea offer, Defendant's right to be free from double jeopardy was not violated by entry of the second plea because Defendant never objected to the first plea being set aside and never sought to have the first plea reinstated, so he effectively consented to the withdrawal of his first plea.

State v. Larsen, 2016 WL 4374255 (Mo. App. W.D. Aug. 16, 2016):
Even though (1) Sec. 479.170.1 states that where it "shall appear" to a municipal judge that an offense is not cognizable in municipal court, the judge shall refer it to state court; and (2) Sec. 479.170.2 states that DWI offenses in which a defendant has two or more prior DWI convictions are not cognizable in municipal court, where the municipal judge accepted Defendant's guilty plea to DWI and sentenced him, double jeopardy precluded the State from later charging Defendant with the same DWI in state court. This is because the municipal court had subject matter jurisdiction to hear the DWI case. Even assuming that Sec. 479.170 was a restriction upon the municipal court's authority, the statute did not prohibit the judge's actions here because it only requires a judge to refer a case to state court where it "appear[s]" to the judge that such referral is required, and there was no evidence before the judge indicating that Defendant had two or more prior convictions.
Facts: Defendant pleaded guilty and was sentenced in municipal court for DWI. Later, the State charged Defendant, as a persistent DWI offender, with the same incident in State court. The trial court granted Defendant's motion to dismiss on double jeopardy grounds. The State appealed.
Discussion: The State claims that Sec. 479.170 prohibited the municipal judge from hearing the municipal DWI case, and that its judgment is a nullity. But the State's jurisdictional argument is not valid after *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 349 (Mo. banc 2009), which rejected the notion of "jurisdictional competence." Art. V, Sec. 23, Mo.Const., gives municipal judges the power to hear municipal ordinance violations. Thus, the municipal court had subject matter jurisdiction. The State's argument that Sec. 479.170 imposes a restriction on the municipal court's authority is nothing more than a "jurisdictional competence" argument, not a subject matter jurisdiction argument. Moreover, the statute's plain language requires a municipal judge to refer a case to state court only when it "appear[s]" to the judge that referral is required. Here, there was no evidence before the municipal judge of Defendant's prior convictions. Dismissal on double jeopardy grounds affirmed.

* **Gamble v. U.S., ___ U.S. ___, 139 S.Ct. 1960 (U.S. June 17, 2019):**
Holding: The Double Jeopardy Clause does not prohibit the prosecution of the same conduct by state and federal authorities; Court reaffirms "dual sovereign" doctrine allowing prosecution of the same conduct by different sovereigns.

*** Currier v. Virginia, ___ U.S. ___, 138 S.Ct. 2144 (U.S. June 22, 2018):**
Holding: (1) A defendant who requests severance of his charges into two separate trials cannot claim that the Double Jeopardy Clause precludes the second trial when the first trial ended in an acquittal, because the defendant had consented to two trials; (2) a plurality of four justices reject issue preclusion as being embodies in Double Jeopardy Clause.

*** Bravo-Fernandez v. U.S., ___ U.S. ___, 137 S.Ct. 352 (U.S. Nov. 29, 2016):**
Holding: The issue-preclusion component of the Double Jeopardy Clause does not bar the State from retrying defendants after a jury returned irreconcilably inconsistent verdicts of conviction and acquittal on different counts (but involving identical facts), even though an appellate court later vacated the conviction based on legal error at the trial; issue preclusion does not apply when the verdict inconsistency renders unanswerable what the jury necessarily decided. Thus, where (1) Defendant was convicted of bribery, but acquitted of related same-fact-based charges such as conspiracy to commit bribery, and (2) the appellate court vacated the bribery conviction based on instructional error, Defendant could be re-prosecuted for the stand-alone bribery conviction. Neither the acquittals on the related same-fact-based counts, nor the appellate vacation of the conviction on legal error grounds, cause issue preclusion for the stand-alone bribery count.

* **Puerto Rico v. Sanchez Valle, ___ U.S. ___, 136 S.Ct. 1863 (U.S. June 9, 2016):**
Holding: The Fifth Amendment's Double Jeopardy Clause prohibits successive prosecutions by Puerto Rico and the United States for the same criminal conduct; this is because, unlike States, Puerto Rico derives its authority to enact and prosecute criminal laws from the U.S. Congress, so the prosecutorial power has the same "ultimate source." States' powers to enact and prosecute criminal laws predated the federal government and are not derived from the federal government.

Editor's Note: A concurring opinion by Justices Ginsburg and Thomas expressly invites defense counsel to bring to the Court a case to reexamine whether Double Jeopardy prohibits prosecutions for the same criminal conduct in both state and federal court; they wrote that the current separate sovereigns doctrine – which allows prosecution of the same offense in State and federal court – is inconsistent with double jeopardy's purpose of prohibiting multiple prosecutions for the same conduct.

U.S. v. Cooper, 103 Crim. L. Rep. 9 (D.C. Cir. 3/30/18):
Holding: Defendant's convictions for conspiracy to embezzle money from a union and conspiracy to pay off the union official who embezzled overlapped too much and hence violated 5th Amendment double jeopardy because they were multipicitous.

U.S. v. Gordon, 102 Crim. L. Rep. 157 (1st Cir. 11/7/17):
Holding: Double Jeopardy violated where Defendant was convicted of five counts relating to a single murder-for-hire plot, instead of one; Congress intended a "plot focused unit of prosecution."

U.S. v. Vichitvongsa, 99 Crim. L. Rep. 8, 2016 WL 1295163 (6th Cir. 4/4/16):
Holding: 18 USC 924(c)(1), making it illegal to use a gun in connection with certain violent crimes, does not authorize multiple convictions where Defendant possessed just one guy while simultaneously involved in two different conspiracies.

U.S. v. Gries, 101 Crim. L. Rep. 657 (7th Cir. 9/20/17):
Holding: Defendant's convictions for engaging in child-exploitation enterprise and conspiracy to distribute child pornography violated double jeopardy, because conspiracy is a lesser-included offense of enterprise.

U.S. v. Morrissey, 103 Crim. L. Rep. 357 (8th Cir. 6/29/18):
Holding: Convictions for both receipt and possession of child pornography violate Double Jeopardy because receipt always requires proof of possession.

U.S. v. Rentz, 2015 WL 430918 (10th Cir. 2015):
Holding: Each charge under statute that criminalizes the use or carrying of a firearm in relation to a crime of violence, 18 USC 924(c), requires an independent use, carry or possession; the number of independent uses, not the number of predicate crimes arising out of a single use, is what controls who many charges can be brought.

Stringfield v. Superior Court, 2016 WL 1393576 (S.D. Cal. 2016):
Holding: Collateral estoppel, as contained in 5th and 14th Amendment's due process clause, bars prosecution for involuntary manslaughter and implied malice murder after Defendant had been acquitted of child abuse; all of the crimes had the same mens rea of gross or criminal negligence, so the acquittal of the child abuse charge barred prosecution for the other offenses with the same mental state.

People v. Juarez, 2016 WL 1061963 (Cal. 2016):
Holding: Conspiracy to commit murder charges were the same as previously dismissed attempted murder charges.

People v. Garcia, 98 Crim. L. Rep. 508 (Cal. 2/16/16):
Holding: Even though burglary statute used the term "room" to define burglary, where Defendant entered a store with the intent to commit a robbery and then took a victim into a store bathroom where he raped her, there was only one burglary, not two; the risk to personal safety occurred when Defendant initially entered the store to commit a felony, and the bathroom itself did not provide a separate, reasonable expectation of additional protection.

Reyna-Abarca v. People, 100 Crim. L. Rep. 492 (Colo. 2/27/17):
Holding: Driving under the influence is a lesser-included charge of DWI-based vehicle homicide so conviction for both violates double jeopardy.

Parker v. State, 2019 WL 180172 (Del. 2019):
Holding: Theft of motor vehicle and theft are same offense for Double Jeopardy.

State v. Shelley, 2015 WL 38867433 (Fla. 2015):
Holding: Double jeopardy prohibits separate convictions for soliciting the consent of a person believed to be the parent of a child to engage in unlawful sex with child, and of traveling to meet child to engage in unlawful sex; legislature did not authorize separate convictions.

Hines v. State, 2015 WL 2393985 (Ind. 2015):
Holding: State constitution's double jeopardy clause prohibited convictions for both battery and "criminal confinement," arising out of a single incident where Defendant hit and pinned victim to wall; there was not different evidence supporting each charge.

State v. Barlow, 2016 WL 683245 (Kan. 2016):
Holding: Where trial court, after receiving jury's verdict of guilty of murder, vacated the conviction before sentencing under the State's "stand your ground" law, this constituted an acquittal that prevented the appellate court from re-entering the conviction under Double Jeopardy principles.

Shouse v. Com., 2015 WL 5666019 (Ky. 2015):
Holding: Crime of leaving a child in a car, causing death, is a carve-out to the offenses of wanton murder and second-degree manslaughter that precludes conviction of the latter two.

Com. v. Traylor, 2015 WL 4459186 (Mass. 2015):
Holding: Seven convictions for abuse of child based on seven injuries, as opposed to seven different incidents, violated double jeopardy; Legislature did not authorize cumulative convictions and sentences for single incident.

State v. Weckerly, 102 Crim. L. Rep. 595 (Me. 3/20/18):
Holding: Where Defendant had a trial where he was acquitted of all offenses except for one count of arson (on which the jury hung), it violated double jeopardy for the State to use evidence of the acquitted counts at a later trial for the arson; when the "ultimate issue" has been determined at a prior trial (here, who committed certain acts), it violates double jeopardy for the State to be able to re-litigate that issue.

People v. Miller, 97 Crim. L. Rep. 562, 2015 WL 4414311 (Mich. 7/20/15):
Holding: Conviction for both drunken driving and drunken driving that caused serious physical injury violated double jeopardy; the legislature did not intend to permit conviction for both since the relevant statute contained no authorization for multiple punishments.

Castaneda v. State, 2016 WL 3348587 (Nev. 2016):
Holding: Defendant's simultaneous possession of 15 images of child pornography constituted a single violation of the statute.

In re Moi, 98 Crim. L. Rep. 119 (Wash. 10/29/15):
Holding: Where Defendant was acquitted at a bench trial of possessing a certain gun, double jeopardy prohibited the State from later prosecuting him for murder on the theory that he shot Victim with that gun; the same issue of ultimate fact was decided in the first trial and the state was collaterally estopped from re-litigating that fact in a second trial; this was true even though the parties agreed to sever the charges and let a judge decide the gun charge and a jury decide the murder charge.

Fedolfi v. State, 2019 WL 6974282 (Alaska Ct. App. 2019):
Holding: Where Officer was charged with official misconduct and a sex offense for having sex with someone in his custody, Double Jeopardy prohibited conviction for both offenses because they merged into the same offense for sentencing.

People v. Ochoa, 2016 WL 3267886 (Cal. App. 2016):
Holding: Prosecution for conspiracy to import drugs barred later prosecution for conspiracy to distribute same drugs.

People v. Goode, 2015 WL 9582740 (Cal. App. 2015):
Holding: Under statute which prohibits multiple punishments for a continuing course of conduct, Defendant could not be convicted of both burglary and attempted burglary where he first tried to open a window (the attempted burglary) and then opened a door of a house (the burglary).

People v. Goolsby, 2016 WL 651872 (Cal. App. 2016):
Holding: Where Defendant's conviction for arson had been reversed for insufficient evidence, Double Jeopardy barred prosecution for lesser-included offenses of arson of property and unlawfully causing a fire.

People v. Scott, 2015 WL 7758325 (Ill. App. 2015):
Holding: Even though Defendant pointed a gun at a pizza delivery person and a passenger in order to steal pizzas from them, this constituted only one act of robbery, not two, under the one-act, one-crime rule.

State v. Frank, 2016 WL 3001939 (La. App. 2016):
Holding: Police officer's convictions both for malfeance in offense and felony carnal knowledge (for sex while on duty) violated double jeopardy under same-evidence test.

Com. v. Aldrich, 2015 WL 5021892 (Mass. App. 2015):
Holding: Attempted larceny is a lesser-included offense of larceny; thus, Defendant could not be convicted of both attempted larceny and larceny for taking currency.

State v. Conley, 2019 WL 660946 (N.C. App. 2019):
Holding: Statute governing possession of a gun on school property did not authorize multiple punishments for each gun.

State v. Sena, 2016 WL 1063166 (N.M. App. 2016):
Holding: Where Defendant was convicted of 10 counts of distribution of child pornography based on 10 still images in one shared folder, the statute was ambiguous as to the unit of prosecution and the rule of lenity required that this be considered one count.

Berea v. Moorer, 2016 WL 3348411 (Ohio App. 2016):
Holding: Where trial court failed to comply with statute which required that it give an explanation of circumstances before accepting a no contest plea, this was a failure to establish facts necessary to support a conviction to which jeopardy attached; thus, State is precluded by double jeopardy from getting a second opportunity to prove guilt.

Ex parte Castillo, 2015 WL 3486960 (Tex. App. 2015):
Holding: Double Jeopardy barred prosecution for burglary after Defendant was acquitted of murder committed in the course of the same burglary.

State v. Schultz, 2018 WL 6524001 (Wisc. App. 2018):
Holding: Where the charging language of an information is ambiguous, court should examine entire record (including introduced at trial) to determine if double jeopardy bar applied.

State v. Zisa, 99 Crim. L. Rep. 671 (N.J. Super. Ct. 8/23/16):
Holding: Prosecutor's unprofessional conduct in making improper remarks and suggesting, without evidence, that Defendant was tampering with witnesses created a double-jeopardy bar to retrial of Defendant.

DWI

Roesing v. Dir. of Revenue, 2019 WL 1912818 (Mo. banc April 30, 2019):
Holding: As matter of first impression, Sec. 577.041.1, which gives Drivers 20-mintues to contact an attorney, includes the right to have the attorney conversation be private; thus, where Officer stood by, listened to, and recorded Driver's telephone conversation with his attorney, Driver's subsequent refusal to take breath test was not voluntary; Director has burden to show Driver wasn't prejudiced, which Director failed to do.
Discussion: A driver who contacts an attorney can make an informed decision about whether to take a BAC test only if the driver is able to candidly disclose all information necessary to receive appropriate advice from an attorney. A driver is not free to speak candidly about incriminating evidence if police are listening to or recording the conversation because a prosecutor could use the information to decide whether to bring charges. Privacy is inherent in a driver's statutory right to counsel. Judgment revoking license for refusal to take BAC test reversed.

State ex rel. McCree v. Dalton, 2019 WL 1247080 (Mo. banc March 19, 2019):
Even though Sec. 577.037.2 provides that if a Defendant's BAC is less than .08 a DWI charge shall be dismissed with prejudice, Petitioner (whose BAC was below .08) is not entitled to a writ of mandamus to dismiss his case before trial, because the statute does not require a pretrial hearing or pretrial determination of the matter; if a defendant is unsatisfied with a denial of a motion to dismiss, defendant can take a direct appeal after trial.
Facts: Petitioner/Defendant, who was charged with DWI and whose BAC was below .08, filed a pretrial motion to dismiss under Sec. 577.037.2. The State presented no evidence at the pretrial hearing. The trial court overruled the motion. Petitioner/Defendant sought a writ of mandamus.
Discussion: As relevant here, Sec. 577.037.2 provides that if a defendant's BAC is below .08, his DWI charge shall be dismissed with prejudice. However, while the statute indicates what the State must prove to avoid dismissal, it makes no mention of *when* the State must present such evidence or *when* the court must rule on the motion. Sec. 577.037 does not provide for pretrial hearing or determination of the issue. This is consistent with Rule 24.04(b) which provides that a motion raising defenses and objections shall be heard before trial, unless the court defers ruling until trial. Here, the trial court's denial of the motion effectively deferred ruling until trial. Since there is not a clear, unequivocal right to pretrial dismissal, Petitioner/Defendant is not entitled to a writ of mandamus. If his motion is denied at trial, he can take a direct appeal after final judgment.

Carvalho v. Dir. of Revenue, 2019 WL 1247086 (Mo. banc March 19, 2019):
Holding: (1) Even though 19 CSR 25-30.031(3) requires that a copy of maintenance reports on breathalyzers be filed with DHSS within 15 days, the failure to comply with this deadline does not render the reports inadmissible, absent a claim disputing the accuracy or performance of the test; (2) where Officer told Driver that his license would be "immediately" revoked if he refused a chemical test, this advice was not "misleading" and did not violate due process because Sec. 302.574.1 provides that Officer "shall take possession of any license" by Driver who refused test, even though Officer also gives Driver a 15-day temporary permit.
Discussion: (1) 19 CSR 25-30.031(3) requires that a copy of maintenance reports on breathalyzers be filed with DHSS within 15 days. Driver argues his breathalyzer results weren't admissible because Director didn't show compliance with the 15-day deadline. Driver does not claim that the failure to meet the deadline affected the validity, performance or accuracy of his test. There is no question the report here was deposited with DHSS. Neither the relevant statutes nor the regulation make the admissibility of the breath test dependent on whether collateral record-keeping requirements are met. When regulatory matters affect the actual *performance* of breathalzyers, strict compliance is required. But regulations play no role in determining admissibility of the report absent a claim as to the test's accuracy or performance. (2) When a Driver refuses a chemical test, their license *is* immediately suspended because Sec. 302.574.1 requires Officer to take possession of the license. Driver objects to the fact that the implied consent warning does not require Officer to inform him that, once his license was suspended, he would get

a 15-day temporary permit even if he refused the test. But due process does not require such particular notice.

Stiers v. Director of Revenue, 2016 WL 143230 (Mo. banc Jan. 12, 2016):
(1) 19 CSR 25-30.051.2 (2013) requires that a breath test machine be calibrated using three standard solutions in order for its results to be admissible; and, (2) even though this CSR was amended in 2014 to require only one standard solution, the 2014 version is not retroactive, and the applicable version is the one in effect at the time Driver was tested.
Facts: In 2013, Driver was stopped for DWI. A breath test measured a BAC of .172. After Director issued its final order revoking Driver's license based on the results of the breath test, Driver sought a trial *de novo*. Driver contended that her breath test results were not admissible because only one standard solution was used to calibrate the breath test machine. 19 CSR 25.30.051.2 (2013) stated that the standard solutions used "shall have a vapor concentration within five present (5%) of the following values: (A) 0.10%; (B) 0.08% *and* (C) 0.04%" (emphasis added). The trial court excluded the results because only one solution was used, not three. Director appealed.
Holding: Sec. 577.037 requires that breath tests be performed in accord with DHSS regulations. 19 CSR 25-30.051.2 (2013) used the word "and" regarding the solution. In conjunction with the word "and," the plain language of the CSR requires three solutions be used. DHSS itself indirectly recognized this when it amended the CSR in 2014 to use the word "or" in place of "and." The amendment's use of the word "or" reduced the required number of solutions to one. But that does not negate the fact that three solutions were required in 2013. Director argues that the 2014 amendment should be retroactive because it is "procedural." But while the rules of evidence govern the procedure for admission of evidence and so the rules in effect at the time of trial are followed, that is an entirely different issue from whether regulations governing how to determine whether a breath machine was validly calibrated at the time it was used to test a driver's BAC were followed. The validity of a breath test must be determined and fixed at the time the test is conducted, because it is used as the basis for suspending or revoking a license; this is a substantive effect. Holding otherwise would also produce absurd results, because different standards of validity would be used at the trial *de novo* than when the test was given or when the administrative proceedings occurred. An invalid test cannot be made valid after-the-fact by amending the rules governing validity. The test results were not admissible.

Henke v. Dir. of Revenue, 2020 WL 5523744 (Mo. App. E.D. Sept. 15, 2020):
Holding: Even though 19 CSR 25-30.050 lists a particular manufacturer or supplier for the Intox EC/IR II breathalyzer machine, the regulation does not require Director to show that the Intox EC/IR II machine was purchased from that particular manufacturer or supplier in order for the breath test results to be admissible.

Branson v. Dir. of Revenue, 2020 WL 2375065 (Mo. App. E.D. May 12, 2020):
Holding: Where (1) in 2009, Driver had his license revoked for 5 years; (2) in 2015, Driver was charged with drug possession, but that case was continued for multiple reasons until 2019; (3) on April 5, 2019, Driver pleaded guilty to drug possession and received an SIS; and (4) on April 16, 2019, Driver petitioned to have his license reinstated, Driver was not eligible for reinstatement under Sec. 302.525, which requires no drug or alcohol convictions for the preceding 5 years. The statute requires this even though Driver claimed his guilty plea should not count because that charge had been pending for 5 years, so he should be considered outside the 5-year lookback. The relevant time is the date of his guilty plea, not when the charge was filed.

Moore v. Dir. of Revenue, 2020 WL 202109 (Mo. App. E.D. Jan. 14, 2020):
Holding: Even though (1) the breathalyzer machine lost power and was unable to print out a BAC reading as a paper ticket, and (2) this did not strictly comply with Dept. of Health regulations regarding printing and that the machine remain on, where there was no evidence that the test results were inaccurate or the machine otherwise malfunctioned (other than the printing function), the trial court should not have excluded the test results; the result of the BAC test displayed on the screen is not dependent on the printer function of the machine.

Howe v. Dir. of Revenue, 2019 WL 578958 (Mo. App. E.D. Feb. 13, 2019):
Even though Officer informed Driver that refusal to submit to a breath test would result in license revocation, where (1) Driver submitted to a breath test and (2) Officer then asked Driver to submit to a blood test without further warning about license revocation, Driver validly refusal to submit to the blood test and her license could not be revoked because Driver was not warned of the consequences of refusal of a blood test.
Facts: Officer warned Driver that refusal to submit to a breath test would result in license revocation. Driver submitted to a breath test, but the results were invalid due to radio frequency interference. Officer then requested Driver submit to a blood test. Officer did not give any warning about revocation from refusal to submit to the blood test. Driver refused the blood test. Director sought to revoke her license.
Holding: The implied consent law requires that a Driver receive certain information. No refusal is valid unless the required statutory information was given. Here, Officer warned of the consequences for refusing a breath test, but not a blood test. This did not meet the requirements of Sec. 577.04.2. While Officer could have warned about two tests at the same time, or warned Driver about the blood test, Officer didn't do that here. Because Officer did not give the implied consent warning for the blood test, Driver's refusal was not valid, and her license can't be revoked.

Thomas v. Dir. of Revenue, 2018 WL 5915531 (Mo. App. E.D. Nov. 13, 2018):
Holding: Eastern District transfers case to Missouri Supreme Court on this question: Whether Driver's breath test results should be suppressed because Sec. 577.041.1 violates due process in that it requires officers to tell drivers that their license will be "immediately" revoked if they refuse a test, even though this is patently not true because revocation will not begin for 15 days. Eastern District does not have jurisdiction to decide this question because it involves a real and substantial challenge to the

constitutionality of a statute, which is within the exclusive jurisdiction of the Supreme Court.

Hearne v. Dir. of Revenue, 2018 WL 4320359 (Mo. App. E.D. Sept. 11, 2018):
Holding: Even though 19 CSR 25-30.031(3) requires that maintenance reports BAC machines be submitted to DHSS within 15 days of the maintenance check, the failure to do so is not grounds to exclude the BAC test results in license revocation proceeding; this is because the driver's legal interest is in ensuring that the machines are maintained and tested – which regulations are mandatory – but the driver has no interest in the filing of the maintenance report with DHSS.

Roam v. Dir. of Revenue, 2018 WL 3848522 (Mo. App. E.D. Aug. 14, 2018):
Holding: Even though 19 CSR 25-30.031(3) requires that maintenance reports BAC machines be submitted to DHSS within 15 days of the maintenance check, the failure to do so is not grounds to exclude the BAC test results in license revocation proceeding; this is because the driver's legal interest is in ensuring that the machines are maintained and tested – which regulations are mandatory – but the driver has no interest in the filing of the maintenance report with DHSS.

Thanner v. Dir. of Revenue, 518 S.W.3d 859 (Mo. App. E.D. May 2, 2017):
Holding: Even though Driver had a valid Georgia license when he moved to Missouri, where Driver had three prior DWI convictions within past 10 years in Georgia, Driver was not eligible for a Missouri license under Sec. 302.060 until 10 years has passed since last conviction.

Bright v. Molenkamp, 2016 WL 617485 (Mo. App. E.D. Feb. 16, 2016):
Holding: (1) Even though Sec. 544.054.1 states that after 10 years a person convicted of a first alcohol-related driving offense may apply "to the court in which he or she pled guilty" for expungement, a "municipal court" is not authorized to hear expungements, because such courts can only hear municipal ordinance violations, Sec. 479.020.1; instead, the expungement petition must be filed in the *circuit court* in which the municipal division is located; "municipal courts" are divisions of the circuit court, Sec. 489.020.5; (2) Because the "municipal court" did not have jurisdiction to hear the expungement action, the appellate court lacks jurisdiction to hear an appeal from the judgment.

Gallagher v. Director of Revenue, 2016 WL 720619 (Mo. App. E.D. Feb. 23, 2016) and Hiester v. Director of Revenue, 2016 WL 720675 (Mo. App. E.D. Feb. 23, 2016):
Holding: 19 CSR 25-30.051(5), which requires compressed ethanol-gas standard mixtures used to calibrate breath test machines come from "approved suppliers," allows admission of results from the supplier Intoximeters Inc., because Intoximeters is an "approved supplier" under 19 CSR 25-30.051(6), even though the gas mixture it supplies was manufactured by Airgas Mid-America. The regulation uses the word "supplier" rather than "manufacturer."

State v. Mattix, 2016 WL 880786 (Mo. App. E.D. March 8, 2016):
(1) 19 CSR 25-30.05(2)(2012 version) requires that a breathalyzer be calibrated using three different solutions in order for the results to be admissible; (2) trial court abused discretion in admitting Defendant's BAC results because the breathalyzer was not calibrated using three methods; and (3) even though Defendant failed field sobriety tests and made incriminating admissions about drinking, Defendant was prejudiced by admission of a .206 BAC result because the prosecutor emphasized this in closing argument and the jury asked about it during deliberations.
Facts: Defendant was charged with DWI. He failed various field sobriety tests and made incriminating admissions about drinking. He was given a breathalyzer test, which showed a .206 BAC. He was convicted at a jury trial.
Holding: The trial court abused discretion in admitting the BAC results. The 2012 version of 19 CSR 25-30.05(2) required that, in order for BAC results to be admissible, the breathalyzer machine had to be calibrated using three different solutions of .10, .08 "and" .04. (This CSR was subsequently amended to require only one solution). Here, the machine was calibrated using only one solution. The CSR applies to both civil and criminal cases. Thus, the BAC results were not admissible under *Stiers v. Director of Revenue*, 2016 WL 143230 (Mo. banc 2016). The State contends that even though the BAC results were erroneously admitted, Defendant was not prejudiced because there is other evidence of guilt from the failed field sobriety tests and incriminating admissions. There is no question that a jury could convict based on the sobriety tests and admissions. However, the standard of review is whether the erroneously admitted evidence had a material effect on the outcome of trial. Here, it did, because the prosecutor emphasized the .206 results in closing argument and the jury asked about them during deliberations. New trial ordered.

Nobles v. Mollenkamp, 2019 WL 4025036 (Mo. App. S.D. Aug. 27, 2019):
Holding: Where (1) the parties agreed to try the issue of Driver's license revocation based on the Alcohol Influence Report, and (2) the trial court reinstated Driver's license on grounds that "Director lacked probable cause to *submit* the alcohol influence report into evidence," appellate court cannot determine whether the trial court ruled the report was not admissible, or whether the trial court made a credibility determination that Officer did not have reasonable grounds to believe Driver was driving while intoxicated; case remanded to clarify ruling.

Davis v. Director of Revenue, 2016 WL 503252 (Mo. App. S.D. Feb. 9, 2016):
Holding: (1) 19 CSR 25-30.051.2 (2013) required that three standard solutions be used to calibrate a breath test machine, *see Stiers v. Director of Revenue*, 2016 WL 143230 (Mo. banc Jan. 12, 2016); (2) where, in 2013, the breath test machine used in Driver's case was calibrated using only one standard solution, the calibration was not valid and Director failed to lay a proper foundation for admission of the breath test results. Revocation of Driver's license is reversed.

Ekstam v. Dir. of Revenue, 2020 WL 4590322 (Mo. App. W.D. Aug. 11, 2020):
Holding: Even though (1) Defendant pleaded guilty to failing to comply with ignition interlock requirements in violation of Sec. 577.599, and (2) Sec. 302.462.1 provides that "upon a finding of guilt to a violation of Sec. 577.599, [the Director] shall revoke the person's driving privilege for one year from the date of *conviction*," where Defendant received a suspended imposition of sentence (SIS) and probation on the criminal offense, this was not a "conviction" under Missouri law, so Director cannot revoke the license (absent a probation revocation).
Discussion: The plain language of the Sec. 302.462.1 requires both a "finding of guilt" and a "conviction." Here, Driver was found guilty of violating Sec. 577.599. But an SIS is neither a conviction nor a sentence. If Driver successfully completes probation, he will not have a conviction under Sec. 577.599. Sec. 302.462.1 does not authorize revocation absent a "conviction."

Collier v. Dir. of Revenue, 2020 WL 3421674 (Mo. App. W.D. June 23, 2020):
Holding: (1) Since Sec. 302.312 allows the Director in license suspension case to meet its burden of production solely by presenting paper reports (business records), it is incumbent on Driver to subpoena arresting Officer to cross-examine him if Driver wishes to do so; (2) Sec. 302.312 does not include the 7-day notice requirement of the intent to admit business records without calling a live witness as provided in the Uniform Business Records as Evidence Law, Sec. 490.692; the legislature chose not to include that safeguard in regard to admission of the Director's records.

Goforth v. Dir. of Revenue, 2020 WL 620464 (Mo. App. W.D. Feb. 11, 2020):
Holding: (1) In license revocation proceeding for refusal to submit to chemical testing, court need only determine, per Sec. 302.574.4, whether the person was arrested or stopped; whether Officer had reasonable grounds to believe the person was driving in an intoxicated or drugged condition; and whether the person refused to submit to the test; Director does *not* have to prove an additional element of whether the person had ever operated a vehicle on a public highway as contained in Sec. 577.020.1. But (2) as a "general proposition," consent to testing cannot be implied under 577.020.1 unless the evidence supports an inference that Driver had "ever" operated a vehicle on a public highway, but it is reasonable to infer that a Driver who gets a license will drive on a public highway. (3) Thus, even though Driver was found in an intoxicated condition while parked in a restaurant parking lot (after falling asleep in the drive-thru pickup lane), court did not err in revoking license based on factors in Sec. 302.574.4, as it can be inferred that Driver had impliedly consented to submit to a test by driving on a public highway.

State v. Christy, 2020 WL 768273 (Mo. App. W.D. Feb. 18, 2020):
Holding: Even though Officer testified to some evidence of intoxication, where Defendant's BAC was below .08% and Defendant contested Officer's testimony through cross-examination of what he observed, and failure to consider Defendant's weight and age, trial court did not clearly err in dismissing case under Sec. 577.037.2.
Discussion: As relevant here, Sec. 577.037.2 provides that where a BAC is less than .08%, the court shall dismiss the case with prejudice unless there is substantial evidence

of intoxication from observations of witnesses or admissions of defendant. The standard of review requires viewing all evidence and inferences in the light most favorable to the trial court's finding. Even though Officer smelled alcohol, that may have come from the passenger who had been drinking. And even though Defendant failed some sobriety tests, that may have been because she was overweight and elderly. The dash-cam video showed Defendant was not slurring, confused or incoherent.

Stanton v. Dir. of Revenue, 2020 WL 6573103 (Mo. App. W.D. Nov. 10, 2020):
Holding: (1) Even though Officer (before whom Driver refused BAC test) was outside of Officer's county when Driver refused test, nothing in Sec. 302.574.3 requires Officer be in his jurisdiction when making the arrest or when requesting the test; (2) even though Officer's arrest of Driver outside of Officer's county may not have withstood Fourth Amendment scrutiny in a criminal case, it did not divest Officer of his status as a law enforcement officer and did not prevent Director from revoking Driver's license.

State v. Rigsby, 2019 WL 6119638 (Mo. App. W.D. Nov. 19, 2019):
(1) Illinois conviction, which despite its title of driving under the influence of drugs, did not require that a person be "impaired" by the drug did not qualify as a predicate "intoxication-related traffic offense" under Sec. 577.023.1(4), and extrinsic evidence that Defendant was impaired in his Illinois offense cannot be considered; and (2) Defendant's other prior DWI conviction which was more than 5 years old did not qualify as a predicate offense because it isn't a previous conviction "within five years of the occurrence of the intoxication-related traffic offense for which the person is charged," Sec. 577.023.1(6).
Facts: Defendant was convicted of DWI as a prior and persistent offender. He had two different Illinois convictions used for enhancement. Regarding the first conviction, the State presented Officer testimony that Defendant had, in fact, been impaired by marijuana, and had failed multiple field sobriety tests. The trial court sentenced Defendant as a prior and persistent offender. He appealed.
Holding: (1) Defendant has a 2005 Illinois conviction for "driving while under the influence of drugs." This title, standing alone, might indicate this is an "intoxication-related offense," Sec. 577.023.1(5)(a), but the title is not controlling. The Illinois statute did not require that Defendant be "impaired," only that he have cannabis in his system. By contrast, in Missouri, a person can be convicted of driving under the influence of a drug only if he is "impaired" by the drug. Defendant's Illinois conviction did not contain all the elements of the Missouri offense of DWI. Thus, it is not an "intoxication-related traffic offense" under Sec. 577.023.1(4). The State sought to use extrinsic facts to show Defendant was, in fact, impaired in Illinois. But courts use a "categorical" approach, which looks at the elements of the statute of conviction to determine if a prior conviction qualifies, not to the facts of each defendant's conduct. The only time that courts look to the underlying conduct is if the statute defining the prior offense can be committed in multiple ways, only some of which would support enhancement. But that's not the case here. (2) Regarding Defendant's other conviction, it was more than five years old from the time of the charged Missouri offense, so it does not count either, Sec. 577.023.1(6). Case remanded for entry of DWI conviction as Class B misdemeanor and sentence accordingly.

Waters v. Director of Revenue, 588 S.W.3d 209 (Mo. App. W.D. Oct. 8, 2019):
Holding: A trial *de novo* is a new, original proceeding and is not intended to review the prior administrative proceeding for alleged error; thus, Driver could not raise alleged "due process" violations committed during the administrative hearing proceeding as claims of error in her trial *de novo* or direct appeal from the result of her trial *de novo*.

State v. Osborn, 2019 WL 1599307 (Mo. App. W.D. April 16, 2019):
Even though Defendant-Driver was unconscious in hospital following an auto accident in which he was suspected of DWI, the warrantless draw of his blood was not supported by exigent circumstances, and the implied consent law, Secs. 577.020 and 577.033, does not authorize a warrantless draw without exigent circumstances either; trial court erred in overruling motion to suppress blood draw BAC evidence.
Facts: Defendant-Driver was involved in an auto accident in which he and others were injured. He was taken to a hospital. He was initially conscious at the hospital. Officer asked him if he would take a preliminary breath test, and he agreed. That test showed the presence of alcohol. Officer then placed Defendant under arrest for DWI, but Defendant then became unconscious. Officer directed nurse to take a blood draw, which showed a BAC of .161. Defendant moved to suppress the BAC results. The trial court overruled the motion, and admitted them at trial.
Holding: The 4th Amendment requires that there be something beyond the natural dissipation of alcohol in a suspect's blood to constitute "exigent circumstances" to permit a warrantless blood draw. Modern telecommunications are such that police are generally required to get a warrant to do a blood draw in DWI cases. The State argues that the implied consent law authorizes a warrantless draw. Sec. 577.020 provides that people who operate vehicles on public roads are deemed to have consented to a blood test in the event they are arrested for DWI or an accident involving a serious injury or fatality. Sec. 577.033 states that a person who is "unconscious … shall be deemed not to have withdrawn the consent provided by Sec. 577.020 and the test or tests may be administered." Although these statutes appear to authorize the warrantless draw, the statutes must comply with constitutional requirements. Prior Missouri cases have authorized warrantless blood draws from unconscious subjects. But those cases are called into question in light of *Missouri v. McNeely*, 569 U.S. 141 (2013) and other decisions. Other states have held that warrantless blood draws from unconscious drivers in criminal cases cannot be summarily controlled by an informed consent statute. According, we hold that Sec. 577.033 does not allow warrantless blood draws of unconscious drivers unless exigent circumstances are present. Reversed and remanded for new trial.

Nix v. Dir. of Revenue, 2019 WL 1904905 (Mo. App. W.D. April 30, 2019):
Holding: Trial court erred in excluding BAC results for insufficient foundation because Officer failed to sign the certification on the BAC report form after he completed the test; exact compliance with regulations relating to matters collateral to the performance of the BAC test is not a foundational prerequisite; here, there was no challenge to the *performance* of the test.

State v. Capozzoli, 2019 WL 2504199 (Mo. App. W.D. June 18, 2019):
Holding: (1) Even though §490.065.2(3)(b) prohibits an expert from stating an opinion "whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged," Officers in DWI trial could testify that Defendant was "intoxicated" because intoxication is a "physical condition" characterized by unsteadiness on feet, slurred speech, and impairment of reflexes; and (2) no Missouri appellate court has addressed the admissibility of "drug recognition officer/experts" under the new (Daubert) standard for admissibility, §490.065.2, but court does not reach issue because Defendant suffered no prejudice since blood test results showing drugs were also admitted.
Discussion: "Mental state" is the *mens rea* element of a crime. Defendant argues that the "intoxicated condition" element of DWI constitutes a "mental condition." It is unclear what criminal offenses the Legislature had in mind when it included "mental condition" in the proscription on expert testimony where it is an element of the crime charged. However, we do not believe that intoxication is a mental condition about which an expert may not testify in a DWI case, because intoxication has been characterized as a "physical condition.

Baker v. Dir. of Revenue, 2019 WL 610383 (Mo. App. W.D. Feb. 13, 2019):
Even though 19 CSR 25-30.060(3) and Form No. 8 state that an officer must certify that no radio transmissions occurred "inside the room" where a breath test was administered, this did not render inadmissible a breath test performed in a patrol vehicle because 19 CSR 25-30.050(2) expressly permits breath tests to be performed in "buildings or vehicles."
Facts: A trial court excluded breath test results performed inside a patrol car because 19 CSR 25-30.060(3) and Form No. 8 state that an officer must certify that no radio transmissions occurred "in the room" where the test was administered, and a patrol car is not a "room."
Holding: Driver's reading of 19 CSR 25-30.060(3) and Form No. 8 would completely nullify the effect of 19 CSR 25-30.050(2), which allows breath tests in "buildings or vehicles." Driver's argument fails because a "room" refers to a defined or enclosed space, and because the Supreme Court has held that DHSS's blood testing *regulations* control over contrary provisions in DHSS *reporting forms*.

Weisner v. Dir. of Revenue, 2019 WL 659681 (Mo. App. W.D. Feb. 19, 2019):
Holding: Even though 19 CSR 25-30.060 and Form No. 8 state that an officer must certify that no radio transmissions occurred "inside the room" where a breath test was administered, this did not render inadmissible a breath test performed in a patrol vehicle because 19 CSR 25-30.050(2) expressly permits breath tests to be performed in "buildings or vehicles."

Boggs v. Dir. of Revenue, 2018 WL 4868281 (Mo. App. W.D. Oct. 9, 2018):
Even though (1) Driver, who was found at his residence about 3:00 a.m., said he did not drink after an accident which occurred at 11:00 p.m., and (2) Driver was intoxicated at his residence, trial court was not required to find as a "matter of law" that there was probable cause to believe Driver was driving while intoxicated at time of accident.

Facts: Driver's vehicle was found at a single-car accident scene about 2:30 a.m. Trooper went to Driver's residence at 3:00 a.m., and found Driver intoxicated. Driver said the accident occurred at 11:00 p.m., and Driver had not drank after the accident. The trial court found that there was no probable cause to believe Driver was driving while intoxicated, and reinstated Driver's license. Director appealed.
Holding: Director argues that because Driver told Trooper he had not consumed alcohol after the accident, the trial court was required to find as a matter of law that Driver was driving while intoxicated. Even accepting that the trial court deemed Trooper's testimony to be credible, there is no authority for the proposition that a Driver's statement that they have not consumed alcohol after an accident establishes, as a matter of law, probable cause to believe Driver was driving while intoxicated hours earlier. Here, Driver contested he was intoxicated by cross-examining Trooper. The trial court was free to draw its own conclusion about whether Driver was intoxicated at 11:00 p.m. When the evidence is contested, and when different inferences can be drawn from it, no error can be found in the trial court's assessment of the evidence.

Rocha v. Dir. of Revenue, 2018 WL 3730909 (Mo. App. W.D. Aug. 7, 2018):
Even though (1) Officer observed Driver with a "strong odor" of alcohol coming from his breath and his eyes were bloodshot, and (2) Driver admitted drinking around midnight, where Officer stopped Driver for speeding and expired registration at 3:00 in the afternoon, there were not reasonable grounds to believe Driver operated car in intoxicated or drugged condition, and trial court's revocation of license is reversed.
Holding: Probable cause will exist when an officer observes illegal or unusual operation of a vehicle and observes indicia of intoxication after coming in contact with a driver. Here, Officer's only evidence of impairment was the smell of alcohol and bloodshot eyes. Although Driver admitted drinking, this was 15 hours before the stop. Officer did not observe glassy eyes or other eye abnormalities associated with intoxication. Officer did not observe any physical impairments, such as loss of balance (even though Driver refused to take any field sobriety tests). Officer did not observe slurred speech or other verbal impairments. The issue is not whether Driver consumed alcohol before he drove, the relevant inquiry is whether Officer had reasonable grounds for believing Driver operated the vehicle in intoxicated or drugged condition. Intoxication requires proof that the consumption of alcohol or drugs interferes or impairs the driver's ability to properly operate the vehicle. The smell of intoxicants and bloodshot eyes was insufficient. Judgment revoking license reversed.

Roesing v. Director of Revenue, No. WD80585 (Mo. App. W.D. March 13, 2018):
Sec. 577.041.1 does not require that Drivers be given the opportunity to consult with an attorney in private; thus, even though Officer listened in on Driver's attorney-client phone call – after which Driver refused to consent to a breath test – Driver's right to consult with an attorney was not violated and his refusal counts as a valid refusal resulting in license suspension.
Facts: Driver was arrested for DWI. Officer read Driver the implied consent law. Driver asked to call his attorney, and reached him by phone. Driver and attorney asked to speak privately, but Officer said that wasn't possible because all rooms in the jail were audio and video recorded. Driver ended up talking to attorney with Officer standing

nearby, listening in. Driver ultimately refused to take a breath test, after consulting with his attorney. At his license suspension hearing, Driver contended his refusal was not valid because he was denied the opportunity to consult with his attorney in private.
Holding: Sec. 577.041.1 provides a statutory right to speak to an attorney before deciding to submit to a breath test. However, there is no constitutional right to speak with an attorney before deciding whether to submit to a breath test. The statute's purpose is solely to provide a reasonable opportunity to contact an attorney. Here, Driver was given that opportunity and, in fact, actually spoke to his attorney. Nothing in the plain language of Sec. 577.041.1 requires that Driver be given the right to confer privately with his attorney. If it is sufficient under the statute to give a person 20 minutes to unsuccessfully contact an attorney, then it is certainly sufficient to give them 20 minutes to successfully contact an attorney, regardless of whether the ensuing conversation is private or not. Driver argues that a non-private communication risks him making inculpatory statements that could be used against him either in the civil license proceeding or at a criminal trial. But here the State is not seeking to use his statements against him. Moreover, attorney-client privilege can be waived, but such waiver must be voluntary. The privilege that attaches to attorney-client communication after exercising the limited statutory right to contact counsel in Sec. 577.041.1 is not waived merely because a driver is required to involuntarily conduct the conversation in the presence of a police officer. Regardless, the attorney-client privilege implicates whether privileged communications can be admitted at trial. The attorney-client privilege does not implicate whether Driver was afforded the limited statutory right to attempt to contact counsel.
Dissenting opinion: When an arrested driver talks to an attorney, the purpose is to discuss both civil issues regarding a driver's license, and potential criminal charges. An arrested driver has a Fifth Amendment right to consult counsel regarding criminal charges. The most widely accepted understanding of an attorney consultation is that it is done privately, and this is the only definition that makes sense in the context of Sec. 577.041. Sec. 600.048.3 requires police stations and jails to have places available for private consultation with attorneys. It does not make logical sense that the legislature would grant a right to speak privately with an attorney when under suspicion of a crime, but not for those in custody suspected of a crime (DWI) who are also at risk of civil penalties (license suspension).

State v. Pylypczuk, 527 S.W.3d 96 (Mo. App. W.D. Aug. 15, 2017):
Even though Sec. 577.023.16 allows records from the Driving While Intoxicated Tracking System (DWITS) to be used to prove prior convictions in DWI cases, the statute does not eliminate the foundational need for those records to be authenticated.
Facts: In DWI case, the State submitted Defendant's DWITS record, which purported to show that Defendant had a prior DWI conviction. The record was neither certified nor accompanied by any kind of business record affidavit, and the State offered no witnesses to testify as to its origins or authenticity. The Prosecutor merely said he had pulled the record from the Dept. of Public Safety website, and it contained the web address of the Dept. of Public Safety. Defendant objected to admission of the record for lack of foundation.
Holding: The State contends that Sec. 577.023 allows DWITS records to be admitted without any foundational requirement. But nothing in Sec. 577.023.16 states that such

records shall be admitted without a foundational requirement. The State argues it must be assumed that since the legislature made such records sufficient to prove prior convictions, it must have intended to eliminate general foundation requirements. But the statute was intended to clarify that DWITS records can be used as evidence of prior convictions, thus eliminating the need for the State to obtain a record of each individual conviction from various courts. Eliminating foundational requirements is not necessary to accomplish this purpose and should not be read into the statute absent language addressing admissibility. The records must be authenticated to be admissible. Reversed and remanded for resentencing as misdemeanor DWI.

McMillin v. Dir. of Revenue, 520 S.W.3d 513 (Mo. App. W.D. June 13, 2017):
Holding: Even though a person can be criminally convicted of a DWI offense for driving a "motorized bicycle" while intoxicated, Director cannot suspend or revoke "motorized bicycle"-Driver's license under Sec. 302.505.1 because "motorized bicycles" are excluded from the statutory definition of "motor vehicle."
Discussion: Sec. 302.505.1 requires the Director to suspend or revoke the license of persons arrested upon probable cause to believe they were driving a "motor vehicle" while intoxicated. For the purpose of Chapter 302, Sec. 302.010(10) provides a "motor vehicle" is "any self-propelled vehicle not operated exclusively upon tracks except motorized bicycles, as defined in section 307.180." Director argues that imposing criminal penalties on a driver who operates a motorized bicycle while intoxicated but not requiring suspension or revocation of license contravenes legislative intent. But the legislature may have recognized that the particular safety risks of motorized bicycles are different than other motor vehicles, and imposed a different regulatory scheme for bicycles for that reason. In any event, the plain language of the statute excluded "motorized bicycles" from the definition of "motor vehicle" throughout Chapter 302.

State v. Larsen, 2016 WL 4374255 (Mo. App. W.D. Aug. 16, 2016):
Even though (1) Sec. 479.170.1 states that where it "shall appear" to a municipal judge that an offense is not cognizable in municipal court, the judge shall refer it to state court; and (2) Sec. 479.170.2 states that DWI offenses in which a defendant has two or more prior DWI convictions are not cognizable in municipal court, where the municipal judge accepted Defendant's guilty plea to DWI and sentenced him, double jeopardy precluded the State from later charging Defendant with the same DWI in state court. This is because the municipal court had subject matter jurisdiction to hear the DWI case. Even assuming that Sec. 479.170 was a restriction upon the municipal court's authority, the statute did not prohibit the judge's actions here because it only requires a judge to refer a case to state court where it "appear[s]" to the judge that such referral is required, and there was no evidence before the judge indicating that Defendant had two or more prior convictions.
Facts: Defendant pleaded guilty and was sentenced in municipal court for DWI. Later, the State charged Defendant, as a persistent DWI offender, with the same incident in State court. The trial court granted Defendant's motion to dismiss on double jeopardy grounds. The State appealed.
Discussion: The State claims that Sec. 479.170 prohibited the municipal judge from hearing the municipal DWI case, and that its judgment is a nullity. But the State's

jurisdictional argument is not valid after *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 349 (Mo. banc 2009), which rejected the notion of "jurisdictional competence." Art. V, Sec. 23, Mo.Const., gives municipal judges the power to hear municipal ordinance violations. Thus, the municipal court had subject matter jurisdiction. The State's argument that Sec. 479.170 imposes a restriction on the municipal court's authority is nothing more than a "jurisdictional competence" argument, not a subject matter jurisdiction argument. Moreover, the statute's plain language requires a municipal judge to refer a case to state court only when it "appear[s]" to the judge that referral is required. Here, there was no evidence before the municipal judge of Defendant's prior convictions. Dismissal on double jeopardy grounds affirmed.

State v. Coday, 2016 WL 1579254 (Mo. App. W.D. April 19, 2016):
Even though the State showed that Defendant had two prior convictions for "driving while under the influence of alcohol" under a Kansas statute, where the Kansas statute allowed conviction for "attempting to operate" a vehicle in an intoxicated condition, the evidence was insufficient to prove Defendant's prior offenses, because Missouri requires that a defendant actually "operate" a vehicle.
Facts: Defendant was convicted of DWI as a persistent offender for having two prior DWI convictions. To prove the prior convictions, the State submitted two reports from Kansas that showed that Defendant had been twice convicted of "driving under the influence of alcohol" under a certain Kansas statute.
Holding: The State has the burden to prove prior convictions beyond a reasonable doubt. The Kansas statute allows conviction for DWI for operating or "attempt[ing] to operate" a vehicle while intoxicated. In Missouri, "attempting to operate" a vehicle does not constitute an intoxication-related traffic offense for purposes of Sec. 577.023. In Missouri, to be guilty of DWI, a person must "operate" the vehicle. Thus, the fact that the State showed that Defendant pleaded guilty to two DWI offenses under Kansas law does not establish beyond a reasonable doubt that Defendant "operated" a vehicle in Kansas. When a foreign conviction encompasses acts outside of those prohibited by Missouri statute, the test is whether the acts committed during the commission of the foreign crime would qualify as an intoxicated-related offense under 577.023. The State contends that Missouri can infer that Defendant was "operating" cars in Kansas because he was also charged with speeding in Kansas at the same time. The Kansas speeding charges, however, were dismissed, so Missouri cannot infer guilt from a mere charge. Case remanded for resentencing without persistent offender status.

Blackwell v. Director of Revenue, 2016 WL 2338354 and Harrell v. Director of Revenue, 2016 WL 2338284 (Mo. App. W.D. May 3, 2016):
Holding: Even though Drivers had their BAC tested in 2014 and their hearings were not until 2015, Director, in order to admit the BAC results, need not show that the simulator needed to maintain the BAC machine was recertified in 2014 (*after* the BAC tests at issue), when the machine had been certified within one year *before* the BAC test.
Discussion: 19 CSR 25-30.051(4) provides that a breath alcohol simulator must be certified against a NIST reference thermometer between Jan. 1, 2013, and Dec. 31, 2013, and "annually thereafter." Here, Director showed that the simulator at issue was certified in 2013, but did not show it was recertified in 2014. Drivers took their BAC tests in

2014. Drivers claim that because their hearings happened in 2015, Director had to show recertification of the machine in 2014 in order to lay a foundation for admission of the results in 2015. However, the Director need only show that the machine was used in compliance with the regulations *at the time of the test*. Maintenance checks that occur or don't occur after the BAC test go to the weight of the evidence, not admissibility. Failure to certify the simulator in 2014 may be grounds to argue that the BAC results aren't reliable, but this doesn't affect admissibility because the machine was properly certified at the time of the tests.

*** Birchfield v. North Dakota, 2016 WL 3434398, ___ U.S. ___ (U.S. June 23, 2016):**
Holding: States can criminalize refusal to take a breath test without a warrant after an arrest for drunk driving, because a breath test is categorically a search incident to arrest. However, States cannot criminalize refusal to submit to a blood test without a warrant, due to the blood test's more intrusive nature.

Brown v. McClennen, 2016 WL 1637664 (Ariz. 2016):
Holding: Defendant's consent to chemical test in boating-while-intoxicated case was not voluntary where Officer told him that implied consent law required that he consent.

State v. Valenzuela, 2016 WL 1637656 (Ariz. 2016):
Holding: Defendant's consent to blood and breath test was not voluntary where Officer told Defendant that implied consent law "requires you to submit."

Dobson v. McClennen, 2015 WL 7353847 (Ariz. 2015):
Holding: In charge of driving with a marijuana metabolite in body, a Defendant may establish an affirmative defense by showing that they are a qualified user of medical marijuana under state medical marijuana law, and that the metabolite would not cause impairment.

State v. Barnes, 2015 WL 3473382 (Del. 2015):
Holding: Even though Truth in Sentencing statute purported to eliminate parole for "all crimes," the statute did not eliminate parole for DWI offenses where none of the key legislative, executive or judicial backers of the statute had intended that result.

State v. Won, 2015 WL 7574360 (Haw. 2015):
Holding: Where refusal to consent to BAC test was crime carrying up to 30 days in jail and $1,000 fine, Defendant's consent to BAC test was not voluntary; he was forced to choose between fundamental constitutional rights.

State v. Eversole, 2016 WL 1296185 (Idaho 2016):
Holding: Even though State had an implied consent law, where Defendant refused to take a breath test, the implied consent was withdrawn for the breath test and also for blood testing.

State v. Meyers, 2019 WL 1086595 (Iowa 2019):
Holding: Even though screening test of Defendant's urine showed "possible" presence of amphetamines or marijuana metabolites, this did not support DWI conviction absent a confirmatory test to verify and identify a quantifiable amount of drug.

State v. Ryce, 98 Crim. L. Rep. 507, 2016 WL 756686 (Kan. 2/26/16):
Holding: Driver who refused to consent to warrantless blood draw in DWI case cannot be criminally prosecuted for the refusal, because Driver has a due process right to withdraw consent under the implied-consent laws; once Driver withdrew consent, the "consent" under the implied-consent law was no longer voluntary.

State v. Weddle, 2020 WL 424922 (Me. 2020):
Holding: Statute requiring police to test blood of all drivers involved in fatal or serious accidents without a warrant is unconstitutional.

Com. v. Camblin, 2015 WL 3631943 (Mass. 2015):
Holding: Trial court should have held a *Daubert* hearing to determine whether source code of breath test machine functioned in a manner that reliably produced accurate results.

Com. v. Gerhardt, 101 Crim. L. Rep. 658 (Mass. 9/19/17):
Holding: Officer can't give an opinion about whether a Defendant-Driver was impaired by marijuana based on field sobriety tests; but Officer can testify that the tests showed lack of balance, coordination and mental acuity.

State v. Carson, 102 Crim. L. Rep. 71 (Minn. 10/11/17):
Holding: Conviction for DWI can't be based on being under influence of a chemical not listed in Minnesota's chemical laws; here, Defendant was under influence of DFE, a propellant used to clean electronic equipment.

State v. O'Connor, 99 Crim. L. Rep. 11, 2016 WL 1178331 (N.D. 3/28/16):
Holding: Where implied consent law required that Officer inform Driver that failure to take BAC test was "a crime punishable in the same manner as DWI," Driver's BAC results must be suppressed where Officer failed to give this warning; court rejects State's argument that Driver's voluntary acquiescence to the test cured the failure to warn.

State v. Banks, 2019 WL 474794 (Or. 2019):
Holding: Defendant-Driver's refusal to consent to a BAC test at the time of his arrest is not admissible as evidence of guilt; a driver does not irrevocably give consent by driving on a public road.

Com. v. Myers, 101 Crim. L. Rep. 495 (Penn. 7/19/17):
Holding: State's Implied Consent Law did not authorize taking blood draw from unconscious suspected drunk Driver-Defendant, because the law leaves the option of refusal, which an unconscious person can't do.

State v. Sarkisian-Kennedy, 2020 WL 399105 (Vt. 2020):
Holding: Horizontal gaze nystagmus (HGN) test is not admissible without expert testimony.

People v. Lopes, 2015 WL 4397765 (Cal. App. 2015):
Holding: Even though Defendant had prior "felony" DWI as a juvenile and was committed to DWI Youth Program, this was not a "prior violation punished as a felony" that would enhance a later adult DWI charge; the juvenile violation and sentence to the Youth Program was not a true prior felony conviction, even though it was labeled as such.

People v. Valencia, 2015 WL 5725517 (Cal. App. 2015):
Holding: DWI Defendant-Driver's refusal to submit to chemical test does not, by itself, constitute resisting, delaying or obstructing a police officer.

People v. Viburg, 2020 WL 238715 (Colo. App. 2020):
Holding: Prior convictions for DWI are elements of felony DWI that must be found by a jury beyond a reasonable doubt.

Hernandez v. State, 2019 WL 513626 (Ga. App. 2019):
Holding: Defendant-Driver's consent to blood test was not voluntary where Officer falsely told her that her out-of-state license would be revoked if she refused.

State v. Fichtner, 2015 WL 4171399 (Minn. App. 2015):
Holding: The presence of one or more children in a Defendant's DWI car constitutes only one aggravating factor, not a separate, stackable factor for each child.

State v. Perry, 2015 WL 869373 (N.J. App. 2015):
Holding: Statute making it a crime to drive with a suspended license following a DWI did not criminalize driving without reinstatement of the license after the imposed term of suspension had expired.

Roop v. State, 2016 WL 690755 (Tex. App. 2016)"
Holding: Good-faith exception to exclusionary rule did not apply to Officer's reliance on State implied consent and mandatory blood draw laws in conducting a warrantless blood draw, because seeking a warrant would not have conflicted with the State laws.

State v. Molden, 2016 WL 690795 (Tex. App. 2016):
Holding: Exclusionary rule applied even though Officer relied in good faith on existing appellate precedent that authorized warrantless blood draw based on implied consent law; here, Defendant had refused a blood test, and *McNeely* held a warrant was required to conduct one absent exceptional circumstances.

Navarro v. State, 2015 WL 4103565 (Tex. App. 2015):
Holding: Use of blood plasma to conduct blood test for DWI was not legally valid because Legislature used the term "blood," which is different than "plasma."

Friend v. State, 2015 WL 50260878 (Tex. App. 2015):
Holding: In DWI case, even though Defendant had executed a *Miranda* waiver and answered some questions on a police form, he unequivocally invoked his right to silence when he wrote on the form that he was "not saying" in response to questions about alcohol consumption; Officer's trial testimony that Defendant wrote "not saying" on the form violated Defendant's right to silence.

State v. Ainsworth, 2016 WL 97416 (Utah App. 2016):
Holding: Statute which created a more serious felony for Defendants who injured or killed someone while driving under the influence of a "measurable amount" of an illegal substance violated the uniform operation of laws provision of Utah Const.; there was no rational basis for charging those with a measurable amount of drug with a higher offense than those under the influence of a non-measurable amount but who were still demonstrably impaired.

State v. Mullen, 2015 WL 1035633 (Wash. App. 2015):
Holding: Where Defendant's prior offense was for reckless driving – which may or may not have involved alcohol or drugs – Defendant had 6th Amendment right to a jury finding that the prior offense involved alcohol or drugs before it could be used as an enhancer for a new DWI charge.

City of Seattle v. Pearson, 2016 WL 793911 (Wash. App. 2016):
Holding: Natural dissipation of THC in blood does not justify warrantless blood draw.

Com. v. Myers, 2015 WL 3652667 (Pa. Super. 2015):
Holding: Where Defendant was arrested in response to a report of a man screaming in an area (and not arrested due to a vehicle incident), but then was rendered unconscious by an intervening event and taken to the hospital, the exigent circumstances exception to the warrant requirement did not allow a warrantless blood draw pursuant to the State's implied consent law for a DWI offense that Defendant was also believed to have committed.

Escape Rule

Harmon v. State, 2020 WL 7702250 (Mo. App. E.D. Dec. 29, 2020):
Holding: (1) Where Movant pleaded guilty to felony stealing in 2014 before *Bazell* (2016) and received a suspended imposition of sentence (SIS), but his probation was not revoked and sentence executed until after *Bazell* in 2018, and Movant filed a timely 24.035 motion, Movant is entitled to sentencing as a misdemeanor because his conviction was not "final" before *Bazell* since he had received an SIS; and (2) Even though Movant failed to appear multiple times for probation revocation hearings and warrants had to be issued for his arrest, the "escape rule" does not bar Movant's claim because the "escape rule" does not apply to post-capture errors, and sentencing Movant for a felony was a post-capture error.
Discussion: Where a postconviction motion challenges errors that occur after Movant has been returned to custody, the escape rue does not apply. The escape rule must not apply to post-capture errors to avoid the temptation to complete the proceedings in a less diligent manner secure in the knowledge that any errors or short-cuts would not result in reversals.

State ex rel. Koster v. Heagney, No. ED103976 (Mo. App. E.D. June 30, 2016):
(1) NGRI-committed Petitioner was entitled to habeas relief on claim that the notice of NGRI in his case was fatally defective because it omitted the language required by Sec. 552.030.2 that he had "no other defense;"(2) Sec. 552.030.2 does not require that the accused himself sign the notice of NGRI; and (3) the "escape rule" applies to "appeals," not habeas corpus actions, but even assuming that it applies, habeas court did not abuse its discretion in not applying the "escape rule" because its application could leave an unlawfully-committed NGRI defendant incarcerated for life without recourse.
Facts: Habeas petitioner challenged his two separate NGRI commitments on various grounds. Petitioner had escaped from the Department of Mental Health hospital for nine months prior to the habeas petition. The habeas court granted relief. The State sought a writ of certiorari to overturn the habeas court's ruling.
Holding: (1) Sec. 552.030.2 provides that the State may accept a defense of NGRI "if the accused has no other defense and files a written notice to that effect." Here, defense counsel filed a notice, but it omitted the "no other defense" language. Even though the NGRI court, in its commitment order, said the defendant had no other defense, the notice was fatally defective because it lacked the statutorily required language. Thus, the habeas court did not err in granting relief on this claim. But (2) Sec. 552.030.2 does not require the written notice be signed personally by the defendant. Thus, the habeas court erred in granting relief on this basis. Finally, (3) the "escape rule" applies to "appeals," not habeas corpus actions. Even assuming that the "escape rule" applies, however, the habeas court did not abuse its discretion in not applying the "escape rule" because its application could leave an unlawfully-committed NGRI defendant incarcerated for life without recourse. Habeas judgment affirmed in part, reversed in part.

State v. Hogan, 610 S.W.3d 417 (Mo. App. S.D. Oct. 28, 2020):
Holding: (1) Even though appellate court applies "escape rule" to deny review of the trial errors in Defendant's case (because Defendant failed to appear for sentencing and

absconded for eight months), the "escape rule" only applies to errors that occurred before the alleged escape; thus, Defendant can raise a post-escape sentencing error claim; (2) where the oral pronouncement of sentence differed from the written sentence and judgment, the oral pronouncement controls; case remanded for entry of corrected sentence.

State v. Savage, 2020 WL 5776016 (Mo. App. W.D. Sept. 29, 2020):
Holding: Even though Appellant-Defendant had recently not reported to his parole officer while direct appeal was pending, where he had previously properly reported at least nine times during the past year and the parole officer had recommended "delayed action" due to his current failure to appear, Court of Appeals will not apply escape rule to dismiss appeal.

Benedict v. State, 2018 WL 6047963 (Mo. App. W.D. Nov. 20, 2018):
Holding: (1) Where, after Movant had failed to appear at scheduled sentencing, the court sentenced Movant to a sentence which was allegedly in excess of that authorized by law, the "escape rule" did not bar his 24.035 claim because the "escape rule" does not apply to post-capture error; and (2) even though Movant's claim that his sentence was in excess of that authorized by law may not be meritorious, the appellate court cannot decide the claim in the first instance but must remand for motion court to enter Findings on the claim.

State ex rel. Koster v. Oxenhandler, 2016 WL 1039446 (Mo. App. W.D. March 15, 2016):
(1) Even though Defendant (Petitioner) had previously been denied habeas relief in another county, Rule 91 does not prohibit a successive habeas petition in a different county where Defendant had been moved; (2) even though the issue on which Defendant obtained habeas relief may not have been pleaded in his petition, Rule 96.01(a) authorizes a court to grant habeas relief "although no petition be presented;" (3) where the trial court ordered an NGRI evaluation before Defendant had filed a notice of intent to rely on NGRI, the trial court erroneously injected the issue of NGRI itself (without having been raised by Defendant) and had no authority to accept the NGRI plea and commit Defendant to DMH; (4) while there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident; (5) although an on-the-record NGRI plea hearing may not be required in every case, it is a "best practice" that is "strongly encouraged" to ensure the plea is knowing and voluntary, to ensure that there is no other defense, and to ensure the defendant understands the consequences of the plea; (6) the "escape rule" does not apply to Rule 91 proceedings, or does not apply here as a matter of discretion; and (7) the trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination.
Facts: In 2004, Defendant was charged with assault. Subsequently, various DMH reports found him incompetent to proceed. In 2006, DMH found him competent. In April 2007, apparently at the request of the court, DMH also prepared a criminal

responsibility report which found that Defendant was NGRI at the time of his offense; the report also stated Defendant's version that the offense was an accident. On July 9, 2007, various bench notes indicate that Defendant filed notice of intent to rely on NGRI that day, and notice that he had no other defense. Also on July 9, 2007, bench notes indicate that the court accepted Defendant's NGRI plea, and committed him to DMH. In 2011, Defendant escaped from DMH in St. Louis; he was soon recaptured. While in St. Louis, Defendant sought habeas relief from his NGRI plea in St. Louis, which was denied. Defendant was transferred to Fulton (Callaway County). He then sought habeas relief from his NGRI plea in Callaway County. The habeas court granted relief on multiple grounds. The habeas court refused to apply the "escape rule." The habeas court also awarded "jail time credit" for all time Defendant spent in DMH. The State appealed.
Holding: (1) As an initial matter, the State argues that Defendant's Callaway petition is precluded because of the decision on the merits in the St. Louis habeas case. However, Rule 91 does not expressly prohibit the filing of successive habeas petitions in lower courts. (2) The State argues that Defendant's claim was not presented in his petition, but Rule 91.06(a) allows granting of habeas relief even without a petition. (3) Although Sec. 552.030 does not require that a NGRI plea be taken in open court on-the-record, and does not require that a Defendant personally sign the notice that he has no other defense, the plea court here violated due process by not following the required order of the statute. The statute requires that *before* a court can accept an NGRI plea, (i) the Defendant must first inject the issue by timely filing a notice of intent to rely on NGRI; (ii) thereafter, the trial court must order a criminal responsibility evaluation; (iii) the defendant must have no other defense *and* must file a written notice to that effect; and (iv) the criminal responsibility evaluation must support the NGRI defense. Here, the responsibility report was not an authorized pretrial evaluation because it was ordered off-the-record *before* Defendant had asserted his NGRI defense. Also, the report did not support the NGRI defense since it contained Defendant's assertion that the crime was an accident, which was in conflict with Defendant's written notice that he had no other defense, thus raising an issue whether Defendant had a defense he was not willing to waive. By requiring Defendant to submit to a criminal responsibility evaluation before he had asserted the NGRI defense, the trial court erroneously injected the defense itself. The court then accepted the NGRI plea on the very day it was asserted – a procedural impossibility if Secs. 552.020.4 and 552.030.3 are followed, since both sections mandate (and only authorize) the preparation of a responsibility report *after* the NGRI defense is timely asserted *by the accused*. Unless the affirmative defense of NGRI is injected by the accused, the trial court has no authority to acquit of NGRI. (4) A defendant can waive the procedural irregularity of a premature responsibility report; however, to preclude later habeas relief, the court and State should make certain that the defendant's knowing, intelligent and voluntary waiver of the procedural irregularity is demonstrated in the record. While there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve the doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident. (5) Though the appellate court does not decide whether an on-the-record NGRI plea is needed in *every* case, "we *strongly* encourage the practice." An on-the-record inquiry would ensure that the accused's plea is knowing and voluntary, that he has no other defense, and the he

understands the consequences of a plea, including that he may be committed to DMH for longer than a prison term. (6) The "escape rule" does not apply to Rule 91 proceedings, but even if it does, it need not be applied here as a matter of discretion; there is no indication that Defendant's escape adversely affected the criminal justice system. (7) The trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination. Judgment setting aside NGRI plea and remanding case for trial affirmed.

State v. Lazarides, 2016 WL 852889 (Or. 2016):
Holding: Court of Appeals lacked authority to apply escape rule after Defendant had been returned to custody.

Hess v. Com., 2019 WL 405319 (Ky. App. 2019):
Holding: Even though Defendant absconded, appellate court would not apply "escape rule" where Defendant participated in the probation revocation proceeding that was the subject of the appeal, and the issues on appeal weren't directly related to her absconding

Ethics

In re: Schuessler, 578 S.W.3d 762 (Mo. banc August 13, 2019):
Holding: (1) Where assistant prosecutors were aware of police misconduct by an Officer-friend and covered it up (by among other things, filing a false charge and lying to Prosecutor's Office and law enforcement investigators), prosecutors are suspended for violating Rules 4.1.13(b)(violating legal obligation to engage in conduct reasonably necessary to protect the best interest of their employer-organization (Prosecutor's Office)); 4-8.4(c)(engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and 4-8.4(d)(engaging in conduct prejudicial to administration of justice); and (2) assistant prosecutor violated Rule 4-8.4(g)(which prohibits words or conduct "in representing a client" showing bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation) when she made racist and homophobic remarks about a criminal suspect even though the suspect was not her "client;" a prosecutor is always representing the people of Missouri and the remarks were made in the Prosecutor's Office, during working hours.

State ex rel. Gardner v. Boyer, 2018 WL 6321238 (Mo. banc Dec. 4, 2018):
Holding: Even though Prosecutor was investigating Officer-Witness for possible illegal use of force in Defendant's case, this was not a conflict of interest in Defendant's case and did not create an appearance of impropriety for Defendant's case, so trial court should not have disqualified Prosecutor or the entire Prosecutor's Office from prosecuting Defendant's case.
Facts: Defendant was charged with unlawful use of a weapon and resisting arrest in an incident involving Officer-Witness. Prosecutor's Office had a policy that any use of force by police would be investigated for possible illegal use of force, so Prosecutor's Office was conducting a routine investigation of Officer-Witness. Thus, Officer was both a witness in Defendant's case, and a person under investigation. Officer-Witness moved

to disqualify Prosecutor and Prosecutor's Office from Defendant's case on grounds that there was an "appearance of impropriety" and that statements Officer made in the criminal case could be used against him in the investigation. The trial court disqualified Prosecutor's Officer.
Holding: An entire Prosecutor's Office can be disqualified from a case if, first, a particular attorney in the office has a conflict of interest, and second, that conflict is imputed to the entire officer either through the Rules of Professional Conduct, or because it creates an "appearance of impropriety." Here, there was no finding that any attorney in Prosecutor's Office even had a conflict of interest. Absent a finding of a conflict, the trial court's disqualification inquiry should have ended. Nevertheless, when applying the "appearance of impropriety" test, a court should look at the fairness of the trial for the *defendant*, not to a third party. It is the fairness of Defendant's trial which the court should have been concerned with, not an appearance of fairness toward Witness.

State ex rel. Peters-Baker v. Round, 2018 WL 6320826 (Mo. banc Dec. 4, 2018):
Holding: Even though postconviction Movant's former Public Defender on direct appeal had joined Prosecutor's Office, where the Prosecutor's Office screened former Public Defender off from postconviction case and there was no claim that the screening was inadequate, trial court erred in disqualifying entire Prosecutor's Office from postconviction case.
Discussion: An entire Prosecutor's Office can be disqualified from a case if, first, a particular attorney in the office has a conflict of interest, and second, that conflict is imputed to the entire officer either through the Rules of Professional Conduct, or because it creates an "appearance of impropriety." Here, former Public Defender had a conflict of interest because she previously represented Movant. But the Rules of Professional Conduct do not impute that conflict to the entire office, and there is no "appearance of impropriety" where former Public Defender was screened from the postconviction case. This does not mean that screening will always suffice to prevent disqualification. E.g., where the "boss" of the Prosecutor's Office is the attorney who has the conflict, an entire Office may need to be disqualified. But courts should be cautious in disqualifying entire Prosecutor's Offices because the elected Prosecutor represents the people who elected her to make prosecutorial decisions for their county.

State v. Marchbanks, 2018 WL 2407605 (Mo. App. W.D. May 29, 2018):
Holding: (1) Even though Defendant was represented by counsel in a drug case and tampering case, and counsel had filed an Assertion of Rights form saying that Defendant was asserting his right to silence, where Officers then questioned Defendant about a murder case while he was in jail, the trial court erred in suppressing those statements because *Miranda* rights cannot be anticipatorily invoked in anticipation of potential future questioning; and (2) even though the Officers' questioning of Defendant may have violated Rule 4-4.2 (which prohibits lawyers from communicating with represented persons and the Prosecutor was ultimately responsible for the Officers' conduct), Defendant makes no argument that Rule 4-4.2 provides a basis to exclude the statements independent of *Miranda*, so court does not decide that issue.
Discussion: Even though Defendant's *Miranda* claims fails because *Miranda* rights cannot be anticipatorily invoked, "[t]his Court is nonetheless sympathetic to

[Defendant's] situation." Officers should have known that Defendant was represented by counsel in both the drug and tampering cases. The Assertion of Rights form was filed with both the jail and on Case.net in the drug and tampering cases. When a party is known to be presented by counsel, that party should only be contacted through their counsel, per Rule 4-4.2. The Prosecutor is responsible for the actions of Officers, even if the Prosecutor didn't actually know that the Officers were going to question Defendant about the murder. There was a responsibility upon the Prosecutor not to sanction or take advantage of statements taken by Officers from a person represented by counsel in the absence of his counsel. However, the case law on this is not based on constitutional protections, and Defendant makes no argument that Rule 4-4.2 may provide a basis to exclude the statements, so we do not reach that issue.

Davis v. Wieland, 2018 WL 2921894 (Mo. App. W.D. June 12, 2018):
Holding: Trial court did not abuse discretion in sanctioning Attorney for sending letter to opposing-party's expert which cited to a colleague of the expert in suggesting that expert's methodology was flawed; although Rule 4-3.4 does not prohibit an Attorney from trying to convince an expert that an opinion is erroneous and should be reconsidered in light of particular facts or the opinion of other experts, when an Attorney emphasizes his connection with an expert's colleagues or superiors, it constitutes an impermissible form of pressure on the expert's decision to testify (because it implies the possibility of punishment for the expert), and may violate Rule 4-3.4 (which prohibits attorneys from obstructing another party's access to evidence and from falsifying evidence), as well as criminal laws on witness tampering.

Bartko v. DOJ, 103 Crim. L. Rep. 460 (D.C. Cir. 8/3/18):
Holding: DOJ is not entitled to blanket law enforcement exemption from disclosure under Freedom of Information Act of ethical violations by US Attorney.

In re Neary, 102 Crim. L. Rep. 154 (Ind. 11/6/17):
Holding: Prosecutor disciplined for secretly listening to private attorney-client conversations at police station; this violated (Indiana) professional rules 4.4(b)(using evidence gathering methods that violate third person's legal rights) and 8.4(d)(conduct prejudicial to justice).

Maine Prof'l Ethic Comm'n, 101 Crim. L. Rep. 52 (c. April 2017):
Holding: Under Maine Rule 4.2, Prosecutor who knows that victim is represented by counsel cannot communicate with victim without going through counsel; prosecutor represents society, not the victim, and has a different duty than victim's counsel.

In re Chavez, 100 Crim. L. Rep. 459 (N.M. 2/6/17):
Holding: Prosecutor violated New Mexico Rule 4.4(a), which prohibits lawyers from using methods to obtain evidence that violate rights of third parties, where Prosecutor issued subpoenas to gather evidence in investigations that were not cases before a grand jury or cases filed in court; Prosecutor used subpoenas to gather cell phone records and medical records for matters that weren't yet pending in court.

Disciplinary Counsel v. Brockler, 98 Crim. L. Rep. 543 (Ohio 2/25/16):
Holding: Prosecutor acted unethically when he used a fake Facebook identity to chat with an alibi witness; Prosecutor's conduct was dishonest, deceitful and a misrepresentation, and violated duty of honesty.

Ariz. State Bar Comm. on Rules of Prof. Conduct, Op. 15-01 (June 2015), 97 Crim. L. Rep. 414: Arizona adopts rule that forbids defense counsel from advising Defendants from entering into plea agreements that waive claims of ineffective counsel, and forbids prosecutors from proposing such deals.

Editor's Note: Missouri Formal Opinion 126 is similar.

N.H. Bar Ass'n Ethics Comm., Op. 2015-16/9, 99 Crim. L. Rep. 15 (N.H.):
Holding: Lawyer appointed to be "standby counsel" in a case should seek guidance from trial court as to what lawyer's duties as "standby counsel" are in terms of investigation, discovery, hearing attendance, legal research, and advice; given that a Defendant has a right to self-representation, the scope of "standby counsel's" duties will "need to be developed through consultation between the court and the defendant, and not simply imposed."

N.Y.C. Bar Ass'n Comm. On Prof'l Ethics, Op. 2018-2 (4/13/18):
Holding: Even though New York has an ethics rule dealing with responsibilities of Prosecutors in dealing with exculpatory evidence and wrongful convictions, the Prosecutor is also obligated under the general duty of competence, Rule 1.1, to investigate credible exculpatory evidence that is revealed after a Defendant is convicted even if the special ethics rule for Prosecutors isn't implicated.

N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 1098 (6/10/16):
Holding: New York ethics committee holds that it is unethical for prosecutors to structure plea bargains that require defendants to give up right to pursue ineffective assistance of counsel claims.

N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 1084 (N.Y. 1/22/16):
Holding: An attorney whose client has died cannot reveal the client's statements that would exculpate another person unless (1) such disclosure was impliedly authorized in that the lawyer believes the client would have wanted the statement to be revealed; (2) revealing the statement is necessary to prevent "death or substantial bodily injury," such as to exculpate someone under sentence of death (but not merely someone in prison because mere incarceration does not involve "death or substantial bodily injury"); or (3) someone who is legally allowed to waive the attorney-client privilege on behalf of the deceased client does so.

Evidence

State v. Carpenter, 2020 WL 5200894 (Mo. banc Sept. 1, 2020):
Trial court abused discretion in excluding Defendant's eyewitness identification Expert, because such testimony is now admissible under Sec. 490.065.2, in that it is scientific expert testimony which will help the trier of fact understand the evidence.
Facts: Defendant was charged with a robbery, where the key question was Victim's identification of Defendant as the robber. Victim testified he was "100% certain" Defendant was the robber. Defendant sought to call an eyewitness identification Expert to testify as to reliability issues with "show-up" identifications. The trial court excluded the Expert on grounds that such testimony is inadmissible under cases such as *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988) and its progeny.
Holding: Law and science have changed since 1988. *Lawhorn* has been superceded by Sec. 490.065.2, which allows expert testimony if the Expert is qualified; the testimony will help the jury understand the evidence; the testimony is based on sufficient facts, reliable principles, and reliably applied principles. Expert testimony about the reliability of eyewitness identifications meets these requirements. Since 1988, there has emerged a "near perfect scientific consensus" concerning the potential unreliability of eyewitness identification. The question is whether the jury would be better off with this information than without it, i.e., whether it would help the jury understand and evaluate the evidence. The answer is yes. The State argues the Expert is making an impermissible comment on Victim's credibility. But the State misconstrues "credibility" with "accuracy." Victim was telling the truth as he believed it to be. Jurors tend to give great weight to victim's confidence in their identification. But science has shown that eyewitness testimony is not reliable even when victims think they are telling the truth. The Expert did not attempt to say that this particular Victim wasn't accurate; that is the sole province of the jury. But the expert could testify generally about scientific evidence showing eyewitness identifications are unreliable. The availability of cross-examination, closing argument, and MAI-CR 310.02 on expert identification are not sufficient justifications to exclude expert testimony that would help the jury.
Editor's note: The dissenting opinion – although agreeing with the general proposition that eyewitness testimony is now admissible under Sec. 490.065.2 – would hold that because the offer of proof on the Expert included both admissible and inadmissible portions, the trial court did not abuse discretion in excluding the Expert. "Going forward, practitioners should take caution that expert testimony about eyewitness identification must comport with the facts and evidence in the case to be admissible, and practitioners and circuit courts should carefully examine the relevance of the testimony to ensure its admissibility."

Kappel v. Prater, 2020 WL 2392492 (Mo. banc May 12, 2020):
Holding: (1) Even though photos taken of an accident vehicle were enlargements of low-quality, grainy photos, where they fairly and accurately depicted the vehicle, they were admissible; and (2) even though Defendant admitted the photos to try to disprove Plaintiff's claim that the accident caused her injury, Defendant was not required to present expert testimony on this matter to admit the photos; the trial judge determined the photos of the vehicle's condition were relevant to showing the probable speed of the

vehicles at time of accident, and such inferences were not beyond the jury's knowledge, even without expert testimony.

State v. Williams, 2018 WL 2016084 (Mo. banc May 1, 2018):
Holding: (1) Mo. Const. Art. I, Sec. 18(c), allowing propensity evidence in child sex cases, does not violate due process because federal and state courts have historically allowed propensity evidence in sex cases with the protection that a trial court can exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice; (2) a trial court is not required to make an express finding on-the-record that evidence is more probative than prejudicial, where the record indicates a sound basis for the trial court's actions (indicating that a balancing occurred); (3) a trial court should consider a variety of factors in conducting a balancing test, including the similarity of prior acts; the lapse in time between the prior acts and the charged offense; the State's need for the prior act evidence to prove its case; and the amount of time the State spends at trial proving the prior act; and (4) trial court did not abuse discretion in admitting, by stipulation, evidence that Defendant had previously been convicted of a child sex offense; the use of the stipulation limited the prejudice of the prior offense more than, e.g., having the prior victim testify.

State v. Prince, 534 S.W.3d 813 (Mo. banc Dec. 5, 2017):
(1) Even though Art. I, Sec. 18(a) allows admission of prior criminal acts, whether charged or uncharged, in child sex cases to show propensity, the evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice; but (2) prior juvenile adjudication for child sex offense was not too remote in time nor too dissimilar to the instant crime to be legally irrelevant.
Facts: Defendant was charged with murder and a child sex offense, for killing a child. The State admitted Defendant's prior juvenile adjudication for a child sex offense committed in 2004.
Holding: Art. I, Sec. 18(c), allows introduction in child sex cases of prior criminal offenses, whether charged or not, to corroborate the victim's testimony or show propensity to commit the charged crime. Defendant's prior juvenile adjudication is logically relevant, but the question is whether it is legally relevant. In other jurisdictions wherein the admission of prior adjudications of sex offenses against children is admissible to demonstrate propensity, there is guidance regarding admission of prior conduct. Remoteness is not subject to a rigid rule, but will depend on the facts of the case. Remoteness and similarity of the prior conduct must be considered together. Remoteness may render evidence inadmissible when the prejudicial effect outweighs the probative value. Here, the prior adjudication is not too remote or dissimilar to be legally irrelevant. While admission of the juvenile adjudication may have been prejudicial to the defense, its probative value was not *substantially* outweighed by the danger of unfair prejudice.

State ex rel. Tipler v. Gardner, 2017 WL 405805 (Mo. banc Jan. 31, 2017):
Art. I, Sec. 18(c) regarding prior bad acts and propensity evidence in child sex cases applies to all prosecutions which occur after Dec. 4, 2014 (its effective date), even though the charged crimes occurred earlier; the amendment is prospective (not retrospective) because the "event" it applies to is "prosecutions" (trials) which occur after its effective date.
Facts: Defendant was charged with a child sex offense which occurred in 2013. In December 2014, amended Art. I, Sec. 18(c), Mo. Const. took effect. Defendant's trial was in 2016. Before trial, the trial court ruled it would allow prior bad act and propensity evidence under the new amendment. Defendant sought a writ of prohibition.
Holding: Normally, a defendant cannot use an extraordinary writ to challenge a pretrial evidentiary ruling; instead, a defendant must object at trial, and raise the issue on direct appeal. Here, however, Defendant is not challenging *how* the trial court applied the new amendment, but whether the trial court can apply it *at all*, so this may be decided via a writ. Art. I, Sec. 18(c) states that in "prosecutions" for crimes involving a victim under 18 years old, "relevant evidence of prior criminal acts, whether charged or uncharged, is admissible" to corroborate the victim's testimony or demonstrate defendant's propensity to commit the presently charged crime. The amendment further states that the court "may exclude" the evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Defendant claims the amendment cannot be applied retrospectively, and thus, cannot be applied to crimes which occurred before its effective date. Constitutional amendments apply prospectively only. The issue here is what "event" the new amendment applies to – the crime or the trial. The amendment did not make previous conduct illegal or change the punishment for previous conduct. The amendment applies to "prosecutions." The amendment is analogous to changes in rules of evidence, which generally apply to existing cases. Thus, the amendment applies to cases which are tried after its effective date, even though the crimes occurred earlier; this is prospective application of the amendment. The Supreme Court emphasizes it is not deciding here whether the particular evidence to be admitted at Defendant's trial is proper under the amendment, or whether a conviction based on that evidence violates any other state or federal constitutional provision; such issues need to be preserved through objection at trial and raised on direct appeal.

Stiers v. Director of Revenue, 2016 WL 143230 (Mo. banc Jan. 12, 2016):
(1) 19 CSR 25-30.051.2 (2013) requires that a breath test machine be calibrated using three standard solutions in order for its results to be admissible; and, (2) even though this CSR was amended in 2014 to require only one standard solution, the 2014 version is not retroactive, and the applicable version is the one in effect at the time Driver was tested.
Facts: In 2013, Driver was stopped for DWI. A breath test measured a BAC of .172. After Director issued its final order revoking Driver's license based on the results of the breath test, Driver sought a trial *de novo*. Driver contended that her breath test results were not admissible because only one standard solution was used to calibrate the breath test machine. 19 CSR 25.30.051.2 (2013) stated that the standard solutions used "shall have a vapor concentration within five present (5%) of the following values: (A) 0.10%;

(B) 0.08% *and* (C) 0.04%" (emphasis added). The trial court excluded the results because only one solution was used, not three. Director appealed.
Holding: Sec. 577.037 requires that breath tests be performed in accord with DHSS regulations. 19 CSR 25-30.051.2 (2013) used the word "and" regarding the solution. In conjunction with the word "and," the plain language of the CSR requires three solutions be used. DHSS itself indirectly recognized this when it amended the CSR in 2014 to use the word "or" in place of "and." The amendment's use of the word "or" reduced the required number of solutions to one. But that does not negate the fact that three solutions were required in 2013. Director argues that the 2014 amendment should be retroactive because it is "procedural." But while the rules of evidence govern the procedure for admission of evidence and so the rules in effect at the time of trial are followed, that is an entirely different issue from whether regulations governing how to determine whether a breath machine was validly calibrated at the time it was used to test a driver's BAC were followed. The validity of a breath test must be determined and fixed at the time the test is conducted, because it is used as the basis for suspending or revoking a license; this is a substantive effect. Holding otherwise would also produce absurd results, because different standards of validity would be used at the trial *de novo* than when the test was given or when the administrative proceedings occurred. An invalid test cannot be made valid after-the-fact by amending the rules governing validity. The test results were not admissible.

State v. Hartman, 2016 WL 1019271 (Mo. banc March 15, 2016):
(1) Where the State alleged that only one person shot Victim, trial court abused discretion in excluding testimony that a person other than Defendant said he (the other person) did the shooting; this was an out-of-court statement that would have exonerated Defendant and it had indicia of reliability; and (2) even though Defendant-Juvenile was convicted of second-degree murder during a "Hart procedure" penalty phase where the jury found LWOP to be inappropriate, Defendant can be tried again for first-degree murder on remand under the "Hart procedure" again.
Facts: Defendant-Juvenile was charged with first-degree murder. He was not charged as an accomplice. He was alleged to have committed the shooting. The evidence at trial was somewhat conflicting, but was that a group of people went to Victim's house and Victim was shot. Various witnesses made plea agreements to testify against Defendant. The trial court precluded Defendant from calling a Witness to testify that one of the other people who went to the house ("Other Person") said he (the Other Person) shot Victim. Defendant was convicted of first-degree murder. Pursuant to the "*Hart* procedure," a penalty phase was held, during which the jury found that life without parole was not appropriate; thus, the trial court vacated the first-degree murder verdict and found Defendant guilty of second-degree murder.
Holding: Hearsay statements, or out-of-court statements used to prove the truth of the matter asserted, are generally inadmissible. However, due process requires that such statements be admitted where they exonerate the accused and are made under circumstances providing assurance of reliability. To meet this test, the statement must be made spontaneously to a close acquaintance shortly after the crime occurred, be corroborated by some evidence in the case, and be self-incriminatory and against interest. The Other Person's statements to Witness meet this test. Other Person made the

statements to a friend (Witness) on the night of the murder. Other witnesses placed Other Person at the scene of the crime. Other Person's statements implicate only him (the Other Person). Defendant denied any participation in the crime. Had Witness' testimony been admitted, the jury could have exonerated Defendant. A new trial is ordered. On retrial, Defendant can be tried for first-degree murder, but the court must again use the "*Hart* procedure" because Defendant was a juvenile at the time of the crime, even though he is now an adult.

Eichacker v. Eichacker, 2020 WL 891147 (Mo. App. E.D. Feb. 25, 2020):
Holding: Trial court erred in excluding vocational rehabilitation counselor as an "expert" on grounds that she was not licensed; Sec. 490.065 provides that an "expert" is qualified by skill, knowledge, experience, training or education; Expert was qualified by experience; a particular license is not required; non-licensure goes only to weight of expert's testimony, not admissibility.

Revis v. Bassman, 2020 WL 1017626 (Mo. App. E.D. March 3, 2020):
Holding: (1) Trial court abused discretion in medical malpractice case in not allowing cross-examination of Expert-Doctor for defense about his public advocacy for "tort reform" as head of medical association and inconsistent statements he had made about this, because this would show bias and prejudice against plaintiffs in medical malpractice cases; (2) even though there were very few existing scientific studies on the topic about which Expert-Doctor testified (in part due to the rarity of the medical condition at issue), Expert's testimony met the standard for "reliability" under Sec. 490.065.2 (and, thus was admissible), because Expert's testimony was based on his own extensive experience in his medical field; and (3) Sec. 490.065 does not require a "formal" *Daubert* hearing on an Expert's qualifications; the only legal requirement is that parties have an opportunity to be heard on their claims, and this can occur, e.g., in a motion in limine hearing.

State v. Wilson, 2020 WL 3421678 (Mo. App. W.D. June 23, 2020):
Holding: (1) The foundational requirements to admit a Facebook post can be met by having Witness who saw the post testify that Witness recognized the name and profile picture through personal familiarity; that Witness was friends on the platform with the poster; that Witness "talked regularly" on the platform with the poster; that Witness was familiar with the communication style of the poster; and the context and timing of the posts identifying the poster. (2) Where the written judgment did not accurately reflect the charged Defendant was convicted of, this is a clerical error that can be corrected *nunc pro tunc* under Rule 29.12(c).

State v. Loper, 2019 WL 5882880 (Mo. App. E.D. Nov. 12, 2019):
Holding: (1) Trial court abused discretion in admitting domestic-violence-expert/officer's testimony that the strangulation and cut on Victim's wrist (which were contested facts in the case) "absolutely" showed "evidence of power and control in this case," because this was particularized opinion testimony which impermissibly vouched for the credibility of Victim and invaded province of jury on whether Defendant committed domestic assault; and (2) where Defendant's conviction for victim tampering

was predicated on the jury's finding that he was guilty of domestic, the victim tampering conviction must also be reversed.
Discussion: (1) Generalized expert opinion testimony (e.g., about domestic violence generally) is generally allowed, but particularized testimony that applies general principles to the specific facts of a case is not allowed, because this tends to impermissibly comment on guilt or innocence, the credibility of witnesses, and invade the province of the jury. Here, the expert/officer's testimony was impermissible particularized testimony and prejudiced Defendant. It was contested at trial whether Victim's injuries were the result of domestic violence or were self-inflicted in a suicide attempt. Expert/officer testified the alleged strangulation and cut on Victim's wrist "absolutely" showed Defendant's exercise of "power and control" over Victim in this case. This invaded the province of the jury, and vouched for the credibility of Victim. It invested the State's case with "scientific cachet." Defendant's domestic assault conviction is reversed and remanded. (2) Because the victim tampering conviction was predicated on the domestic assault conviction, it must be reversed and remanded, too. The jury instruction for victim tampering said the jury first had to find "that E.S. was the victim of the crime of domestic assault."

State v. Schelsky, 2019 WL 5882871 (Mo. App. E.D. Nov. 12, 2019):
Holding: (1) Even though Defendant attempted to escape from the county jail where he was being held, this did not constitute attempted escape from "custody," because Sec. 556.061(17), defines "custody" as when a person "has been arrested but has *not* been *delivered to a place of confinement*"; (2) Officer's testimony that "I know when you stick a gun in someone's side, you're planning to kill them," and "You don't point a gun at somebody you're not going to kill" was improper lay opinion testimony which invaded the province of the jury on the ultimate issue of Defendant's mental state to commit first-degree assault, but was not plain error due to overwhelming evidence of guilt.
Discussion: Defendant attempted to escape from the county jail, where he was being held before trial. This does not support a conviction for attempted escape from "custody," Sec. 575.200. Sec. 556.061(17) states that a person is in "custody" when he has been arrested but not delivered to a place of confinement. Sec. 556.061(37) states that a place of confinement is any building where a court is legally authorized to order a person charged or convicted of a crime be held. Defendant's offense was attempted escape from "confinement," Sec. 575.210.1, not escape from "custody." Conviction reversed.

John Doe 122 v. Marianist Province of the United States, 2019 WL 7341484 (Mo. App. E.D. Dec. 31, 2019):
Holding: Even though Expert-Priest was an expert in Canon law, dealing with sexual abuse by clergy, and church organizations, this experience did not given him any specialized knowledge that would allow him to testify that Defendant-Religious-School's use of the terms "religious life," "considerable misgivings" and "problems" in old documents meant the school knew of sexual abuse by clergy at the school; this was mere speculation. But case transferred to Supreme Court due to general interest and importance of several issues.

Discussion: Expert testimony is admissible as long as the expert's competence on the subject matter is superior to ordinary jurors and the expert's opinion aids the jury in deciding an issue in the case. But an expert's opinion must still be founded on substantial information, not mere conjecture or speculation. There must be a rational basis for the opinion to take the testimony out of the realm of guesswork. A witness' attempt to state what was in someone else's mind is either sheer speculation or unadulterated hearsay.

State ex rel. Becker v. Lamke, 2019 WL 3294563 (Mo. App. E.D. July 23, 2019):
In child sex case, trial court cannot, *sua sponte*, order pretrial that the State file a memorandum stating the corpus delecti of the charges independent of Defendant's confession, because this would require the State to disclose its privileged work product, opinions, theories, conclusions and mental impressions of the case.
Facts: The trial court, *sua sponte*, ordered the State to file a memorandum stating the corpus delicti of the case. The defense did not request this. The State sought a writ of prohibition. The defense, on appeal, again did not request this memorandum.
Holding: Appellate court notes the unusual posture of this case, since the defense is not requesting the memo at issue. Judge argues his pretrial order was intended to promote a fair and expeditious trial. But the fact that Defendant isn't asking for the memo and isn't contesting corpus delecti indicates that this will not likely be an issue at trial. Meanwhile, the State will suffer irreparable harm if it has to file the memo, because it will require the State to disclose privileged work product, opinions, theories, conclusions and mental impressions of the case. Writ granted.

State v. Suttles, 2019 WL 2656153 (Mo. App. E.D. June 28, 2019):
Holding: As matter of first impression, expert testimony in child sex cases that children often delay disclosing sexual abuse meets the standard for admissibility under Sec. 490.065 (*Daubert* test).

B.J.T. v. D.E.C., 2019 WL 273055 (Mo. App. E.D. Jan. 22, 2019):
Holding: (1) Trial court abused discretion in order of protection case in preventing Witness from testifying on behalf of Petitioner; testimony is only cumulative "when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute;" and (2) trial court erred in imposing a "10 minute rule" on length of witness testimony, because "ten minutes is seldom, if ever, sufficient for a proper adversarial hearing."

State v. Ferguson, 2019 WL 922589 (Mo. App. E.D. Feb. 26, 2019):
Holding: Trial court in child sex case abused discretion in (1) admitting School Counselor's testimony that she had "no doubt at all" whether the alleged acts which Victim told her "had actually happened to her," because this improperly vouched for Victim's credibility, and (2) also admitting Child Advocacy Center Expert's testimony that Victim's information was "reliable," because this invaded province of jury by improperly vouching for Victim's credibility.
Discussion: (1) The State claims School Counselor's testimony was presented merely to show her subsequent conduct in referring Victim to the Child Advocacy Center. But School Counselor's testimony went beyond that. The jury was as capable as School

Counselor in judging Victim's credibility. The testimony was prejudicial because the State presented School Counselor as an expert who had superior knowledge. (2) An expert should not be allowed to give their opinion on the veracity of another witness. In child sex cases, "general" expert testimony about generalized behavior of child Victims is allowed, but "particularized" testimony concerning a Victim's credibility is not, because "particularized" testimony usurps the fact-finding role of the jury. Here, the testimony was improper "particularized" testimony which vouched for Victim.

State ex rel. Gardner v. Wright, 2018 WL 2978352 (Mo. App. E.D. Aug. 21, 2018):
(1) Trial court erred in child sex case in granting motion in limine to exclude State's Expert who would testify generally about children's late disclosure of child sex allegations on grounds that this would not assist the trier of fact, i.e., was not "relevant"; (2) such testimony is relevant under the Sec. 490.065.2/Daubert test.
Facts: In child sex case, the State sought to present Expert, who would generally testify about how children may disclose sexual abuse allegations late. Defendant filed a motion to exclude such testimony under Sec. 490.065.2/*Daubert*. The trial court excluded the testimony on grounds it was not relevant. The State sought a writ of prohibition.
Holding: This is a case of first impression regarding Sec. 490.065.2, which adopts Federal Rule of Evidence 702/*Daubert* as the standard of admissibility for expert testimony in criminal cases in place of the *Frye* test. Under 490.065.2/*Daubert*, the judge acts as a gatekeeper to ensure that expert testimony is not only relevant, but reliable. Although the 490.065.2/*Daubert* test applies here, this case actually turns on something that has not changed since *Frye* – relevance. The trial court's primary reason for excluding Expert was trial court's erroneous conclusion that testimony about late disclosure was not specialized knowledge that would assist the jury, i.e., that the testimony was not relevant. The court believed that ordinary jurors would understand late disclosure and not need expert testimony on the subject. Defendant argued ordinary jurors would understand this because of publicity about the MeToo Movement and late disclosure there. But numerous Missouri cases have held that testimony about late disclosure *is* outside the jury's common knowledge and *will assist* the jury in understanding children's late disclosure. Writ granted.

Koelling v. Mercy Hospitals East Communities, 2018 WL 3978144 (Mo. App. E.D. Aug. 21, 2018):
Holding: Trial court abused discretion in medical malpractice case in not allowing Plaintiff to cross-examine retained defense Expert about the fact that Expert had been a defendant in numerous medical malpractice cases himself, and had hostility about such cases because of this; this fact was relevant to his bias against medical malpractice claims.
Discussion: A witness may be impeached on cross-exam through use of evidence showing witness' bias, prejudice or interest. The jury is entitled to know information that might impact credibility and weight to give to testimony. Expert had testified in his pretrial deposition that the prior medical malpractice cases against him made him angry at the legal system, and he did not believe the cases were resolved fairly. While a trial court can properly limit cross-examination regarding bias and prejudice, it is not within the trial court's discretion to exclude it completely. By prohibiting Plaintiff from asking

anything about Expert's prior litigation experience, the trial court completely foreclosed Plaintiff's ability to show bias because of this.

Hill v. SSM Health Care St. Louis, 2018 WL 2407299 (Mo. App. E.D. May 29, 2018):
Holding: Where Defendant-Hospital gave numerous inconsistent explanations about why a video of a slip-and-fall incident was destroyed, trial court erred in denying Plaintiff's motion for application of the spoliation doctrine, which would have allowed Plaintiff to have an adverse inference that the video would have been favorable to Plaintiff's position.
Discussion: Spoliation is the intentional act of destruction or significant alteration of evidence. The spoliator must destroy or alter evidence under circumstances showing fraud, deceit, or bad faith. The spoliator's failure to adequately explain the evidence's destruction may give rise to an adverse inference. This punishes the spoliator by holding them to admit that the destroyed evidence would have been unfavorable to their position. Here, Defendant-Hospital gave numerous inconsistent explanations about why the video was destroyed, including shifting versions of what happened to the video, varying time lengths for overwriting the video, and false statements about not having the capacity to save the video.

State v. Salmon, 2018 WL 1058603 (Mo. App. E.D. Feb. 27, 2018):
(1) Where Defendant was charged with endangering welfare of child by failing to provide proper feeding to Baby, trial court erred in allowing Prosecutor to cross-examine a witness about Defendant's juvenile record and prior bad acts; and (2) Prosecutor's "demonstrative evidence" whereby he filled a baby bottle every three hours during trial in front of the jury amounted to improper testimony by an unsworn witness and party, and lacked adequate foundation because it did not fairly represent how a real baby would be fed (although court does not actually decide this issue).
Facts: Defendant was charged with endangering welfare of a child by not adequately feeding her Baby. A defense witness testified that the Baby "always had a bottle in its mouth" and the witness never saw Baby being abused. On cross, the Prosecutor, over objection, asked witness if he thought Defendant was "the type of person that would" endanger a child, if he knew Defendant had previously assaulted two people, and if he knew that when Defendant was a juvenile she "shanked" somebody. Also during trial, the Prosecutor, as "demonstrative evidence," repeatedly filled a baby bottle in front of the jury every three hours. The Prosecutor argued in closing that he had been "feeding Baby" every three hours, and even though he had been doing "other things," the baby got fed.
Discussion: (1) Questions about uncharged prior bad acts (the assaults) were improper and irrelevant. Prior bad acts can only be used for matters such as establishing motive, intent, absence of mistake, identity or common scheme of plan – none of which applied here. Defendant's juvenile records (the "shanking" incident) were protected under Sec. 211.271.3, which provides that such records are not lawful or proper evidence, and "shall not be used for any purpose whatsoever in any proceeding, civil or criminal." The Missouri Supreme Court recently allowed a defendant's juvenile records to be admitted where that defendant was on trial for a child sex case, but that case is distinguishable because Mo. Const. Art. I, Sec. 18(c) allows propensity evidence in child sex cases.

Defendant's endangering welfare case is not a child sex case so Art. I, Sec. 18(c) does not apply. New trial granted on this issue. (2) Because a new trial is granted on the prior bad act/juvenile record issue, appellate court does not decide the "demonstrative evidence" issue, but calls it "problematic." The demonstration made Prosecutor an unsworn witness. A lawyer in a case cannot be both witness and lawyer, because that requires the lawyer to argue his own credibility. Also, the demonstration did not fairly reflect the conditions under which Baby would have really been fed, since many variables might influence how or when a Baby eats. A Baby may not drink a bottle every three hours, even if offered. Prosecutor laid no foundation to show the demonstration was a fair representation of proper feeding.

State v. Stufflebean, 2018 WL 1278126 (Mo. App. E.D. March 13, 2018):
Holding: Where the State was unable to admit a surveillance video from Wal-Mart because it could not provide proper authentication, it violated the best evidence rule to allow Officers testify to what they had watched on the tape (but not prejudicial here in light of other evidence); the best evidence rule applies when evidence is offered to prove the contents of a writing or recording, including videos.

State v. Ashcraft, 530 S.W.3d 579 (Mo. App. E.D. Oct. 3, 2017):
Holding: Where Defendant-Parent was charged with abuse of a child, Sec. 568.060.2, for breaking Childs's arm, State should not have been allowed to introduce evidence that Defendant-Parent did not have child vaccinated against childhood diseases, because such was irrelevant to charged crime (but not plain error here).
Discussion: The State has not suggested that Defendant's role in declining to have Child vaccinated was in any way related to Child's broken arm. The State offers no evidence that parents who decline to vaccinate children are more likely to strike children. Further, we are not persuaded that Defendant's decision on vaccination was circumstantial evidence of Defendant's mental state for the charged crime of breaking the arm. Parents are allowed not to immunize children in Missouri, and an expert testified that was increasingly popular.

Shallow v. Follwell, 2017 WL 463078 (Mo. App. E.D. Oct. 17, 2017):
Holding: Trial court, in medical malpractice case, abused discretion in allowing Defendant to present four experts who testified to the same opinion; even though logically relevant, the probative value was outweighed by the prejudicial effect because it was excessively repetitive and cumulative and, thus, legally irrelevant.
Discussion: Excessive cumulative expert testimony may create the risk that a jury will resolve differences in expert opinion by "counting heads" instead of giving fair consideration to the quality and credibility of the testimony. No matter how logically relevant the testimony may be, the trial court must determine when cumulative evidence should stop. This inquiry involves deciding when the repetitive evidence becomes so prejudicial or inflammatory as to outweigh its probative value, i.e., when the repetitive testimony becomes legally irrelevant. Missouri law did not prohibit Defendant from calling four experts, each of whom had different specialties, to testify to their portion of the defense theory; this is a formidable strategy as opposed to simply having one expert testify to the entire defense. The problem here is that all four experts were not only

allowed to provide testimony about their particular specialty and how it related to the defense theory, but they were allowed to offer a chorus of the same ultimate opinions repetitively.

State v. Rogers, 2017 WL 4247476 (Mo. App. E.D. Sept. 26, 2017):
Holding: Where Expert from Child Advocacy Center initially testified in child sex case about general characteristics of victims of child sexual abuse, but then testified to specific examples of how Child's behavior and statements fit the general description, including statements in Child's CAC video interview, this particularized testimony invaded the province of the jury, and improperly bolstered child's credibility.
Discussion: Experts in child sex cases may give general testimony about the behavior and characteristics commonly seen in child sex abuse victims, but cannot give particularized testimony about a specific victim's credibility. Particularized testimony usurps the fact-finding role of the jury and invests the Expert's testimony with scientific cachet on the central issue of the victim's credibility. Here, Expert initially gave generalized testimony. But then Prosecutor asked Expert repeated questions about Child's video interview and how Child's statements or behavior fit the profile of a sex abuse victim. Further, the phrase "indicator of reliability" appears 16 times in the Prosecutor's exam of Expert. Jurors would plainly understand reliability as a synonym for credibility. The Prosecutor's extensive exam of Expert about reliability was wholly improper. Defendant was prejudiced because evidence of guilt was not overwhelming and case hinged on Child's credibility. New trial ordered.

Will v. Pepose Vision Institute, 2017 WL 2267429 (Mo. App. E.D. May 23, 2017):
Holding: In case of first impression, trial court abused discretion in excluding evidence that defendant attempted to influence plaintiff's expert by contacting expert's supervisor (but not prejudicial in this case); general rule in a civil case is that evidence that a litigant or his agent attempted to influence or suppress a witness is admissible as an admission or as an indication of the litigant's consciousness that his case is weak, unfounded, false or fraudulent.

State v. Ralph, 2017 WL 2450414 (Mo. App. E.D. June 6, 2017):
Holding: In case of first impression, State can prove up prior and persistent offender status by having court clerk testify to convictions contained in the Missouri Justice Information System (JIS).
Discussion: Sec. 490.130 allows electronic records contained in a statewide court automated record-keeping system, like JIS, to be admissible without certification. Testimony describing those records is sufficient without physical printouts, although the better practice would be to introduce a physical printout of the JIS record testified to to create a better record for appellate review of what the clerk read from.

State v. Prince, 2017 WL 2644431 (Mo. App. E.D. June 20, 2017):
Holding: Even though new Mo. Const. Art. I, Sec. 18(c) allows "relevant evidence of prior criminal acts" to be admitted to show propensity in child sex cases, Sec. 211.271(3), which states that juvenile records are "not lawful or proper evidence," bars admission of

Defendant's juvenile records to show propensity (but Eastern District transfers case to Supreme Court due to general interest of issue).

State v. Cerna, 2017 WL 2773946 (Mo. App. E.D. June 27, 2017):
Holding: In first Missouri case to construe term "lascivious exhibition of genitals or pubic area" regarding child pornography statute, court holds following factors should be considered: (1) whether the focal point of the visual depiction is child's pubic area or genitals; (2) whether the setting or depiction is sexually suggestive; (3) whether the child is depicted in an unnatural pose or inappropriate attire; (4) whether the child is clothed or nude; (5) whether the depiction suggests sexual coyness or willingness to engage in sexual activity; and (6) whether the depiction is intended or designed to elicit a sexual response in the viewer.

State v. Cecil McBenge, 2016 WL 6695799 (Mo. App. E.D. Nov. 15, 2016):
(1) Even though Defendant and his brother's DNA were found at a murder scene where Victim's house had been ransacked and Victim beaten to death, the evidence was insufficient to convict of first degree murder because there was no evidence that Defendant or his brother personally deliberated on the killing; but (2) because Defendant was also charged with second degree felony-murder based on first degree burglary and because the evidence was sufficient to prove Defendant committed first degree burglary and Victim was killed as a result, case is remanded for trial on second degree felony-murder. (3) Similarities between 1980 burglary in which Brother was implicated and 1984 burglary-murder were not sufficient to prove Defendant's motive, intent or identity in 1984 murder, so evidence of 1980 murder was not admissible; there is no authority providing that the motive, intent or identity exceptions to uncharged crimes applies to crimes committed by an accomplice; Defendant's intent was never at issue because he did not clam the offense was a mistake or accident; he denied committing the offense; additionally, the 1980 murder's prejudicial effect was greater than its probative value.
Facts: Defendant and his brother were charged with first degree murder in the 1984 death of Victim. Alternatively, they were charged second degree felony-murder based on burglarizing her house, and Victim's resultant death. Defendant's Brother dated Victim's granddaughter and knew Victim kept money in a Calumet baking powder can in her house. In 1980, Victim's house was burglarized. Brother was not linked to that crime until 1986, when a fingerprint lifted from the scene was tested and matched Brother. Brother was apparently never charged with the 1980 burglary because the three-year statute of limitations ran by 1986. Meanwhile, Victim's house was burglarized again in 1984 in the crime at issue. Her house was ransacked, and Victim was beaten to death. In 2011, Brother's DNA was found on a cheese wrapper at the house, and Defendant's DNA was found on a stocking. The trial court admitted evidence about the 1980 burglary to prove Defendant's motive, intent and identity. The jury was instructed on first degree murder, and second degree felony-murder based on the burglary. The jury convicted of first degree murder.
Holding: (1) The evidence is not sufficient to convict of first degree murder. The State must prove Defendant committed acts which aided another in killing; it was Defendant's conscious purpose in committing those acts that Victim be killed; and Defendant personally deliberated on Victim's death. There is no evidence Defendant or his brother

personally committed Victim's murder or personally deliberated in killing Victim. There is no evidence that Defendant or his brother had an agreement to kill Victim. There is no evidence Defendant or his brother made a statement or exhibited any conduct indicating an intent to kill Victim. No deadly weapon was used; instead Victim was beaten. While the fact that Victim was beaten shows that someone deliberated, it does not prove that Defendant deliberated. In short, there was not sufficient evidence to find Defendant personally deliberated on Victim's death. The first degree murder conviction must be reversed. (2) But this does not mean Defendant must be discharged. Here, Defendant was also charged with second degree felony-murder based on burglarizing Victim's house. It is not possible for appellate court to just enter a conviction for second degree felony-murder because the jury was not required to find that Victim's death occurred as a result of Defendant's commission of the burglary, although the jury had been so instructed. Unlike first degree murder, a defendant may be convicted as an accomplice to second degree murder without a finding that defendant had any culpable mental state other than intent to promote commission of the offense. In other words, a defendant can be convicted of second degree murder as an aider without proof that defendant specifically intended to kill Victim. There was sufficient evidence to prove Defendant committed first degree burglary and Victim was killed as a result. Case remanded for trial on second degree felony-murder. (3) The trial court abused discretion in admitting evidence of the 1980 burglary. The State argues the 1980 burglary is logically relevant to prove motive, intent or identity. As an initial matter, there is no legal authority that the State may use evidence of uncharged crimes committed by an accomplice to prove motive, intent or identity. However, appellate court assumes for purposes of this appeal only that the State may do this. Even so, the 1980 burglary should not have been admitted. Even if evidence is logically relevant because it tends to prove guilt, it is legally relevant only if its probative value outweighs the prejudicial effect. The 1980 burglary was more prejudicial than probative. There was not a strict necessity to admit the 1980 burglary to show motive because other evidence showed motive, i.e., Granddaughter testified Brother knew Victim kept money in the Calumet can. The 1980 burglary did not show intent because Defendant never put his intent at issue. A defendant puts intent at issue only if he admits the charged acts, but claims they were committed innocently or by mistake. A defendant's denial of a charged act does not make intent an issue. Nor did the 1980 burglary prove identity. Although there were similarities in the 1980 and 1984 crimes, there were also differences. The methodologies were not so unusual and distinctive to resemble a "signature."

State v. Brian McBenge, 2016 WL 6695801 (Mo. App. E.D. Nov. 15, 2016):
(1) Even though Defendant and his brother's DNA were found at a murder scene where Victim's house had been ransacked and Victim beaten to death, the evidence was insufficient to convict of first degree murder because there was no evidence that Defendant or his brother personally deliberated on the killing; but (2) because Defendant was also charged with second degree felony-murder based on first degree burglary and because the evidence was sufficient to prove Defendant committed first degree burglary and Victim was killed as a result, case is remanded for trial on second degree felony-murder. (3) Similarities between 1980 burglary and 1984 burglary-murder were not sufficient to prove Defendant's motive or identity in 1984 murder, so evidence of 1980

murder was not admissible, because its prejudicial effect was greater than its probative value.

Facts: Defendant and his brother were charged with first degree murder in the 1984 death of Victim. Alternatively, they were charged with second degree felony-murder based on burglarizing her house, and Victim's resultant death. Defendant dated Victim's granddaughter and knew Victim kept money in a Calumet baking powder can in her house. In 1980, Victim's house was burglarized, but Defendant was not linked to that crime until 1986, when a fingerprint lifted from the scene was tested and matched Defendant. Defendant was apparently never charged with the 1980 burglary because the three-year statute of limitations ran by 1986. Meanwhile, Victim's house was burglarized again in 1984 in the crime at issue. Her house was ransacked, and Victim was beaten to death. In 2011, Defendant's DNA was found on a cheese wrapper at the house, and his brother's DNA was found on a stocking. The trial court admitted evidence about the 1980 burglary to prove Defendant's motive and identity. The jury was instructed on first degree murder, and second degree felony murder based on the burglary. The jury convicted of first degree murder.

Holding: (1) The evidence is not sufficient to convict of first degree murder. The State must prove Defendant committed acts which aided another in killing; it was Defendant's conscious purpose in committing those acts that Victim be killed; and Defendant personally deliberated on Victim's death. There is no evidence Defendant or his brother personally committed Victim's murder or personally deliberated in killing Victim. There is no evidence that Defendant or his brother had an agreement to kill Victim. There is no evidence Defendant or his brother made a statement or exhibited any conduct indicating an intent to kill Victim. No deadly weapon was used; instead Victim was beaten. While the fact that Victim was beaten shows that someone deliberated, it does not prove that Defendant deliberated. In short, there was not sufficient evidence to find Defendant personally deliberated on Victim's death. The first degree murder conviction must be reversed. (2) But this does not mean Defendant must be discharged. Here, Defendant was also charged with second degree felony-murder based on burglarizing Victim's house. It is not possible for appellate court to just enter a conviction for second degree felony-murder because the jury was not required to find that Victim's death occurred as a result of Defendant's commission of the burglary, although the jury had been so instructed. Unlike first degree murder, a defendant may be convicted as an accomplice to second degree murder without a finding that defendant had any culpable mental state other than intent to promote commission of the offense. In other words, a defendant can be convicted of second degree murder as an aider without proof that defendant specifically intended to kill Victim. There was sufficient evidence to prove Defendant committed first degree burglary and Victim was killed as a result. Case remanded for trial on second degree felony-murder. (3) The trial court abused discretion in admitting evidence of the 1980 burglary. The State argues the 1980 burglary is logically relevant to prove motive or identity. However, even if evidence is logically relevant because it tends to prove guilt, it is legally relevant only if its probative value outweighs the prejudicial effect. The 1980 burglary was more prejudicial than probative. There was not a strict necessity to admit the 1980 burglary to show motive because other evidence showed motive, i.e., Granddaughter testified Defendant knew Victim kept money in the Calumet can. Nor did the 1980 burglary prove identity. Although there were similarities in the

1980 and 1984 crimes, there were also differences. The methodologies were not so unusual and distinctive to resemble a "signature."

State v. Hobbs, 2016 WL 4435689 (Mo. App. E.D. Aug. 23, 2016):
Trial court abused discretion in child molestation case in admitting at penalty phase Officer's testimony that Defendant was charged with other unadjudicated child sex offenses, because such evidence is admissible in penalty phase only if the State proves by preponderance of the evidence that Defendant committed the conduct alleged; the State offered no supporting evidence, such as testimony by Victims or admissions by Defendant.
Facts: Defendant was convicted of child molestation, and the case proceeded to a penalty phase. During penalty phase, the State presented Officer's testimony that Defendant was presently charged with other unadjudicated child sex offenses.
Holding: Although evidence pertaining to a defendant's criminal conduct may be admissible in penalty phase as history and character evidence, Sec. 577.036.3, such evidence is admissible only if the State proves by a preponderance of evidence that Defendant committed the alleged conduct. Such proof may include testimony by Victims of the alleged conduct, or Defendant's admissions to the alleged conduct. Here, however, there were no witnesses to support the alleged conduct, or admissions by Defendant. The State merely referred to additional charges without supporting evidence. Reversed and remanded for new penalty phase.

State v. Bell, 2016 WL 2341906 (Mo. App. E.D. May 3, 2016):
(1) Where during initial interrogation, Defendant requested an attorney, but before one was provided, police had subsequent interviews with Defendant in which they (a) read the probable cause statement to him and said he was a "calm dude to sit there after hearing that," (b) said they had talked to his wife and girlfriend, and (c) said that he may want to explain his side of the story especially because the probable cause statement was being released to the press, police engaged in the functional equivalent of interrogation without providing counsel and Defendant's confession should have been suppressed; but (2) admission of the confession was harmless as to second degree murder, though prejudicial as to Defendant's conviction for first degree murder; remedy is to remand case to require State to choose to retry Defendant for first degree murder, or accept entry of conviction for second degree murder; (3) even though Defendant was arrested with cocaine in his pocket, this was evidence of uncharged bad acts that was not legally or logically relevant to the charge of first degree murder.
Facts: Defendant and Victim bumped into each other on a street. An argument ensured, and Defendant eventually shot Victim and Victim's girlfriend. Defendant was charged and convicted of first degree murder. During initial interrogation, Defendant said he wanted a lawyer and wrote "No" on a *Miranda*-waiver form. Interrogation ceased, but no counsel was provided. Twelve hours later, police read Defendant the probable cause statement in his case, and said he was "a calm dude to sit there after hearing that." Subsequently, they also told him that they had talked to his wife and girlfriend. Police also said Defendant should take the "opportunity to put your side" of the story out, especially because the probable cause statement was being released to the press.

Defendant eventually said he would talk. At that point, police re-read his *Miranda* rights and he waived them.

Holding: (1) Defendant clearly invoked his right to counsel during initial interrogation. However, counsel was not provided. After invoking the right to counsel, police may not subject a defendant to further interrogation unless either counsel is present, or the *defendant himself initiates* further communication with police. Here, the record is clear that Defendant himself did not re-initiate communication. Moreover, interrogation refers not just to express questioning, but also to its "functional equivalent," meaning any words or actions on the part of police that police know or should know are reasonably likely to elicit an incriminating response. The focus of this analysis is on the perceptions of the defendant, not the police. Here, the police's further interactions with Defendant were the "functional equivalent" of interrogation. The rules against continued police interrogation after a defendant has invoked counsel were designed to prevent police badgering of a defendant. Here, Defendant was badgered after he invoked counsel. His confession should have been suppressed. (2) The appellate court must determine whether admission of the confession was harmless error. Here, the confession was critical to prove deliberation for first degree murder, but there was other evidence of guilt to prove the lesser-included offense of second degree murder. Even though the traditional remedy would be to remand for a new trial, an appellate remedy should extend no further than the scope of the wrong. Thus, appellate court remands case to require State to elect either to retry Defendant for first degree murder *or* accept entry of conviction for second degree murder. (3) The trial court erred in admitting evidence that Defendant had cocaine in his pocket when arrested. This was a prior bad act that had no logical or legal relevance to whether Defendant committed the murder. This was true even though defense counsel had argued that Victim was angry because *Victim* had been involved in a bad drug deal earlier that day. Even if true, no evidence suggested *Defendant* was involved in the drug deal, and the State argued Defendant and Victim were strangers to each other.

State v. Voss, 2016 WL 145727 (Mo. App. E.D. Jan. 12, 2016):

(1) Defendant can be convicted of first-degree involuntary manslaughter for involvement in a death of a Victim from a drug overdose, where Defendant's reckless conduct caused Victim's death in that Defendant supplied heroin to Victim, helped Victim ingest it, saw signs that Victim was overdosing, and failed to seek medical attention; (2) trial court abused discretion in penalty phase in admitting hearsay testimony from the mother of a different victim than the one in this case in which she claimed that Defendant had caused her son's death, too; allowing a mother of a different victim than the one in this case to read a "victim-impact" statement, because this mother was not a family member of the victim in this particular case; allowing Victim's sister to testify to hearsay that she believed Defendant was involved in five other heroin overdose deaths; and allowing a probation officer to testify to hearsay from a police report that Defendant was involved in another person's overdose death. However, the penalty phase testimony was harmless given other admissible penalty phase evidence.

Facts: Defendant was convicted at a jury trial of first-degree involuntary manslaughter for recklessly causing the heroin overdose death of Victim. During penalty phase, trial court admitted testimony by various witnesses that Defendant had also caused other people to die of heroin overdoses, though none of those witnesses had personally

witnessed this. The court also allowed a mother of a victim in one of those other alleged deaths to read a victim-impact statement about her son's death.
Holding: (1) It is a matter of first impression in Missouri whether a person can be convicted of first-degree involuntary manslaughter for involvement in a victim's death from drug overdose. The involuntary manslaughter statute is not defined in terms of a Defendant's failure to act, and thus, any duty to act must be otherwise imposed by law. The comment to Sec. 562.011.4 provides an example of liability for manslaughter based on the failure to perform an act "such as supplying medical assistance to a close relative." A Defendant can be criminally liable for a failure to act where "one stands in a certain status relationship to another." Here, that standard was met because Defendant created or increased the risk of injury to Victim by providing Victim heroin, helping to prepare it for ingestion, and after observing signs of overdose, leaving Victim alone and not contacting medical help. This is sufficient evidence from which a reasonable juror could find recklessness, i.e., conscious disregard of risk of death to Victim and such disregard was a gross deviation from what a reasonable person would do in such circumstances. (2) In penalty phase, "history and character" evidence of prior unadjudicated criminal conduct is admissible under Sec. 557.036.3 if it satisfies the preponderance of evidence standard, which means it must be based on a witness' "firsthand knowledge" of the unadjudicated criminal conduct. Here, the witnesses who testified that Defendant had caused other heroin overdose deaths did not have firsthand knowledge of those incidents. Their knowledge was based on hearsay. Hearsay testimony is admissible during penalty phase only if it falls within a recognized hearsay exception, which the testimony from these witnesses did not. With regard to the mother of a victim in a different incident than the one charged who read a victim-impact statement about how her son's death affected her, this mother-witness was not a victim in the instant case and her statement did not concern the facts of the instant case. Although Sec. 557.041 does not define the term "victim," Sec. 595.200(6) provides a definition of "victim" as a direct victim of a crime or family members of a direct victim. Sec. 557.041.2 allows the "victim of such offense" to make a victim-impact statement in a particular case. This language only authorizes a victim of *the offense at issue* (charged offense) to make a statement. Although this was a close case, the inadmissible evidence was harmless when considered with other admissible penalty phase evidence, particularly damaging admissions made by Defendant. Howver, courts should be "cautious" about admitting alleged prior unadjudicated conducted.

Richey v. State Farm Mutual Ins. Co., 2016 WL 402264 (Mo. App. E.D. Feb. 2, 2016):
(1) A prior consistent statement is not hearsay and is admissible if offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and (2) a police officer cannot offer an opinion as to the fault of a party to an accident, where officer did not personally witness accident; this is because a jury likely will give undue weight to police testimony; this rule applies regardless of whether officer is testifying as an expert or not.
Facts: Driver suffered injuries in an accident, and sued Insurer for uninsured motorist coverage. Driver claimed he was run off the road by an unknown other vehicle. Insurer's theory was that Driver made up the claim about the unknown vehicle. Insurer's opening statement said that no one ever brought up a "phantom" car until Driver's lawyer

got involved, and then "the phantom gets created." The trial court prevented Driver from calling Witnesses to testify that Driver had told them about the unknown car. Also during trial, a police officer testified that Driver was at fault for the accident.
Holding: (1) Generally, a witness' corroborative extrajudicial statements are not admissible, because this would give one party an unfair advantage by presenting the same testimony in multiple forms. However, where a witness is impeached by acts or statements, prior consistent statements of the witness may be admissible for rehabilitation. Insurer claims that the trial court correctly excluded Witnesses from testifying because Driver sought to call them before Driver testified. Insurer argues that Driver's credibility had yet to be brought into question. However, a charge of recent fabrication made in opening statement is sufficient to warrant introduction of evidence otherwise classified as hearsay to rebut the fabrication charge. Whether Appellant personally had yet been impeached was irrelevant. Trial court abused discretion in excluding Witnesses. (2) Missouri courts have uniformly held that a police officer cannot offer an opinion as to who is at fault for an accident that the officer did not witness. This is because a jury will likely give undue weight to police testimony. This rule applies regardless of whether the officer is testifying as an expert witness or not.

State v. Mattix, 2016 WL 880786 (Mo. App. E.D. March 8, 2016):
(1) 19 CSR 25-30.05(2)(2012 version) requires that a breathalyzer be calibrated using three different solutions in order for the results to be admissible; (2) trial court abused discretion in admitting Defendant's BAC results because the breathalyzer was not calibrated using three methods; and (3) even though Defendant failed field sobriety tests and made incriminating admissions about drinking, Defendant was prejudiced by admission of a .206 BAC result because the prosecutor emphasized this in closing argument and the jury asked about it during deliberations.
Facts: Defendant was charged with DWI. He failed various field sobriety tests and made incriminating admissions about drinking. He was given a breathalyzer test, which showed a .206 BAC. He was convicted at a jury trial.
Holding: The trial court abused discretion in admitting the BAC results. The 2012 version of 19 CSR 25-30.05(2) required that, in order for BAC results to be admissible, the breathalyzer machine had to be calibrated using three different solutions of .10, .08 "and" .04. (This CSR was subsequently amended to require only one solution). Here, the machine was calibrated using only one solution. The CSR applies to both civil and criminal cases. Thus, the BAC results were not admissible under *Stiers v. Director of Revenue*, 2016 WL 143230 (Mo. banc 2016). The State contends that even though the BAC results were erroneously admitted, Defendant was not prejudiced because there is other evidence of guilt from the failed field sobriety tests and incriminating admissions. There is no question that a jury could convict based on the sobriety tests and admissions. However, the standard of review is whether the erroneously admitted evidence had a material effect on the outcome of trial. Here, it did, because the prosecutor emphasized the .206 results in closing argument and the jury asked about them during deliberations. New trial ordered.

State v. Hancock, 2020 WL 4462680 (Mo. App. S.D. Aug. 4, 2020):
Holding: (1) Even though trial court mistakenly said the time for filing a New Trial Motion was longer than that allowed in Rule 29.11(b) and Defendant relied on that advice, courts aren't authorized to extend the time for filing a New Trial Motion; Defendant's late-filed New Trial Motion waived preserved review for appeal; (2) even though Defendant made an Offer of Proof on the admissibility of his Voice Identification Expert, where the Offer was made using an affidavit from the Expert (in order to save money) rather than calling the Expert to testify, the trial court did not abuse discretion in finding that Offer was "hearsay," and also finding that the affidavit did not demonstrate the "reliability" of Expert's testimony under Sec. 490.065.2; (3) where Defendant sought to call a gun shop owner to testify as an Expert on gun color and barrel length, this wasn't admissible because jurors' could use their own observations and common sense to determine these matters, so the testimony wasn't necessary or helpful to jurors under Sec. 490.065.2(1).
Discussion: Two weeks before trial, Defendant sought to endorse a Voice Identification Expert. The trial court denied the request but said Defendant could make an Offer of Proof at trial. At trial, Defendant, citing cost concerns, presented an affidavit from Expert as the Offer of Proof. The trial court denied the Offer as "hearsay," but also ruled the Offer didn't prove Expert's testimony was "reliable" under Sec. 490.065.2. Appellate court holds trial court did not abuse discretion in finding Offer to be "hearsay." Had Defendant hoped by this method to obtain appellate review of this testimony without even trying to offer it in admissible form at trial, he effectively sought an advisory opinion, which this Court will not give. Where evidence is excluded by pretrial ruling, proper procedure contemplates an attempt to admit the evidence at trial, and if an objection is sustained, then an Offer of Proof.

State v. Schachtner, 2020 WL 5904455 (Mo. App. S.D. Oct. 6, 2020):
Concurring Opinion: In significant concurring opinion, Judge Rahmeyer questions whether propensity evidence committed when a defendant was a child should be admissible. Here, State was permitted to introduce propensity evidence of Defendant's sexual acts committed when he was 13-years old, which was 22 years before the charged acts as an adult. "It is a slippery slope to interpret the constitutional amendment [allowing propensity evidence], which is contrary to the general proposition that the defendant is to be tried for the crime he is charged with, by including activities done by children. I believe it should give us pause in the judicial system when we allow evidence of the behavior of children to be used to convict them of behavior as an adult….In a different case, where there was no admission [of guilt] by the defendant, I would not be convinced that the propensity evidence of a child should have been admitted."

State v. Marsh, 2020 WL 7395396 (Mo. App. S.D. Dec. 16, 2020):
Holding: (1) Appellate court assumes, *arguendo*, that trial court may have erred in allowing Probation Officer to testify at trial about statements Defendant made to her, because Sec. 559.125.2 states that information "obtained by a probation or parole officer shall be privileged … and shall not be receivable by any court" except to the judge supervising probation; but admission was harmless here because it was duplicative of a different Witness' testimony; and (2) where the written sentence differed from the oral

pronouncement, the oral pronouncement controls; this is a clerical error that can be corrected nunc pro tunc.

In the interest of D.S.H. v. Greene County Juvenile Officer, 562 S.W.3d 366 (Mo. App. S.D. Oct. 24, 2018):

Where State sought to terminate Father's parent rights to his natural children, trial court erred in admitting Child Advocacy Center records containing statements of different children who were not the children of Father (they were the half-siblings of Father's natural children), and the half-siblings best interest was not before the court; the half-siblings' statements about Father were hearsay and did not fall within the exception of In re Marriage of PKA, 725 S.W.2d 78 (Mo. App. 1987).

Discussion: The *PKA* case creates an exception to hearsay for CAC records containing statements of children of a *parent*, and where the child's best interest is before the court. Here, however, the children at issue who made damaging statements about Father are not Father's children. They are the half-siblings of Father's children. Moreover, parental rights regarding the half-siblings are not before the court because Father has no parental rights over the half-siblings. The State argues that Sec. 211.447.5(2)(c), which allows for termination of parental rights if there is abuse toward "any child in the family," makes the records admissible. But that statute does not make inadmissible hearsay admissible. Exceptions to hearsay are grounded in trustworthiness. Statements made by children of a parent are deemed to be trustworthy. But the children here are not Father's children. The basic *PKA* trustworthiness dynamic is missing because the half-siblings have no parent-child relationship with Father, and the half-siblings' best interest was not before the court. The half-siblings' statements were out-of-court statements admitted for their truth and not subject to cross-examination. Judgment terminating parental rights reversed.

In the interest of K.L.C. v. Reynolds County Juvenile Officer, 562 S.W.3d 358 (Mo. App. S.D. Oct. 19, 2018):

Holding: Juvenile court erred in convicting Juvenile of acts that would be a crime if committed by an adult based on standard of "clear, cogent and convincing" evidence, rather than more stringent "proof beyond a reasonable doubt" standard.

Discussion: In juvenile proceedings, where a juvenile is accused of committing an act that would be a crime if committed by an adult, the constitutionally required standard of proof is "beyond a reasonable doubt." Applying the lesser-standard was structural error that requires reversal.

State v. Tice, 2018 WL 2296538 (Mo. App. S.D. May 21, 2018):

Holding: (1) Suppression of evidence is not the same thing as exclusion of evidence; (2) "suppression" (motion to suppress) is used for evidence which is not objectionable as violating any rule of evidence, but which has been illegally obtained; (3) exclusion of evidence that is not illegally obtained (such as inadequate foundation) is done via a motion in limine, not motion to suppress.

Miller v. State, 2017 WL 4129128 (Mo. App. S.D. Sept. 19, 2017):
Holding: Even though the motion court found that a trial court had not made every reasonable effort to hold a probation revocation hearing before the probation term expired, where Movant's counsel at the revocation hearing did not object to the timeliness of the revocation hearing and stipulated that the parties had agreed to hold it on that date, this was a judicial admission by defense counsel that forever waives all controversy on the matter. Motion court erred in setting aside the revocation.
Discussion: An admission by an attorney in open court which is against the interests of his client constitutes a judicial admission for purposes of the client. A judicial admission is conclusive on the party making it. Judicial admissions are a waiver of all controversy and, therefore, a limitation on the issue. Here, Movant's prior defense counsel made a judicial admission stipulating to the probation revocation hearing being held after the probation term expired. Thus, Movant could not later challenge the revocation.

Davis v. Director of Revenue, 2016 WL 503252 (Mo. App. S.D. Feb. 9, 2016):
Holding: (1) 19 CSR 25-30.051.2 (2013) required that three standard solutions be used to calibrate a breath test machine, *see Stiers v. Director of Revenue*, 2016 WL 143230 (Mo. banc Jan. 12, 2016); (2) where, in 2013, the breath test machine used in Driver's case was calibrated using only one standard solution, the calibration was not valid and Director failed to lay a proper foundation for admission of the breath test results. Revocation of Driver's license is reversed.

State ex rel. Jackson v. Parker, 2016 WL 1211326 (Mo. App. S.D. March 28, 2016):
(1) Even though Sec. 492.304 provides that a recording of an alleged child sex victim shall not be admissible if the Interviewer does not testify, the statute contains an exception that the recording is admissible if it qualifies for admission under Sec. 491.075; thus (2) even though Interviewer of child was not available to testify, trial court erred in excluding the video of the interview, because although the video was not admissible under 492.034, it was admissible under 491.075 because the child's statements had sufficient indicia of reliability.
Facts: In child sex case, Child was interviewed by a Forensic Interviewer at a Child Advocacy Center. The interview was video recorded, and observed by other CAC Witnesses. Subsequently, the Interviewer herself became unavailable. The trial court held a 491 hearing, and determined that there was sufficient indicia of reliability in the statements made by Child so that the CAC Witnesses to the interview would be able to testify. However, the court ruled that the video itself would not be admitted due to noncompliance with Sec. 492.304, in that Forensic Interviewer was unavailable to testify. Sec. 492.304.1(6) provides that a recording of an alleged sex victim under age 14 is admissible if the "person conducting the interview … in the recording is present at the proceeding and available to testify or be cross-examined by either party." The State sought a writ of prohibition to allow the video to be admitted at trial.
Holding: The trial court did not properly apply Secs. 491.075 and 492.304. Sec. 492.304 provides an *alternative*, rather than exclusive, procedure for determining admissibility of a recording. Sec. 492.304.2 provides that if the child does not testify, the recording shall not be admissible "unless the recording qualifies for admission under section 491.075." Thus, recordings that do not meet the criteria for admission under Sec.

492.304 may still be admissible if they qualify under 491.075. Here, the recording was found to be admissible under 491.075. Writ granted.

State v. Marshall, 2020 WL 889122 (Mo. App. W.D. Feb. 25, 2020):
Holding: In child sex case, Expert's testimony that victims delay in reporting abuse was admissible as based on "reliable principles" under Sec. 490.065.2(1).
Discussion: *Daubert* factors themselves are not controlling in applying Sec. 490.065. Although Sec. 490.065 is based on Federal Rule of Evidence 702, Rule 702 itself makes clear that not all expert testimony must satisfy the *Daubert* factors. The U.S. Supreme Court has held that *Daubert* factors may not be relevant where experts testify based on "technical" or "other specialized knowledge" as opposed to "scientific" knowledge. Importantly, Expert here testified only to general behaviors seen in victims; Expert did not give particularized testimony about the specific Victim in case. Rule 702 recognizes that "generalized" testimony may be subject to a different reliability analysis than particularized testimony about specific facts in litigation. Regarding generalized testimony, it is not meaningful to question the replicability of Expert's analysis, the error rate of that analysis, or the standards and controls governing that analysis. A different reliability analysis is appropriate with respect to non-scientific, generalized testimony.

State v. Brown, 2020 WL 1016616 (Mo. App. W.D. March 3, 2020):
Holding: Where, in child sex case, (1) State presented two prior Victims who testified in graphic detail about their prior uncharged rapes by Defendant and (2) State repeatedly argued in closing that Defendant was a "pedophile" even though there was no diagnosis of this presented, the probative value of this propensity evidence was outweighed by its prejudicial effect under Mo. Const. Art I, Sec. 18(c); trial court plainly erred in admitting this evidence, but no reversal because other evidence of guilt was overwhelming.
Discussion: Art. I, Sec. 18(c) requires a court to (1) determine if propensity evidence is logically relevant and has probative value, and if so, to determine (2) whether the danger of unfair prejudice outweighs the probative value. Here, the prior rapes had probative value because they were very similar to the charged crime, even though they occurred more than 17 years earlier. Next, the Court must examine the issue of unfair prejudice. The danger of unfair prejudice was "high" here, because the jury knew Defendant had not been convicted of the prior uncharged rapes and might be inclined to convict to punish him for those. The prior Victims' testimony went beyond merely recounting the prior uncharged rapes, and "graphically" described the prior acts, how this impacted Victims' life afterwards, and referenced a third prior victim. The State exacerbated the risk of unfair prejudice by repeatedly arguing in closing that Defendant was a "pedophile" even though there was no evidence presented of such a diagnosis. Under these circumstances, the trial court plainly erred in admitting the propensity evidence. But because the issue is not preserved, this is not reversible error since the other evidence of guilt is overwhelming.

State v. Ellmaker, 2020 WL 6139847 (Mo. App. W.D. Oct. 20, 2020):
Even though DWI-Defendant, after having been arrested and given Miranda warnings, answered some questions by police, trial court violated Defendant's right to post-Miranda silence by admitting police testimony that Defendant said he didn't want to answer whether he had been intoxicated.
Facts: Police stopped Defendant for possible DWI. Defendant failed various field sobriety tests, was arrested and given *Miranda* warnings. Police interrogated Defendant. He gave answers to some questions about drinking, but when asked if he was under the influence when stopped, he said he did not want to answer that question. At trial, the State was allowed to introduce police testimony that Defendant did not want to answer that question. The State also referred to Defendant's refusal to answer in opening statement, and argued it in closing argument.
Holding: *Doyle v. Ohio*, 426 U.S. 610 (1976), held that it violates a defendant's due process rights to allow post-arrest, post-*Miranda* silence to be used against a defendant at trial, because the *Miranda* warning implicitly assures a suspect that his silence won't be used against him. A defendant can waive his right to silence by making statements to police. But a defendant can also reclaim his right to silence (revoke his waiver), at which time silence is again protected. Here, Defendant initially waived his right to silence by answering some police questions. But later, Defendant indicated that he wished to remain silent. If a defendant indicates *in any matter*, at any time before or *during* questioning that he wishes to remain silent, the interrogation must cease. Here, Defendant reclaimed his right to silence by expressly refusing to answer the police question about whether he was intoxicated. A *Doyle* violation occurred when the State was permitted to use this as evidence of guilt. The violation was not harmless because the State repeatedly used this as evidence of guilt. Reversed and remanded for new trial.

Linton by Linton v. Carter, 2020 WL 6572769 (Mo. App. W.D. Nov. 10, 2020):
Holding: Expert-Doctor's opinion as to cause of injury at issue was not admissible where not based on a reasonable degree of medical certainty; Expert testified only to "possible" causes of injury or what "could have" caused injury.

State v. Norman, 2020 WL 7214151 (Mo. App. W.D. Dec. 8, 2020):
Holding: (1) Trial court erred, in rape case, in allowing State to use Victim's prior consistent statements to SANE Nurse to rehabilitate Victim (after Victim had been impeached on cross-examination with inconsistent statements), because prior consistent statements are admissible for rehabilitation if, and only if, the prior consistent statement was made before the impeaching statement (and here it was not); Nurse's testimony was more akin to a post-consistent statement used to bolster Victim's testimony; (2) trial court erred in allowing the rehabilitation because only one piece of Victim's cross-examination testimony was inconsistent, but trial court admitted testimony about many of Victim's prior consistent statements that went well beyond the scope of impeachment; but (3) because this was a bench trial, and Defendant cannot show that trial court relied on the inadmissible evidence in finding guilt, error is non-prejudicial.

State v. Taylor, 2019 WL 5875162 (Mo. App. W.D. Nov. 12, 2019):
Holding: Trial court erred in finding Defendant to be prior and persistent offender based on Illinois convictions, because even though the Illinois records were certified by the clerk and had the seal of the court on them, they were not signed by a judge of the court as required by Sec. 490.130.
Discussion: Sec. 490.130 requires that court records from another state be (1) attested to by the clerk of the court; (2) bear the seal of the court; and (3) be certified by a judge of the court as "attested in due form." Here, the Illinois records were not signed by any Illinois judge. Thus, trial court erred in relying on them as competent evidence to prove prior and persistent status. Case remanded for resentencing without this status.

State v. Capozzoli, 2019 WL 2504199 (Mo. App. W.D. June 18, 2019):
Holding: (1) Even though §490.065.2(3)(b) prohibits an expert from stating an opinion "whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged," Officers in DWI trial could testify that Defendant was "intoxicated" because intoxication is a "physical condition" characterized by unsteadiness on feet, slurred speech, and impairment of reflexes; and (2) no Missouri appellate court has addressed the admissibility of "drug recognition officer/experts" under the new (Daubert) standard for admissibility, §490.065.2, but court does not reach issue because Defendant suffered no prejudice since blood test results showing drugs were also admitted.
Discussion: "Mental state" is the *mens rea* element of a crime. Defendant argues that the "intoxicated condition" element of DWI constitutes a "mental condition." It is unclear what criminal offenses the Legislature had in mind when it included "mental condition" in the proscription on expert testimony where it is an element of the crime charged. However, we do not believe that intoxication is a mental condition about which an expert may not testify in a DWI case, because intoxication has been characterized as a "physical condition.

State v. Patrick, 566 S.W.3d 245 (Mo. App. W.D. Jan. 8, 2019):
Holding: (1) Trial court in domestic assault case abused discretion in admitting police body camera footage in which Defendant made a remark about a knife, because the remark about the knife was not relevant in that it referred to an incident that occurred the night before the charged crime, not the charged crime itself, and (2) the remaining evidence was insufficient to convict of the charged offense, so conviction reversed.

State v. McWilliams, 2018 WL 4999171 (Mo. App. W.D. Oct. 16, 2018):
Holding: Where in child sex case Prosecutor repeatedly asked Expert Forensic Interviewer about the "significance" of Child Victim giving "idiosyncratic details" of the alleged offense, and about the significance that Child Victim "correcting" some of her answers, trial court abused discretion in admitting this testimony because, taken as a whole, it was particularized testimony that was designed to comment on Child Victim's credibility.

B.K. v. Missouri State Highway Patrol, 561 S.W.3d 876 (Mo. App. W.D. Oct. 23, 2018):
Holding: (1) Records printed from the Fine Collection Center regarding traffic offenses are not admissible under Sec. 490.130 – which makes "records of proceedings of any court of this state" from a supreme court-approved automated record-keeping database admissible – because the FCC is not a court; but (2) the records may be admissible by other means, such through as the Business Records Act.

State v. Adams, 2018 WL 6313503 (Mo. App. W.D. Dec. 4, 2018):
Holding: Where child Victim in statutory sodomy case testified to two different acts of sodomy (one on a bed, one on a sofa), but the verdict director for the one charged count allowed the jury to convict if it found that Defendant had had Victim touch his penis, the trial court plainly erred in submitting this instruction because it violated Defendant's right to a unanimous verdict under *Celis-Gracia,* since the instruction did not sufficiently distinguish which act the jury must unanimously find; Defendant was prejudiced because he asserted an accident defense to one of the incidents, and a general denial offense to the other.

Sherrer v. Boston Scientific Corp., 2018 WL 3977539 (Mo. App. W.D. Aug. 21, 2018):
Holding: Sec. 491.050, which states that a "person" who appears as a witness can be impeached by a prior criminal conviction, applies to corporations who testify through an agent, because Sec. 1.020(12) states that "person" extends to corporate entities; thus, trial court abused discretion in medical product liability case in not allowing Plaintiff to examine corporate CEO about fact that Defendant-corporation had been criminally convicted in past.

State v. Carter, 2018 WL 4567556 (Mo. App. W.D. Sept. 25, 2018):
Trial court did not abuse discretion in prohibiting Defendant from cross-examining State's fingerprint expert with NAS Report "Strengthen Forensic Science in the U.S.: A Path Forward," because State's expert denied the report was "authoritative" and even though Sec. 490.150 states that reports done under authority of Congress "shall be evidence to the same extent that authenticated copies of the same would be," this statute deals with authentication of documents, not the authoritativeness of documents.
Facts: The trial court granted State's motion in limine to preclude Defendant from cross-examining State's fingerprint expert with an NAS Report. Defendant sought to admit the report under Sec. 490.150, on grounds it was printed under the authority of Congress.
Holding: A text or treatise can be used to examine an expert where there is evidence that the text or treatise is "authoritative." This can be established three ways: (1) by concession of the expert herself; (2) by judicial notice; or (3) by other experts. Here, the State's expert denied that the NAS Report was "authoritative" in her field, and said the only authoritative materials were those published by the FBI or Justice Department. Thus, the report wasn't admissible under the first circumstance. Defendant claims Sec. 490.150 allows judicial notice of the report. Sec. 490.150 provides that documents published under "authority of congress…shall be evidence to the same extent that *authenticated* copies of the same would be." Defendant confuses authentication with

authoritativeness. The *authentication* of a document, here the NAS Report, provides no substantive support to the relevant issue of whether the report is *authoritative*. Even assuming Defendant proved the report was authentic under Sec. 490.150, he still needed to prove it was authoritative within the expert's field. Defendant could have called other experts to testify to its authoritative nature, but did not.

State v. Matthews, 2018 WL 1798380 (Mo. App. W.D. April 17, 2018):
Where (1) Defendant was charged with abuse of a child resulting in death from blunt force trauma and other child endangerment counts for physical injury, malnourishment and failing to seek medical treatment, and (2) the trial court had severed other child endangerment counts for keeping large reptiles around the children, the trial court abused discretion in allowing the State to present extensive evidence about the dangers posed by the large reptiles, because this violated Defendant's right to be tried only for the offenses charged.
Facts: The State presented several witnesses who testified that having large snakes and alligators in the family home was dangerous to children.
Holding: Mo. Const. Art. I, Secs. 17 and 18(a) provide that a Defendant has the right to be tried only for the charged offense. Defendant was not on trial for anything having to do with the large reptiles in this particular trial. The State claims the reptile evidence shows Defendant's motive for failing to obtain medical care for the children, because he had a prior history with the Children's Division over the reptiles. While it may have been within the court's discretion to admit some evidence that Defendant had been the subject of prior Hot Line complaints and was hostile to the Children's Division, this cannot justify the extensive evidence regarding the feeding habits of the snakes and alligators and the manner that Defendant exposed his children to them. The State claims the evidence was relevant to the claim that Defendant didn't feed his children, but had money to feed the reptiles. But Defendant never claimed that he didn't have money to feed his children, and didn't claim mistake or accident regarding that. The State claims the evidence was relevant to give a "complete picture" of the offense. But there was no evidence that Defendant's having the reptiles was part of a "generalized plan" to abuse or endanger children; nor was it necessary to present the reptile evidence as an inherent part of proving the charged crimes. Reversed for new trial.

State v. Beck, 2018 WL 3118528 (Mo. App. W.D. June 26, 2018):
Holding: Even though in child sex case the State presented testimony from Child-Victim only on one instance of sexual conduct for each charged count, where the jury also heard Child-Victim's forensic interview were she detailed numerous other instances of sexual conduct that would fall within each charge, the trial court plainly erred in submitting jury instructions which did not specifically describe the particular criminal act that would support the charge, because this denied Defendant his right to a unanimous jury verdict under Mo. Const., Art. I, Sec. 22(a), on each charge.
Discussion: The State contends that no manifest injustice occurred because the prosecutor focused in closing argument on a single incident for each count. But closing argument is not evidence, and cannot cure the State's failure to specify in jury instructions the three instances of conduct used to support each charge. The State also cites a case where the appellate court found no manifest injustice where there was

specific evidence only about two acts of abuse – one for each count – and Defendant made a general denial offense. But, here, while the State limited its testimony of Child-Victim only to once specific act per count, the State also played the forensic interview where Child-Victim detailed multiple possible acts for each count. Reversed for new trial.

City of Kansas City v. Cosic, 2018 WL 1061358 (Mo. App. W.D. Feb. 27, 2018):
Holding: (1) An appellate court cannot take judicial notice of a municipal ordinance, so where the ordinance was not introduced as evidence or made part of the record in the trial court, the appellate court cannot recognize it; (2) even though the ordinance might have been introduced as an exhibit in the trial court, where Appellant failed to deposit the exhibit with the appellate court, appellate court cannot recognize it; and (3) even though Appellant included the ordinance in an appendix to its brief, the mere inclusion of a document in an appendix does not make it part of the record on appeal; only matters in the legal file or deposited with the appellate court are part of the record. Appeal based on municipal ordinance not before the appellate court dismissed.

State v. Balbirnie, 2018 WL 1276979 (Mo. App. W.D. March 13, 2018):
Holding: Second-degree statutory rape, Sec. 566.034.1, does not require the State to prove that Defendant knew the victim was less than 17 years old; instead, Sec. 566.020.2 makes mistake-of-age an affirmative defense upon which the defendant bears the burden of persuasion to persuade the jury that the defense is more probably true than not, Sec. 566.056(2). The State's sole burden is to prove the victim was under 17.

State v. Matthews, 2018 WL 1472766 (Mo. App. W.D. March 27, 2018):
Holding: Where (1) Defendant was charged with child abuse and endangerment for physical abuse, failure to obtain medical care, failure to provide proper nourishment, and leaving children in a hot car, and (2) trial court had previously severed three other counts of child endangerment relating to keeping alligators and snakes in the home with the children, trial court abused discretion in allowing State to present extensive evidence (including from experts) about the alligators and snakes and their dangerous nature because this violated Defendant's right to be tried only for the offenses charged under Mo.Const. Art. I, Secs. 17 and 18(a), and defense counsel had not "opened the door" to such evidence by asking a defense witness if the children were "all taken care of."
Discussion: The trial court had previously severed three other counts of child endangerment relating to the alligators and snakes. By granting severance, the court determined the reptile-related counts would likely result in unfair prejudice to Defendant regarding the non-reptile related child endangerment and abuse counts. At trial, the defense asked a defense witness if, when she saw the children, they looked "all taken care of," and the witness answered yes. The State contended this "opened the door" to the reptile evidence. Taken in context, however, neither defense counsel's question nor the witness' answer "opened the door" to this evidence. The witness did not testify that the children lived "in a good home" or anything about the condition of the home. Regardless, "opening the door" is one thing, but what comes through the door is another. Everything does not come through the door. The State presented extensive evidence about the alligators and snakes, including photos and multiple witnesses, including an

expert who testified the reptiles would be dangerous to children. The State argued the reptile-evidence in closing argument. Although a small portion of the reptile evidence might have been admissible to explain why various witnesses were at the house, the majority of the reptile evidence, including the expert testimony, was irrelevant and prejudicial. New trial ordered.

State v. Ellis, 2016 WL 7438738 (Mo. App. W.D. Dec. 27, 2016):
Holding: (1) Trial court erred under "rule of completeness" when it refused to admit the entirety of Defendant's videotaped statement to police on grounds that his statement was not a "confession;" the rule of completeness applies to "admissions," as well as "confessions" (but reversal not required here); and (2) trial court erred in child sex case in allowing Prosecutor to question Expert whether it means Child is "lying" because she told different, inconsistent stories; this improperly commented on Child's credibility, but reversal not required because Defendant cross-examined Expert on Child's credibility, too.
Discussion: (1) The "rule of completeness" applies to both "confessions" (statement where Defendant admits guilt) and "admissions" (statement of Defendant which tends to incriminate, but is not a direct confession of guilt). When the State introduces part of a confession or admission into evidence, a defendant is authorized to introduce the remaining portions, even though they are "self-serving," where admission of the statement in edited form distorts the meaning of the statement or excludes information which is substantially exculpatory. The trial court retains discretion, however, to exclude unduly prejudicial or irrelevant portions. Here, Defendant failed to explain how the excluded portions were needed to avoid distortion or were substantially exculpatory to portions admitted by the State; (2) Experts can testify in child sex cases about generalized behaviors of child sex abuse victims, but cannot give particularized testimony on a Child-Witness' credibility. Expert should not have been allowed to opine whether it means that a victim is or is not lying if a generalized behavior is exhibited. Such testimony, though in generalized form, plainly comments on credibility. Experts are not allowed to give opinions on credibility. However, reversal is not required here because Defendant cross-examined expert on Child's credibility, too, by asking Expert to confirm that just because Child exhibited certain behaviors does not mean that sexual abuse occurred. Defendant "was as guilty of using [Expert] to elicit improper expert testimony commenting on credibility as was the State."

State v. Moyle, 532 S.W.3d 733 (Mo. App. W.D. Oct. 31, 2017):
Holding: Even though there may be no Witness who can testify that specific events depicted on a store's surveillance video were fairly and accurately portrayed because no Witness actually saw the events (Defendant stealing merchandise), a foundation can be established to admit the surveillance video by having a Witness (such as the store's manager) testify as to the accuracy of the process of producing the video; a trial court should consider (1) whether the recording system was working properly and the storage method; (2) the historic reliability of the recording system and the storage method; whether the recording has been altered, tampered or modified.

State v. Watt, 2017 WL 3026766 (Mo. App. W.D. July 18, 2017):
Defendant may offer "voice exemplar" of himself without being subject to cross-examination provided that the exemplar is proved to the satisfaction of the trial court to be genuine and authentic, i.e., not deceptive or misleading.
Facts: Defendant, in DWI case, sought to offer a "voice exemplar" of himself to rebut Officer's claim that his speech sounded intoxicated when arrested. Defendant wanted to show that this was his usual speech. The trial court excluded it solely on the ground that Defendant did not want to be subject to cross-examination.
Holding: The admissibility of voice exemplars by the defense is an issue of first impression in Missouri. The U.S. Supreme Court has repeatedly upheld the use of voice exemplars by the Gov't against a criminal defendant, rejecting the notion that such evidence violates a defendant's right against self-incrimination. Various states and federal courts have held that the due process principle of reciprocity requires that defendants likewise be granted the right to admit voice exemplars without being deemed to have waived their right to be free from self-incrimination. Western District agrees with these other courts. Thus, the trial court erred in excluding a voice exemplar solely on grounds that Defendant refused to submit to cross-examination. But here, Defendant failed to establish that his proposed exemplar was a "true sample of his true voice." To admit an exemplar, Defendant must prove to the satisfaction of the trial judge that his exemplar is genuine and authentic, not deceptive and misleading. Here, Defendant offered to read something in front of the jury, but this is not appropriate proof of genuineness or authenticity. Appropriate proof would have been something outside the context of the trial, such as a voicemail or other audio recording made pre-arrest; this not to suggest that any voice exemplar created post-arrest is per se inadmissible, but the proposed exemplar here wasn't sufficient.

State v. Pylypczuk, 527 S.W.3d 96 (Mo. App. W.D. Aug. 15, 2017):
Even though Sec. 577.023.16 allows records from the Driving While Intoxicated Tracking System (DWITS) to be used to prove prior convictions in DWI cases, the statute does not eliminate the foundational need for those records to be authenticated.
Facts: In DWI case, the State submitted Defendant's DWITS record, which purported to show that Defendant had a prior DWI conviction. The record was neither certified nor accompanied by any kind of business record affidavit, and the State offered no witnesses to testify as to its origins or authenticity. The Prosecutor merely said he had pulled the record from the Dept. of Public Safety website, and it contained the web address of the Dept. of Public Safety. Defendant objected to admission of the record for lack of foundation.
Holding: The State contends that Sec. 577.023 allows DWITS records to be admitted without any foundational requirement. But nothing in Sec. 577.023.16 states that such records shall be admitted without a foundational requirement. The State argues it must be assumed that since the legislature made such records sufficient to prove prior convictions, it must have intended to eliminate general foundation requirements. But the statute was intended to clarify that DWITS records can be used as evidence of prior convictions, thus eliminating the need for the State to obtain a record of each individual conviction from various courts. Eliminating foundational requirements is not necessary to accomplish this purpose and should not be read into the statute absent language

addressing admissibility. The records must be authenticated to be admissible. Reversed and remanded for resentencing as misdemeanor DWI.

City of Raymore v. O'Malley, 527 S.W.3d 857 (Mo. App. W.D. Aug. 29, 2017):
Even though Defendant charged with municipal violation claimed she had a legal justification defense that could be determined from the evidence in the municipal trial, where Defendant was seeking a trial de novo in circuit court, circuit court erred in granting pretrial motion to dismiss because a justification defense must be supported by evidence and a trial de novo proceeds as if no action had been taken in municipal court.
Discussion: Regarding Defendant's justification defense, she had the burden of injecting the issue and it was required to be supported by evidence. Here, Defendant presented her motion to dismiss to the circuit court before her requested trial de novo. Her claim could not have been supported by any evidence, given that none had been adduced at the time the circuit court granted the motion to dismiss. Defendant seeks to rely on evidence presented at the municipal court trial to support her claimed defense. But the concept of a trial de novo is that it is a new prosecution. The trial de novo proceeds as if no action had been taken in the municipal court (division). Even so, it is possible for a court to properly grant a motion to dismiss based on an affirmative defense if the defense is irrefutably established *by the pleadings*. But the only pleadings in this case are the uniform citation and amended information which charged the offense; neither irrefutably establishes that Defendant's conduct was justified as a matter of law. Grant of motion to dismiss reversed.

State v. Escobar, 2017 WL 2644090 (Mo. App. W.D. June 20, 2017):
Holding: On plain error review, trial court erred under *Celis-Gacia* in submitting jury instructions which failed to distinguish between multiple independent, identical acts of child sexual abuse occurring in the same location, because this can result in jurors not unanimously finding the same act to convict (but not manifest injustice here).

State v. Swartz, 2017 WL 582669 (Mo. App. W.D. Feb. 14, 2017):
Holding: (1) Where Defendant was charged with failure to drive on the right half of roadway, Sec. 304.015, trial court erred in submitting jury instruction which failed to state that the road had to be of "sufficient width" to be able to drive on right side; and (2) trial court erred in excluding Defendant's evidence that road was less than 30 feet in width, which is required by Sec. 229.010, and which Defendant claimed caused him to drive in center of road.
Discussion: Where, as here, there is no MAI for the charge, trial court must give an instruction that conforms to the substantive law. The instruction told jurors to convict if they found Defendant "failed to drive on the right half of the roadway." Defendant sought to use as a defense that he was driving in the center of the road because the road was not of "sufficient width." Sec. 229.010 requires roads built after 1939 to be 30 feet wide. The instruction failed to include the essential element of whether the road was of "sufficient width." Defendant was prejudiced because whether he was able to drive on the right side was factually disputed at trial.

State v. Pennington, 2016 WL 4014002 (Mo. App. W.D. July 26, 2016):
Holding: The general rule that if evidence can be identified at trial, there is no need to establish chain of custody, applies only when the evidence is distinguishable; chain of custody must be established for non-distinguishable evidence such as drugs; since there was no indication that the crack rock at issue was distinguishable from any other crack rock, the State must establish chain of custody.

U.S. v. Slatten, 101 Crim. L. Rep. 510 (D.C. Cir. 8/4/17):
Holding: (1) Trial court erred in excluding statements of co-Defendant that co-Defendant fired first shots in crime; (2) mandatory 30-year minimum prison sentence violated 8th Amendment ban on cruel and unusual punishment in manslaughter case.

U.S. v. Alvarez-Nunez, 99 Crim. L. Rep. 545 (1st Cir. 7/8/16):
Holding: 1st Amendment prohibits using Defendant's songs with violent lyrics to increase sentence, although such lyrics can be used to show motive or state of mind in some cases.

Nappi v. Yelich, 97 Crim. L. Rep. 527 (2d Cir. 7/15/15):
Holding: Where, in felon-in-possession case, Defendant's defense theory was that his Wife planted gun because she was having an affair with another man, State court unreasonably applied federal law in prohibiting Defendant from cross-examining Wife about that; this denied him right to confront Wife under 6th Amendment.

U.S. v. Lopez, 2015 WL 10692810 (3d Cir. 2015):
Holding: Gov't violated due process by repeatedly asking Defendant at trial if he told anyone about "what happened" before his trial testimony; such impeachment violated his right to post-*Miranda* silence.

Rhoades v. Davis, 2019 WL 334890 (5th Cir. 2019):
Holding: Photographs from Defendant's childhood are relevant mitigation in death penalty case.

U.S. v. Garcia, 2019 WL 1275330 (7th Cir. 2019):
Holding: Officer's "expert testimony" about meaning of cryptic phone calls between Defendant and drug dealer was merely "educated speculation" rather than proof beyond a reasonable doubt to support conviction for drug dealing.

U.S. v. Mackin, 97 Crim. L. Rep. 528, 2015 WL 4190212 (7th Cir. 7/13/15):
Holding: Defendant granted new trial in felon-in-possession case where before trial Gov't failed to disclose complete chain of custody information regarding the gun, and Defendant based his defense on the Gov't not following proper chain of custody; during trial, the Gov't disclosed the complete chain of custody, but the Gov't's error had misled Defendant to believe he had a viable defense.

U.S. v. West, 2015 WL 9487929 (7th Cir. 2015):
Holding: Trial court erred in excluding evidence of Defendant's mental disabilities because they were relevant to the voluntariness of his confession.

U.S. v. Fomichev, 103 Crim. L. Rep. 494 (9th Cir. 8/8/18):
Holding: Marital privilege prevents Gov't from using recording of Defendant-Husband and Wife in immigration marriage fraud case, even though Wife secretly recorded the conversation as part of agreement with Gov't.

U.S. v. Wells, 102 Crim. L. Rep. 306 (9th Cir. 12/19/17):
Holding: Expert testimony that Defendant met "criminal profile" of a workplace shooter improperly admitted to show guilt, i.e., that he acted in accord with the general profile.

U.S. v. Espinoza, 102 Crim. L. Rep. 404 (9th Cir. 1/22/18):
Holding: The relevant standard for whether a Defendant should be able to present evidence that another person committed the crime is whether certain facts make it "more likely" that the other person committed the crime; a Defendant need not produce "substantial evidence directly connecting" the third person to the crime; thus, trial court erred in prohibiting Defendant from showing that her neighbor had the opportunity, motive and knowledge to use Defendant as a "blind mule" to transport drugs.

U.S. v. Lemus, 2016 WL 805739 (9th Cir. 2016):
Holding: Where no actual drugs were seized from Defendant, Gov't could not establish the purity (and thus the weight) of the methamphetamine Defendant allegedly tried to sell by having an FBI agent testify that in only four of 30 controlled buys in the metropolitan area was the purity of meth less than 90%.

U.S. v. Alcantara-Castillo, 2015 WL 3619853 (9th Cir. 2015):
Holding: Prosecutor's cross-exam of Defendant by asking him if Officer who testified was "inventing stories" was improper, because it effectively asked Defendant to comment on Officer's veracity at trial.

U.S. v. Martin, 2015 WL 466855 and 2015 WL 4680424 (9th Cir. 2015):
Holding: Where Defendant was charged with not reporting income for federal tax purposes, admission of her prior incorrect farm expense deductions for state income tax purposes was improper prior bad acts evidence; there was no relevant connection between Defendant's awareness of the rules on farm expenses and whether she had knowledge about federal income reporting requirements.

U.S. v. Folse, 2015 WL 10383067 (D.N.M. 2015):
Holding: A letter allegedly authored by Defendant to the roommate of the alleged victim was not admissible under res gestae doctrine to show consciousness of guilt; the letter was not inextricably intertwined with Defendant's case, and did not exist until well after the charged crime.

U.S. v. Shipp, 110 Fed. R. Evid. Serv. 1537 (E.D. N.Y. 2019):
Holding: Ballistics expert can only testify that firearm could not be excluded as source of bullet fragment, not that the firearm was the source of the bullet; this is because the President's Council of Advisors on Science and Technology have cast doubt on reliability of theory behind matching pieces of ballistics evidence.

U.S. v. Ledbetter, 2016 WL 2956250 (S.D. Ohio 2016):
Holding: Requiring Defendant to display gang-related tattoo violated 5th Amendment privilege against self-incrimination.

Dobson v. McClennen, 2015 WL 7353847 (Ariz. 2015):
Holding: In charge of driving with a marijuana metabolite in body, a Defendant may establish an affirmative defense by showing that they are a qualified user of medical marijuana under state medical marijuana law, and that the metabolite would not cause impairment.

Perez v. People, 2015 WL 3745292 (Colo. 2015):
Holding: Admission of Defendant's prior stalking offense for stalking an adult victim by pretending to be a home inspector was more prejudicial than probative to show his intent to commit charged crime of sexual contact with a child, where Defendant had approached child in a car and threatened child to get in; the two offenses were not sufficiently similar to show intent.

State v. Edwards, 101 Crim. L. Rep. 8 (Conn. 4/11/17):
Holding: Police officers who testify to cell tower location data should be considered experts and their testimony judged scientifically sound before admission.

Jones v. U.S., 2019 WL 1066182 (D.C. 2019):
Holding: Expert's false and misleading testimony about accuracy of microscopic hair comparisons warranted new trial.

Tann v. U.S., 2015 WL 7289640 (D.C. 2015):
Holding: Probative value of rap lyrics and songs referencing gangs, in prosecution for conspiracy and violent crimes, was not substantially outweighed by the prejudicial effect.

State v. Horwitz, 2016 WL 2586307 (Fla. 2016):
Holding: Under Fla. Const.'s right against self-incrimination, where a Defendant does not testify, State cannot use his his pre-*Miranda*, pre-arrest silence as evidence of guilt.

Dolan v. State, 2016 WL 618901 (Fla. 2016):
Holding: A defendant's prior booking photo from a sheriff's website was not admissible, without further authentication, to prove that Defendant was the person who had an alleged prior conviction.

Olds v. State, 2016 WL 2946361 (Ga. 2016):
Holding: In deciding whether to admit evidence of Defendant's prior bad sexual acts against women in effort to prove "intent," court must balance the probative value with the prejudicial effect of the evidence; court cannot simply decide that because proof of intent is a substantial burden for the prosecution, then the prior bad acts have substantial probative value toward intent.

People v. Lerma, 98 Crim. L. Rep. 418 (Ill. 1/22/16):
Holding: Expert testimony on reliability of eyewitness identification is admissible even in cases where the Defendant was not a complete stranger to the eyewitness.

People v. Way, 101 Crim. L. Rep. 69 (Ill. 4/20/17):
Holding: Defendant charged with aggravated DWI following an auto accident should have been permitted to present alternative defense theory that unforeseeable medical condition was cause of crash.

Williams v. State, 98 Crim. L. Rep. 123, 2015 WL 6447736 (Ind. 10/26/15):
Holding: Where Officer testified that there was "zero doubt in my mind" that Defendant's hand-to-hand exchange of materials with an informant was a drug transaction, this was inadmissible opinion evidence on the ultimate issue of guilt.

State v. Tyler, 2015 WL 3958498 (Iowa 2015):
Holding: Medical examiner's opinion was not sufficiently based on scientific evidence to assist jury, and thus was not admissible, where he admitted that his opinion that a baby's death was a homicide (by drowning in a bathtub) was primarily based on Defendant's inconsistent statements given to police and not on the actual autopsy.

State v. Fisher, 99 Crim. L. Rep. 109 (Kan. 4/22/16):
Holding: Even though Defendant never invoked his right to silence during police questioning, Prosecutor could not question Defendant at trial about why he didn't volunteer the information he gave in his trial testimony.

Trigg v. Com., 2015 WL 2340355 (Ky. 2015):
Holding: Defendant's pre-arrest silence during a search of a residence where drugs were found was not an adoptive admission by silence; the State claimed Defendant's lack of protest to the search was evidence of guilt; however, Defendant's lack of protest was not a response to an accusatory or incriminating "statement," as required under the adoptive admission rule.

Daugherty v. Com., 2015 WL l4967148 (Ky. 2015):
Holding: Defendant's due process right to present a defense was violated when court prevented him in murder case from showing that Victim was a convicted felon, and from showing statements Victim made before, during and after the shooting.

Com. v. Thomas, 100 Crim. L. Rep. 409 (Mass. 2/13/17):
Holding: Police were unduly suggestive in showing photos of guns to Witness and making comments such as "Looks just like it, huh," and "We're smarter than you think, aren't we."

Com. v. Gerhardt, 101 Crim. L. Rep. 658 (Mass. 9/19/17):
Holding: Officer can't give an opinion about whether a Defendant-Driver was impaired by marijuana based on field sobriety tests; but Officer can testify that the tests showed lack of balance, coordination and mental acuity.

Com. v. Adonsoto, 99 Crim. L. Rep. 722 (Mass. 9/16/16):
Holding: Police must record all police station interrogations of non-English speaking Defendants conducted through an interpreter; recordings are necessary to gauge reliability and also provide an independent basis to evaluate the truth of the police testimony for confrontation clause purposes.

Com. v. Camblin, 2015 WL 3631943 (Mass. 2015):
Holding: Trial court should have held a *Daubert* hearing to determine whether source code of breath test machine functioned in a manner that reliably produced accurate results.

Grimm v. State, 2016 WL 2342875 (Md. 2016):
Holding: Defendant's confession to child sex offense was not corroborated by Victim's testimony that Victim could not remember any sexual acts by Defendant, even though Victim's testimony was "preposterous;" thus, there was no corpus delicti and evidence was insufficient to convict.

State v. Expose, 98 Crim. L. Rep. 248, 2015 WL 8343119 (Minn. 12/9/15):
Holding: Even though psychologists have a duty to warn third-parties of threats by patients, there is no exception to the psychologist-patient privilege for terroristic threats that permits psychologist to testify in court; these concepts are not inconsistent since the psychologist can warn a third-party but still be incompetent to testify in court about matters the patient disclosed in confidence.

Hartfield v. State, 2015 WL 926972 (Miss. 2015):
Holding: Even though declarant's letter said she assisted in disposing of Victim's body because she was afraid she'd be killed if she didn't assist, the letter was not admissible under the hearsay exception for statement against penal interest, because the letter was exonerating declarant and placing blame on someone else.

State v. Colburn, 2016 WL 718610 (Mont. 2016):
Holding: Court abused discretion in child sex case in applying rape shield law to prohibit questioning Victim as to whether she had been sexually abused by her own father (not Defendant); evidence was relevant to rebut Nurse's testimony that Victim's knowledge of sex likely came from having experienced sexual abuse.

State v. Johnson, 862 N.W.2d 757 (Neb. 2015):
Holding: DNA testing is not admissible without evidence of statistical significance of the findings; State expert's testimony that Defendant "cannot be excluded" is irrelevant without evidence of statistical significance; because of the weight jurors will likely give DNA evidence, the value of inconclusive testing is substantially outweighed by the danger that jurors will be unfairly misled.

State v. Scott, 101 Crim. L. Rep. 432 (N.J. 6/28/17):
Holding: Prosecutor cannot question Defendant's Witness-Mother about specific instances in which Defendant lied; bias can be developed by showing she is Defendant's Mother or asking if she would protect her son; unlike most states and federal courts, N.J. does not allow Witnesses to be questioned about specific conduct that involves dishonesty or false statements.

State v. Simms, 98 Crim. L. Rep. 591 (N.J. 3/15/16):
Holding: Prosecutors cannot ask experts hypothetical questions which essentially "sum up" the Gov't's entire case, and elicit an opinion indicating that the Defendant is guilty; here, the Prosecutor asked expert a 10-paragraph hypothetical question about a "hypothetical transaction" containing the facts of the case about a transaction on a street and whether this would be a drug deal.

State v. Cain, 2016 WL 958914 (N.J. 2016):
Holding: Prosecutor cannot ask expert lengthy hypothetical which embodies all the facts of the crime, which leads expert to give opinion on Defendant's state of mind in drug case, i.e., whether drugs seized from Defendant were possessed with intent to distribute.

State v. Willis, 99 Crim. L. Rep. 184 (N.J. 5/11/16):
Holding: Evidence of Defendant's three-year-old prior sexual assault should have been excluded in new sexual assault trial, where the new trial became dominated by the prior case; the prior bad act was remote in time and distracted jurors from deciding the case at hand.

State v. Jones, 98 Crim. L. Rep. 371 (N.J. 1/20/16):
Holding: When evaluating the reliability/suggestibility of a showup identification, the court should consider only the reliability/suggestibility of the showup itself, and not extrinsic evidence of the guilt of Defendant.

People v. Price, 101 Crim. L. Rep. 430 (N.Y. 6/27/17):
Holding: Proper foundation wasn't laid for admission of photograph from Blackplanet.com purporting to show Defendant with a gun used in a robbery; prosecution failed to show photo was authentic, fair or accurate.

People v. DiPippo, 2016 WL 1190482 (N.Y. 2016):
Holding: Defendant should have been permitted to present as a defense that Third-Party actually committed the crime where Defendant proffered evidence that Third-Party had made statements indicating that Third-Party did the crime, there was some evidence

linking Third-Party to the crime, and Third-Party had previously committed similar crimes (sexual assaults) in the past.

People v. Ortiz, 2015 WL 8787119 (N.Y. 2015):
Holding: Trial court erred in allowing Prosecutor to use a statement made by defense counsel at Defendant's arraignment to attack Defendant's credibility at trial (trial counsel had stated a fact differently than Defendant did at trial), and then refusing to allow trial counsel to withdraw or declare a mistrial; the Prosecutor caused defense counsel to become an adversary of Defendant, and made it impossible for counsel to admit to the jury that counsel was wrong, moments before she was going to argue for Defendant's innocence in closing argument.

People v. Pavone, 2015 WL 9089124 (N.Y. 2015):
Holding: Use of Defendant's post-arrest silence to impeach his claim that he committed murder under extreme emotional disturbance violated due process.

State v. Acker, 2015 WL 7737925 (N.D. 2015):
Holding: Trial court erred in failing to weigh prejudicial impact of admission of Defendant's prior convictions for sexual assault against their probative value in aggravated assault prosecution; the prior convictions were not harmless because they were referenced three times at trial.

State v. Thomas, 102 Crim. L. Rep. 46 (Ohio 10/7/17):
Holding: Even though charged murder was committed with a knife that was not recovered, trial court erred in admitting Defendant's unrelated knife collection because unrelated knives were irrelevant and designed to get jury to convict on the basis of bad character for having a knife collection and acting in conformity with it.

State v. Banks, 2019 WL 474794 (Or. 2019):
Holding: Defendant-Driver's refusal to consent to a BAC test at the time of his arrest is not admissible as evidence of guilt; a driver does not irrevocably give consent by driving on a public road.

State v. Henley, 103 Crim. L. Rep. 402 (Or. 7/19/18):
Holding: State's forensic interviewer's testimony in child sex case about how adults "groom" children was scientific evidence that required proof of scientific validity before it can be admitted; even though the testimony wasn't presented as "scientific," the "grooming" testimony coming from an interviewer who had interviewed more than 600 children gave the testimony scientific cachet; new trial ordered.

State v. Broadnax, 2015 WL 4099053 (S.C. 2015):
Holding: Conviction for armed robbery did not involve a crime of dishonesty or false statement, so was not automatically admissible for impeachment purposes without weighing the probative value versus prejudicial effect.

State v. Sarkisian-Kennedy, 2020 WL 399105 (Vt. 2020):
Holding: Horizontal gaze nystagmus (HGN) test is not admissible without expert testimony.

Acosta v. State, 2015 WL 3448864 (Ala. App. 2015):
Holding: Defendant was denied right to present complete defense when trial court applied hearsay rule to prohibit Officer from testifying to another person's statement that the other person committed the charged crime; if the other person had been on trial, the statement would have been admissible, so should be admissible in Defendant's trial.

People v. Morris, 2015 WL 3932754 (Cal. App. 2015):
Holding: Defendant's right to a fair trial was violated when State called an excused juror to testify that juror overheard Defendant make incriminating remarks at the courthouse; there was an unacceptable probability that other jurors would be biased toward the testimony since they had served with the juror.

People v. Andrews, 184 Cal. Rptr.3d 183 (Cal. App. 2015):
Holding: Defendant can assert defense of honest and reasonable mistaken belief as to Victim's consent in sexually battery trial, where there is substantial evidence to support the defense and it is consistent with the Defendant's theory of case.

People v. Murphy, 2019 WL 2184854 (Colo. App. 2019):
Holding: Officer's testimony that "body language" of witness showed deception was improper lay testimony, even though Officer said it was based on his training and experience.

People v. McClelland, 2015 WL 186962 (Colo. App. 2015):
Holding: Probative value of photos of victim while alive was outweighed by danger of unfair prejudice at trial for murder or reckless manslaughter.

People v. Froehler, 2015 WL 4571431 (Colo. App. 2015):
Holding: Officer's testimony about a law-enforcement-developed software program used to search Defendant's computer was expert testimony, and not admissible as lay testimony; the general public could not be familiar with the software because it is not even available to the public.

People v. Pike, 2016 WL 359117 (Ill. App. 2016):
Holding: Expert testimony that Defendant could not be excluded as source of DNA, but that 50% of rest of population could also not be excluded, was irrelevant, because the probability of inclusion of 50% of the population did not tend to make Defendant's identification as the perpetrator more or less probable.

People v. Salem, 2016 WL 1098535 (Ill. App. 2016):
Holding: Even though Defendant had pleaded guilty to a felony, where he had not yet been sentenced, this was not a "conviction" that could be used to impeach him.

People v. Thodos, 2015 WL 5578621 (Ill. App. 2015):
Holding: Even though Defendant's religious advisor was not a pastor of a church or a paid clergy member, where the advisor was accredited by a religious denomination, he was covered by the clergy-penitent privilege, which precluded him from being compelled to testify about Defendant's confession to him.

People v. Fields, 2015 WL 927092 (Ill. App. 2015):
Holding: Where Defendant's prior conviction for sex abuse was reversed, this required reversal of his conviction at trial in another sex case where the prior conviction was used as propensity evidence to convict.

Barcroft v. State, 2015 WL 664244 (Ind. App. 2015):
Holding: In murder prosecution, due process prohibited State from using evidence that Defendant asked to consult an attorney to rebut his claim of insanity.

People v. Myrick, 2016 WL 155622 (N.Y. App. 2016):
Holding: Officer should not have been permitted to testify that Defendant was the person depicted in store surveillance video of the robbery.

People v. Cruz, 2015 WL 3461792 (N.Y. App. 2015):
Holding: A showup identification conducted one hour after a robbery is not admissible; there were no exigent circumstances requiring a showup.

People v. Days, 2015 WL 5124966 (N.Y. App. 2015):
Holding: Expert testimony on false confessions should have been allowed.

State v. Dillon, 2016 WL 1545136 (Ohio App. 2016):
Holding: State in murder trial should not have been permitted to present evidence that Defendant viewed pornography on his home computer and used white supremacist screen names; the State offered this evidence purportedly to establish that Defendant was in Ohio at the time of the murder so committed the murder there, but this could have been established by general testimony that the State determined that Defendant had used his computer in Ohio when the murder occurred.

Blea v. State, 2016 WL 519743 (Tex. App. 2016):
Holding: In determining whether Victim suffered serious physical injury to support first-degree assault, court should not consider the exacerbation of the injury by actions not attributable to Defendant, such as medical treatment.

Navarro v. State, 2015 WL 4103565 (Tex. App. 2015):
Holding: Use of blood plasma to conduct blood test for DWI was not legally valid because Legislature used the term "blood," which is different than "plasma."

Phillips v. State, 2015 WL 3504487 (Tex. App. 2015):
Holding: Under jailhouse witness rule which requires independent evidence connecting Defendant to a crime and a cautionary jury instruction when Defendant allegedly makes

statements "against his interest" to other inmates, the phrase "against interest" applies to any statement adverse to him, not just statements acknowledging guilt; thus, the rule applied where Defendant allegedly asked other inmates to lie for him at trial.

State v. Hood, 2018 WL 6684901 (Utah App. 2018):
Holding: Trial court's admission of evidence that Defendant was excommunicated from his Church was prejudicial, because jury would assume Defendant was person of immoral character.

Jennings v. Com., 2015 WL 9304493 (Va. App. 2015):
Holding: Price tags attached to stolen clothes were subject to best evidence rule; thus, State was required to either produce the price tags themselves or explain why they were missing, in order to establish value.

Anderson v. State, 2016 WL 1254610 (Md. Ct. Spec. App. 2016):
Holding: Witness could not be impeached with prior conviction for carrying a concealed weapon, because this offense did not indicate Witness was unworthy of belief.

Phillips v. State, 2015 WL 6472286 (Md. Ct. Spec. App. 2015):
Holding: DNA analysis conducted per the FBI Quality Assurance Standards may be admissible, but is not automatically admissible.

People v. Collins, 2015 WL 4077176 (N.Y. Supp. 2015):
Holding: "High sensitivity" DNA analysis was not generally accepted as reliable in the forensic community to analyze small DNA deposits; thus, this type of DNA test is not admissible under *Frye*.

Com. v. Davis, 2015 WL 4550110 (Pa. Super. 2015):
Holding: The crime-fraud exception to the spousal privilege does not apply in the criminal context; thus, the privilege applied to Defendant's alleged incriminating statements made to his wife about the charged crime.

Evidentiary Hearing (Rules 24.035 and 29.15)

Ryan v. State, 2018 WL 2311275 (Mo. banc May 22, 2018):
Holding: (1) "Group guilty pleas" are discouraged and may be a relevant factor in determining if a plea is voluntary, but the mere fact that a plea was taken in a "group" does not, *per se*, render the plea involuntary; (2) to the extent that a Movant wants a court to consider the relevance of a "group plea" as to voluntariness or so as to require an evidentiary hearing, a "group plea" issue must be pleaded in an amended motion.

Watson v. State, 2017 WL 1629372 (Mo. banc May 2, 2017):
(1) Where a judge at sentencing affirmatively misinforms Defendant-Movant about the deadline for filing a pro se postconviction motion under 29.15 (or 24.035), this can

excuse the untimely filing; and (2) Movant was entitled to evidentiary hearing on claim that trial counsel was ineffective in not seeking lesser-included offense instruction for nested lesser, where counsel conceded guilt on the lesser.
Facts: Defendant-Movant was convicted at trial of first degree robbery. A contested fact at trial was whether Defendant-Movant displayed a gun during the robbery. At sentencing, trial judge told Defendant-Movant he must file a pro se 29.15 motion within 180 days after his delivery to the DOC. In fact, the time for filing would be 90 days after a mandate on direct appeal. In any event, Defendant was ultimately sent to the Dept. of Mental Health, not DOC. Defendant-Movant's conviction was affirmed on direct appeal and a mandate issued. Defendant filed his pro se 29.15 motion more than 90 days later. He claimed his motion should be considered timely because he relied on the trial judge's advice as to when his motion was due, and he hadn't been delivered to DOC.
Holding: (1) A trial court is not required to tell defendants the deadline for filing an amended motion. There is a difference between failing to inform and *mis*informing Where a court misinforms defendants about critical information upon which the defendants had a right to rely, they are entitled to a remedy. This case presents a new, limited exception to the timeliness requirements. The untimeliness is excused because the trial judge misinformed Defendant-Movant about the deadline. To the extent *Talley v. State*, 399, S.W.3d 872 (Mo. App. E.D. 2013) holds otherwise, it should no longer be followed. (2) The differential element between first and second degree robbery here was whether Defendant displayed or threatened use of a gun. Second degree robbery is a nested lesser offense of first degree robbery because it is impossible to commit the greater without necessarily committing the lesser. The trial court would have been required to give the lesser if counsel had requested it, since determining the facts was for the jury. The State argues counsel was using an "all-or-nothing" defense as a matter of strategy. Counsel can choose that as a matter of strategy, but other cases have granted an evidentiary hearing to determine if that's what counsel, in fact, did. Here, counsel did not argue Defendant was entirely innocent. Counsel conceded Defendant was guilty of second degree robbery. The record does not refute Defendant-Movant's claim of ineffectiveness for failing to request the lesser. Remanded for evidentiary hearing.

State v. DePriest, 2017 WL 770975 (Mo. banc Feb. 28, 2017):
(1) Movants (Brother and Sister) were entitled to evidentiary hearing on claim that plea counsel (who had represented both of them) operated under an actual conflict of interest which adversely affected his representation where (a) counsel knew the evidence against Brother was strong, but the evidence against Sister was weaker, (b) counsel advised rejecting various plea offers that would have benefited one over the other, and (c) counsel eventually recommended accepting a plea offer that required both of them to plead guilty together, even though the offer appeared to favor Sister. (2) Prejudice is presumed in a guilty plea case where a Movant shows that a conflict of interest actually affected the adequacy of representation. (3) "Group guilty pleas" are disfavored and should be "consigned to judicial history."
Facts: Brother and Sister were charged with various drug offenses. They were jointly represented by Attorney. Attorney recognized that the evidence against Brother was stronger, and the evidence against Sister weaker. The State initially offered both Brother and Sister a 10-year deal. Attorney told them to reject it. Later, the State made other

plea offers, including one in which Sister would be required to testify against Brother; Attorney told Sister not to accept that offer. Later, Sister was jailed on an unrelated charge. The State offered to let Sister bond out on that charge *only if both* she and Brother pleaded guilty in the drug cases. Attorney told them both to plead guilty. Brother's plea was an "open" plea but was relying on Sister being able to bond out on the unrelated charge. Sister's plea dismissed certain charges and allowed her to bond out on the other charge, but was also open. The plea was at a "group guilty plea" with numerous other defendants also pleading guilty at the same time and being questioned by the judge as a group. Brother and Sister later filed separate 24.035 motions, alleging Attorney was operating under an actual conflict of interest in representing both of them. The motion court denied the claim without an evidentiary hearing.

Holding: The motion court denied a hearing on grounds that Movants had not shown prejudice, in that they had not shown that there is a reasonable probability that but for counsel's errors they would rejected pleading guilty and insisted on going to trial. But this is the wrong standard for conflict of interest claims in a guilty plea. A movant who shows that a conflict of interest actually affected the adequacy of representation need not show prejudice. Prejudice is presumed because the right to unconflicted counsel is an essential aspect of the Sixth Amendment right to counsel. Actual conflicts of interest in guilty plea proceedings cause counsel to refrain from doing things, such as in pretrial negotiations. To assess the impact of such a conflict on the attorney's options, tactics and decisions in plea negotiations would be impossible. (The standard for conflict of interest at trial is that counsel must have done something or foregone doing something at trial, which was detrimental to the movant and advantageous to the one with antagonistic interests.) Here, Movants pleaded facts alleging that counsel was acting under an actual conflict of interest that adversely affected his performance. Case remanded for an evidentiary hearing.

Concurring Opinion: Judge Wilson questions the adequacy of the amended motions, and expresses his view that the civil pleading requirements of Rule 55 should apply to Rule 24.035 and 29.15 amended motions. "[E]ven if Rule 55 does not compel postconviction counsel to take this approach, postconviction clients would be better served if their counsel did so."

Washington v. State, 2020 WL 1522585 (Mo. App. E.D. March 31, 2020):

Holding: (1) Even though Defendant-24.035 Movant said she was "clearheaded" where (a) Defendant-Movant stabbed a police officer while off her medications for schizophrenia; (b) Defendant-Movant had been incompetent and committed to DMH for a period of time prior to her guilty plea; (c) DMH doctors had reported to court that Defendant-Movant would be competent only if she took her medication; (d) after Defendant-Movant was discharged from DMH, she was placed in county jail for more than a year before her guilty plea and later sentencing; and (e) Defendant-Movant said she was not taking her medication and made remarks at her later sentencing reflecting possible delusions about her mother, trial court erred in not, *sua sponte*, ordering a new competency evaluation before sentencing, because a reasonable judge would have had doubts as to Defendant-Movant's competency at sentencing; and (2) Movant was entitled to evidentiary hearing on her claims that plea counsel was ineffective in advising her to plead guilty when she may have been incompetent, and in failing to investigate and

pursue an NGRI defense; Movant's allegations that she had decompenstated since being discharged from DMH and become incompetent, and that doctors would testify she was NGRI at time of crime were not refuted by the record.
Discussion: When counsel is representing an accused diagnosed with a mental disease or defect *and* multiple exams agree medication impacts her competence *and* she is not on medication at the time of the plea *and* she exhibits the same delusions as appear in the exam reports, this indicates a questionable mental condition that makes counsel ineffective without investigating it. To show prejudice, Movant must show a reasonable probability she was not competent. Here, she has alleged that doctors would testify she wouldn't be competent if she wasn't on her medication. Similarly, counsel should have investigated an NGRI defense since counsel knew or should have known Movant wasn't medicated at time of crime. None of the pretrial DMH reports addressed NGRI. Sentence vacated, and remanded for evidentiary hearing on whether plea should be vacated.

Perry v. State, 2019 WL 3917548 (Mo. App. E.D. August 20, 2019):
Holding: (1) 24.035 Movant was entitled to evidentiary hearing on claim that his plea counsel had an undisclosed conflict of interest in advising him to plead guilty because counsel was a City Councilman in City where crime occurred, had a personal friendship with investigating Officer, and would not want to criticize the police at trial or cross-examine his Officer friend; prejudice would be presumed if such facts showing a conflict of interest are true, obviating the need for Movant to prove what prejudice actually resulted; (2) Movant's assurances to plea court that he was satisfied with his counsel are insufficient to refute conflict-of-interest claim, because Movant was unaware of the conflict at the time he made his assurance.

Kulhanek v. State, 560 S.W.3d 94 (Mo. App. E.D. Oct. 23, 2018):
Holding: Even though 24.035 Movant said he was guilty of second-degree murder and was satisfied with counsel, Movant was entitled to evidentiary hearing on claim that counsel was ineffective in not advising him of voluntary manslaughter defense; this was not refuted by record because voluntary manslaughter admits every element of second-degree murder with the added element of sudden passion arising from adequate cause, and a general claim of satisfaction with counsel does not refute that counsel failed to advise on voluntary manslaughter.
Discussion: Voluntary manslaughter is a complicated legal concept not within the general knowledge of laypersons. A layperson may be unaware that they have a voluntary manslaughter defense. Even though Defendant admitted to second-degree murder, the factual basis underlying a guilty plea is not always a complete account of the circumstances surrounding the crime, nor is it intended to be. The factual basis indicates there was a "fight," but does not indicate who the initial aggressor was. Even though Defendant admitted to second-degree murder, he did not contradict that he may have been guilty only of voluntary manslaughter if, as pleaded, he was not the initial aggressor and acted with sudden passion arising from adequate cause.

Like v. State, No. ED106388 (Mo. App. E.D. Dec. 26, 2018):
Holding: Even though (1) Defendant-24.035 Movant and the judge had discussed at Movant's guilty plea that defense counsel could not guarantee Movant's "out date" and that that would be determined by the Department of Corrections, and (2) Movant said that no promises were made to him to plead guilty, Movant was entitled to an evidentiary hearing on claim that defense counsel was ineffective in advising Movant that he would receive jail time credit toward this offense from an offense in another county, because this advice was legally wrong since the two offenses were not "related to" each other; the discussion about an "out date" refers to when Movant would be paroled, which is different than jail time credit; and Movant's general denial that he was not promised anything did not refute the claim that he believed he would be receiving jail time credit.

Eye v. State, 551 S.W.3d 671 (Mo. App. E.D. July 17, 2018):
Holding: 29.15 Movant was entitled to evidentiary hearing in drug case on claim that trial counsel was ineffective in failing to call Witness who would testify that drug items found in Movant's residence belonged to Witness; in the absence of an evidentiary hearing, motion court erred in finding that Witness would have given perjured testimony or invoked his Fifth Amendment privilege not to incriminate himself.
Discussion: Even though other witnesses testified that Movant was not at his residence for several days before the drug items were found, Witness' testimony that the drug items belonged to him would not have been cumulative of any other witnesses' testimony. Such testimony would have provided a viable defense. The motion court denied the claim without a hearing on grounds that it was "highly unlikely" that Witness would have "cooperated with such a defense," and Witness would have either invoked his Fifth Amendment right not to incriminate himself or given perjured testimony. However, without Witness' testimony at an evidentiary hearing and without trial counsel's testimony as to why counsel didn't call Witness, the record does not refute Movant's claim. Reversed for evidentiary hearing.

Moore v. State, 526 S.W.3d 351 (Mo. App. E.D. Aug. 22, 2017):
Holding: Movant was entitled to evidentiary hearing on 29.15 claim that his trial attorney was ineffective in moving for and then withdrawing a motion for change of judge, because this claim was not "conclusively" refuted by the record in that the record contained contradictory evidence about Movant's wishes regarding a change of judge.

Ryan v. State, 2017 WL 2256754 (Mo. App. E.D. May 23, 2017):
Holding: Even though Movant's 24.035 motion did not expressly plead any claim regarding a "group guilty plea" procedure, where Movant claimed that he was coerced into pleading guilty because counsel gave him only a few minutes before the plea to decide whether to plead or not, and Movant's plea was taken as part of a "group guilty plea," Movant is entitled to an evidentiary hearing on this claim; the disfavored "group guilty plea" procedure can be considered in deciding whether an evidentiary hearing is needed.
Discussion: The practice of "group guilty pleas" just to "save time" for a judge is incompatible with due process. Because Movant's plea was accepted as part of a group plea – a process that can impinge on voluntariness of the plea – Movant's claim that his

plea was involuntarily induced by counsel's pressure is not conclusively refuted by the record. Remanded for evidentiary hearing.

Bearden v. State, 2017 WL 1151063 (Mo. App. E.D. March 28, 2017):
Holding: 24.035 Movant was entitled to evidentiary hearing on claim that plea counsel was ineffective in failing to object to "group guilty plea" procedure.

Watson v. State, 2016 WL 6236630 (Mo. App. E.D. Oct. 25, 2016):
(1) 29.15 Movant was entitled evidentiary hearing on claim that counsel was ineffective for misadvising him about what the State would have to prove for first-degree robbery and the law on accomplice liability, which caused him to reject a 10-year plea offer; (2) even though Movant was charged and convicted of multiple offenses in addition to robbery, he pleaded prejudice properly because his motion stated he would have been sentenced to 10 years rather than the 18 total he received; (3) even though Movant did not plead that the State would not have withdrawn the offer or that the trial court would have accepted it, omitting these is not fatal because these can be established at an evidentiary hearing; (4) in order to ensure that claims are decided accurately, courts should err on the side of having evidentiary hearings to allow Movants an opportunity to present evidence.
Discussion: The motion court found Movant failed to allege prejudice because he did not specifically allege the plea offer applied to all charges. But the motion as a whole implies that the offer did, because it says Movant would have been sentenced to 10 years, instead of the 18 total that he received for all charges.

Routt v. State, 2016 WL 3999803 (Mo. App. E.D. July 26, 2016):
24.035 Movant was entitled to evidentiary hearing on his claim that sentencing counsel was ineffective in failing to call his Stepsister to testify about his mental illness, addiction and ask for leniency, even though Movant's Mother had given similar testimony at sentencing, where Movant alleged that counsel had met with Movant for only three minutes before the sentencing hearing and had not investigated the Stepsister.
Facts: Movant pleaded open to various charges. He had different attorneys for plea and sentencing. At sentencing, the State presented two witnesses who presented aggravating evidence about Movant. Sentencing counsel presented Movant's mother, who testified about Movant's mental illness and addiction. The sentencing court sentenced Movant to 35 years, and rejected a drug treatment program. At sentencing, Movant complained that his attorney had only met with him for "three minutes" before the sentencing hearing, and they had never discussed potential witnesses other than Mother. Later, Movant filed a 24.035 motion alleging sentencing counsel was ineffective in failing to investigate and call Stepsister, who knew "the most" about his mental illness and addiction, and who would have asked for leniency. The motion court denied the claim without a hearing.
Holding: Unlike many postconviction cases where Movants express satisfaction with counsel at sentencing, here Movant at sentencing complained that counsel had only met with him for three minutes and did not investigate sentencing fully. This supports Movant's claim that counsel was ineffective. The State claims that Stepsister's testimony would be merely cumulative. But to be cumulative, the record must show (1) counsel made a strategic and reasonable decision not to call or investigate witness; (2) counsel

thoroughly investigated Movant's history; (3) counsel presented multiple witnesses about Movant's history; and/or (4) the motion court held an evidentiary hearing where the witness testified, and was able to conduct a detailed review of witness' testimony. None of these 4 factors were fulfilled here. The record shows counsel met with Movant about sentencing for three minutes. Counsel did not thoroughly investigate witnesses for sentencing, or make a reasonable decision that investigation was unnecessary. Even though Stepsister's testimony might overlap with Mother's, the motion alleged Stepsister knew "the most" about Movant's mental illness and addiction, and would have requested leniency and testified about rehabilitation. Case remanded for evidentiary hearing.

Watson v. State, 2016 WL 4761436 (Mo. App. E.D. Sept. 13, 2016):
Holding: Movant was entitled to evidentiary hearing where Movant's 29.15 motion alleged that trial counsel ineffectively advised him regarding the State's plea offer of 10 years for robbery (which caused him to forgo the offer and proceed to trial), this stated a claim which was not refuted by the record even though the motion did not specifically state that the 10-year offer applied to the additional charges besides the robbery; the motion as a whole made clear that the 10-year offer applied to all charges because it stated that Movant "would have been sentenced to 10 years instead of 18 years," which he received at trial; further, the benefit of the doubt regarding the motion's language should favor Movant.

Miller v. State, 2016 WL 2339049 (Mo. App. E.D. May 3, 2016):
(1) Movant was entitled to evidentiary hearing on his claim that his plea counsel was ineffective in failing to object to a "group plea" procedure which rendered his plea involuntary; "group pleas" are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea; (2) redacted transcripts on appeal violate Rule 81.15(b), which requires an accurate transcript be provided for appeal; transcripts must provide all parts of the proceeding.
Facts: Movant pleaded guilty in two separate cases, involving two different counties and two different defense counsel, at a "group guilty plea" involving six unrelated defendants. He filed a 24.035 motion, contending that his counsel were ineffective in failing to object to the "group plea" procedure, which rendered his pleas involuntary. The motion court denied the claim without a hearing.
Holding: (1) In at least 10 prior cases, the Eastern District has condemned the practice of "group" guilty pleas, but this has fallen on "deaf ears." "[T]he attorneys practicing in this courtroom either have tuned us out or they fear retribution from the trial judge for raising objections to this procedure." While the Supreme Court has held that group pleas are not automatically impermissible, they are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea. Defense counsel may be ineffective in failing to object to "group pleas." Counsel's failure to object, in and of itself, is sufficient to warrant a hearing. (2) On a separate matter, a redacted transcript of the "group plea" was submitted on appeal. Rule 81.15(b) requires a true and accurate transcript be submitted. "This court should never be provided redacted transcripts."

Rose v. State, 2016 WL 7176916 (Mo. App. S.D. Dec. 9, 2016):
29.15 Movant was entitled to evidentiary hearing on claim that trial counsel was ineffective in multiple-act sex case in failing to object to verdict director which did not differentiate between the multiple different acts and allowed jury to convicted without unanimous agreement as to what act Defendant committed.
Facts: Defendant was charged with one count of sodomy for touching child Victim. Victim testified Defendant touched her more than 20 times. Defendant denied the offense. The verdict director informed the jury to convict if it found Defendant touched Victim, but did not otherwise differentiate between the acts. On direct appeal, the appellate court found that the verdict director failed to ensure a unanimous verdict, but found no plain error (manifest injustice).
Holding: *Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016), abrogated cases which had held that failure to mount an incident-specific defense precludes a finding that non-specific verdict directors resulted in manifest injustice. The instruction here did not inform jurors that they had to be unanimous on the same criminal act. The allegation that counsel was ineffective in failing to object to the verdict director requires an evidentiary hearing to determine if counsel's actions were unreasonable and if Defendant was prejudiced.

Beamgard v. State, 2020 WL 4590097 (Mo. App. W.D. Aug. 11, 2020):
Holding: Even though (1) the plea court told Movant/Defendant at an open plea that he could receive the "maximum across the board" on multiple charges, and (2) defense counsel argued for concurrent sentences, where the plea court never informed Movant that he could receive "consecutive sentences," his 24.035 claim that his plea was involuntary because he wasn't informed of this (and received consecutive sentences) was not refuted by the record; Movant entitled to evidentiary hearing.
Discussion: Rule 24.02(b)(1) requires a plea court inform a defendant of "the maximum possible penalty provided by law." This means the plea court must inform the defendant of the possibility of consecutive sentences. Here, the plea court's statement that Movant could receive the "maximum across the board" was not the same as explaining consecutive sentences. And even though defense counsel argued at sentencing for concurrent sentences, this doesn't refute Movant's claim as to what his own understanding was of his possible sentence. Remanded for evidentiary hearing.

Rice v. State, 524 S.W.3d 524 (Mo. App. W.D. July 25, 2017:
Holding: Even though 24.035 Movant was told at his plea that no one could guarantee when he would be released, that he might have to serve his entire sentence, and that no promises had been made to him, Movant was entitled to an evidentiary hearing on claim that plea counsel misinformed him about having to serve a mandatory 80% minimum sentence.
Discussion: Where counsel misinforms a defendant about the effect of the plea, counsel renders ineffective assistance. Movant alleges he would not have pleaded guilty if he had correct information about the minimum sentence. A defendant can correctly say at a plea that they have been promised nothing, but this does not mean that they weren't given incorrect advice by their attorney. A negative response to a routine inquiry is not sufficient to refute the record.

Sanders v. State, 2017 WL 770967 (Mo. App. W.D. Feb. 28, 2017):
Where 24.035 Movant had previously been convicted of endangering welfare of a child, Sec. 568.045, which may have been non-sexual in nature, and later pleaded guilty to failure to register as a sex offender because of this offense, Movant was entitled to evidentiary hearing on claim that his plea counsel was ineffective in failing to inform him that he didn't have to register and had a complete defense to the registration charge, and that the charge lacked a factual basis.
Discussion: The judge, in denying Movant's claims, relied on Sec. 589.400.1(7) for the proposition that Movant was required to register; that section requires anyone who has been or is required to register under federal law to register in Missouri. However, the State charged Movant with violating Sec. 589.400.1(1), which requires registration for offenses committed under Chapter 566 RSMo. Nothing within the charging documents or at the plea hearing indicates that the child endangerment charge was sexual in nature. Although the judge may have had some information outside the record to show it was sexual, given that child endangerment alone does not require registration, and that was the basis for the registration charge, Movant is entitled to a hearing to determine if counsel was ineffective and if there was a factual basis for his plea.

Taylor v. State, 2016 WL 4468253 (Mo. App. W.D. Aug. 23, 2016):
Movant was entitled to evidentiary hearing on claims that he was coerced into pleading guilty to second-degree burglary by the State's initial filing of first-degree burglary charges for which there was no probable cause, and by his counsel's failure to investigate and advise him that there was no factual basis for first degree burglary; this is because the State can only raise the prospect of greater charges if there is probable cause to support them, and nothing in the probable cause affidavits supported first-degree burglary.
Facts: Defendant/Movant was charged with three first-degree burglaries for break-ins at three schools. He ultimately pleaded guilty to three second-degree burglaries and received maximum consecutive sentences. He filed a 24.035 motion claiming his plea was involuntary because he was coerced into pleading to second-degree burglary when there was no probable cause to support first-degree burglary, and his counsel was ineffective in failing to advise him that there was no factual support for first-degree burglary. The motion court denied the claim without a hearing because Movant said at his plea that he was not coerced and was satisfied with counsel.
Holding: Even though the State may threaten harsher charges if a defendant does not plead guilty, the defendant's plea may still be voluntary, but only if the State had a good-faith basis for the harsher charges, i.e., the harsher charges must be supported by probable cause. In order for the offenses here to constitute first-degree burglary, Movant must have been armed, must have caused or threated physical injury to a third party, or a third party must have been present in the schools. However, the probable cause affidavits submitted in the case failed to recite any such facts. Moreover, the charging instruments – although purporting to charge first-degree burglary – contained facts supporting only second-degree burglary. Defendant was entitled to effective counsel in plea negotiations. Counsel was required to conduct a reasonable investigation before advising to accept a plea. Where Movant can show that counsel's failure to investigate affected the

voluntariness and understanding with which his plea was made, he is entitled to withdraw his plea. Movant's statement at his plea that he was not coerced was too general to refute his claim about the charging defects regarding first-degree burglary. His general statement of satisfaction with counsel was also too general to refute the claims here. Movant was prejudiced because it appears he pleaded guilty with nothing in exchange. He received the maximum possible sentence for second-degree burglary, even though he could not have been convicted of first-degree burglary. Remanded for evidentiary hearing.

Pola v. U.S., 2015 WL 690312 (6th Cir. 2015):
Holding: Even though Defendant's affidavit seeking an evidentiary hearing was "self-serving," he was entitled to a hearing to develop an ineffectiveness claim; an affidavit is not incredible just because the asserted facts favor the affiant.

Witthar v. U.S., 2015 WL 4385675 (8th Cir. 2015):
Holding: Defendant's affidavit that she instructed her attorney to file a notice of appeal and he refused to do so was sufficient to warrant a hearing on her claim of ineffective counsel, even though her plea agreement contained an appeal waiver, and her attorney denied such a request was ever made.

Norris v. U.S., 99 Crim. L. Rep. 131, 2016 WL 1621715 (11th Cir. 4/25/16):
Holding: Even though the trial transcript in African-American Petitioner's trial showed no evidence of racial bias, Petitioner was entitled to evidentiary hearing on his habeas claim that trial Judge harbored racial bias where he alleged that trial Judge had told a witness that he "had a difficult time" adjudicating cases involving blacks, and a government investigation had also shown that Judge "harbored racial bias."

People v. Tyler, 2015 WL 5316879 (Ill. App. 2015):
Holding: Pattern of police misconduct that resulted in coerced confessions was similar to Petitioner's case and warranted evidentiary hearing for Petitioner on his similar police misconduct claim.

People v. Morales, 20 N.Y.S.3d 509 (N.Y. City Crim. Ct. 2015):
Holding: Defendant was entitled to evidentiary hearing on his claim that plea counsel failed to advise him of immigration consequences; his claim was supported by evidence that his present counsel had been unsuccessful in getting any response from plea counsel.

Experts

State v. Carpenter, 2020 WL 5200894 (Mo. banc Sept. 1, 2020):
Trial court abused discretion in excluding Defendant's eyewitness identification Expert, because such testimony is now admissible under Sec. 490.065.2, in that it is scientific expert testimony which will help the trier of fact understand the evidence.
Facts: Defendant was charged with a robbery, where the key question was Victim's identification of Defendant as the robber. Victim testified he was "100% certain" Defendant was the robber. Defendant sought to call an eyewitness identification Expert to testify as to reliability issues with "show-up" identifications. The trial court excluded the Expert on grounds that such testimony is inadmissible under cases such as *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988) and its progeny.
Holding: Law and science have changed since 1988. *Lawhorn* has been superceded by Sec. 490.065.2, which allows expert testimony if the Expert is qualified; the testimony will help the jury understand the evidence; the testimony is based on sufficient facts, reliable principles, and reliably applied principles. Expert testimony about the reliability of eyewitness identifications meets these requirements. Since 1988, there has emerged a "near perfect scientific consensus" concerning the potential unreliability of eyewitness identification. The question is whether the jury would be better off with this information than without it, i.e., whether it would help the jury understand and evaluate the evidence. The answer is yes. The State argues the Expert is making an impermissible comment on Victim's credibility. But the State misconstrues "credibility" with "accuracy." Victim was telling the truth as he believed it to be. Jurors tend to give great weight to victim's confidence in their identification. But science has shown that eyewitness testimony is not reliable even when victims think they are telling the truth. The Expert did not attempt to say that this particular Victim wasn't accurate; that is the sole province of the jury. But the expert could testify generally about scientific evidence showing eyewitness identifications are unreliable. The availability of cross-examination, closing argument, and MAI-CR 310.02 on expert identification are not sufficient justifications to exclude expert testimony that would help the jury.
Editor's note: The dissenting opinion – although agreeing with the general proposition that eyewitness testimony is now admissible under Sec. 490.065.2 – would hold that because the offer of proof on the Expert included both admissible and inadmissible portions, the trial court did not abuse discretion in excluding the Expert. "Going forward, practitioners should take caution that expert testimony about eyewitness identification must comport with the facts and evidence in the case to be admissible, and practitioners and circuit courts should carefully examine the relevance of the testimony to ensure its admissibility."

Kappel v. Prater, 2020 WL 2392492 (Mo. banc May 12, 2020):
Holding: (1) Even though photos taken of an accident vehicle were enlargements of low-quality, grainy photos, where they fairly and accurately depicted the vehicle, they were admissible; and (2) even though Defendant admitted the photos to try to disprove Plaintiff's claim that the accident caused her injury, Defendant was not required to present expert testimony on this matter to admit the photos; the trial judge determined the photos of the vehicle's condition were relevant to showing the probable speed of the

vehicles at time of accident, and such inferences were not beyond the jury's knowledge, even without expert testimony.

State ex rel. Malashock v. Jamison, 2016 WL 6441285 (Mo. banc Nov. 1, 2016):
Even though Plaintiff had designated Expert as witness Plaintiff intended to call at trial and the general subject matter of Expert's testimony, where Plaintiff never revealed the Expert's analysis, opinions or conclusions, Rule 56.01 allowed Plaintiff to later rescind the endorsement of Expert; thus, Plaintiff did not irrevocably waive the work-product protections surrounding Expert, and Defendant could not depose Expert.
Facts: Plaintiff designated Expert as a witness expected to testify at trial regarding the "performance and factors" of a vehicle. Later, Plaintiff "de-endorsed" Expert. Defendant then sought to depose Expert. The trial court ordered the deposition on grounds that Plaintiff waived the work-product doctrine by designating Expert as a witness. Plaintiff sought a writ of prohibition.
Holding: An expert's knowledge, opinions and conclusions are the work product of the attorney retaining the expert. The designation of an expert before trial begins the process of waiving work-product, but the waiver is not complete until there has been a "disclosing event," which is the actual disclosure of the expert's opinions and conclusions. Here, Expert's opinions and conclusions were never disclosed. Plaintiff "de-endorsed" Expert before trial without disclosing Expert's opinions and conclusions. Expert is no longer expected to testify at trial. Thus, Plaintiff did not waive the work product doctrine. Writ granted.

Eichacker v. Eichacker, 2020 WL 891147 (Mo. App. E.D. Feb. 25, 2020):
Holding: Trial court erred in excluding vocational rehabilitation counselor as an "expert" on grounds that she was not licensed; Sec. 490.065 provides that an "expert" is qualified by skill, knowledge, experience, training or education; Expert was qualified by experience; a particular license is not required; non-licensure goes only to weight of expert's testimony, not admissibility.

Revis v. Bassman, 2020 WL 1017626 (Mo. App. E.D. March 3, 2020):
Holding: (1) Trial court abused discretion in medical malpractice case in not allowing cross-examination of Expert-Doctor for defense about his public advocacy for "tort reform" as head of medical association and inconsistent statements he had made about this, because this would show bias and prejudice against plaintiffs in medical malpractice cases; (2) even though there were very few existing scientific studies on the topic about which Expert-Doctor testified (in part due to the rarity of the medical condition at issue), Expert's testimony met the standard for "reliability" under Sec. 490.065.2 (and, thus was admissible), because Expert's testimony was based on his own extensive experience in his medical field; and (3) Sec. 490.065 does not require a "formal" *Daubert* hearing on an Expert's qualifications; the only legal requirement is that parties have an opportunity to be heard on their claims, and this can occur, e.g., in a motion in limine hearing.

State v. Loper, 2019 WL 5882880 (Mo. App. E.D. Nov. 12, 2019):
Holding: (1) Trial court abused discretion in admitting domestic-violence-expert/officer's testimony that the strangulation and cut on Victim's wrist (which were contested facts in the case) "absolutely" showed "evidence of power and control in this case," because this was particularized opinion testimony which impermissibly vouched for the credibility of Victim and invaded province of jury on whether Defendant committed domestic assault; and (2) where Defendant's conviction for victim tampering was predicated on the jury's finding that he was guilty of domestic, the victim tampering conviction must also be reversed.
Discussion: (1) Generalized expert opinion testimony (e.g., about domestic violence generally) is generally allowed, but particularized testimony that applies general principles to the specific facts of a case is not allowed, because this tends to impermissibly comment on guilt or innocence, the credibility of witnesses, and invade the province of the jury. Here, the expert/officer's testimony was impermissible particularized testimony and prejudiced Defendant. It was contested at trial whether Victim's injuries were the result of domestic violence or were self-inflicted in a suicide attempt. Expert/officer testified the alleged strangulation and cut on Victim's wrist "absolutely" showed Defendant's exercise of "power and control" over Victim in this case. This invaded the province of the jury, and vouched for the credibility of Victim. It invested the State's case with "scientific cachet." Defendant's domestic assault conviction is reversed and remanded. (2) Because the victim tampering conviction was predicated on the domestic assault conviction, it must be reversed and remanded, too. The jury instruction for victim tampering said the jury first had to find "that E.S. was the victim of the crime of domestic assault."

State ex rel. Headrick v. Lewis, 2019 WL 7341480 (Mo. App. E.D. Dec. 31, 2019):
Holding: Where, in medical malpractice case, trial judge ordered Plaintiff to submit to a medical test using an injectable dye without specifying the "manner, conditions, scope of, or identity" of the expert to conduct the exam, or that the testing would be reliably conducted or produce reliable results, this violated Rule 60.01(a)(3) and was beyond the trial court's authority to order.
Discussion: Rule 60.01 allows a trial court to order a physical exam of a party where the party's physical condition is in controversy. In general, the pleadings in a medical malpractice case are sufficient to place Plaintiff's condition in controversy. But Rule 60.01(a)(3) contains important procedural safeguards to protect a person's due process rights to bodily integrity. Here, the trial court ordered Plaintiff be injected with a dye. The trial court didn't comply with specifying the "manner, conditions, [and] scope of" testing since the record contains no identification of the dye. This vitiated the due process protections of the Rule. Also, there was a paucity of evidence that the test would produce reliable results, or that the ordered testing will be administered according to reliable principles and methods. Writ of prohibition to stop testing granted.

John Doe 122 v. Marianist Province of the United States, 2019 WL 7341484 (Mo. App. E.D. Dec. 31, 2019):
Holding: Even though Expert-Priest was an expert in Canon law, dealing with sexual abuse by clergy, and church organizations, this experience did not given him any

specialized knowledge that would allow him to testify that Defendant-Religious-School's use of the terms "religious life," "considerable misgivings" and "problems" in old documents meant the school knew of sexual abuse by clergy at the school; this was mere speculation. But case transferred to Supreme Court due to general interest and importance of several issues.
Discussion: Expert testimony is admissible as long as the expert's competence on the subject matter is superior to ordinary jurors and the expert's opinion aids the jury in deciding an issue in the case. But an expert's opinion must still be founded on substantial information, not mere conjecture or speculation. There must be a rational basis for the opinion to take the testimony out of the realm of guesswork. A witness' attempt to state what was in someone else's mind is either sheer speculation or unadulterated hearsay.

State v. Suttles, 2019 WL 2656153 (Mo. App. E.D. June 28, 2019):
Holding: As matter of first impression, expert testimony in child sex cases that children often delay disclosing sexual abuse meets the standard for admissibility under Sec. 490.065 (*Daubert* test).

State v. Ferguson, 2019 WL 922589 (Mo. App. E.D. Feb. 26, 2019):
Holding: Trial court in child sex case abused discretion in (1) admitting School Counselor's testimony that she had "no doubt at all" whether the alleged acts which Victim told her "had actually happened to her," because this improperly vouched for Victim's credibility, and (2) also admitting Child Advocacy Center Expert's testimony that Victim's information was "reliable," because this invaded province of jury by improperly vouching for Victim's credibility.
Discussion: (1) The State claims School Counselor's testimony was presented merely to show her subsequent conduct in referring Victim to the Child Advocacy Center. But School Counselor's testimony went beyond that. The jury was as capable as School Counselor in judging Victim's credibility. The testimony was prejudicial because the State presented School Counselor as an expert who had superior knowledge. (2) An expert should not be allowed to give their opinion on the veracity of another witness. In child sex cases, "general" expert testimony about generalized behavior of child Victims is allowed, but "particularized" testimony concerning a Victim's credibility is not, because "particularized" testimony usurps the fact-finding role of the jury. Here, the testimony was improper "particularized" testimony which vouched for Victim.

State ex rel. Gardner v. Wright, 2018 WL 2978352 (Mo. App. E.D. Aug. 21, 2018):
(1) Trial court erred in child sex case in granting motion in limine to exclude State's Expert who would testify generally about children's late disclosure of child sex allegations on grounds that this would not assist the trier of fact, i.e., was not "relevant"; (2) such testimony is relevant under the Sec. 490.065.2/Daubert test.
Facts: In child sex case, the State sought to present Expert, who would generally testify about how children may disclose sexual abuse allegations late. Defendant filed a motion to exclude such testimony under Sec. 490.065.2/*Daubert*. The trial court excluded the testimony on grounds it was not relevant. The State sought a writ of prohibition.
Holding: This is a case of first impression regarding Sec. 490.065.2, which adopts Federal Rule of Evidence 702/*Daubert* as the standard of admissibility for expert

testimony in criminal cases in place of the *Frye* test. Under 490.065.2/*Daubert*, the judge acts as a gatekeeper to ensure that expert testimony is not only relevant, but reliable. Although the 490.065.2/*Daubert* test applies here, this case actually turns on something that has not changed since *Frye* – relevance. The trial court's primary reason for excluding Expert was trial court's erroneous conclusion that testimony about late disclosure was not specialized knowledge that would assist the jury, i.e., that the testimony was not relevant. The court believed that ordinary jurors would understand late disclosure and not need expert testimony on the subject. Defendant argued ordinary jurors would understand this because of publicity about the MeToo Movement and late disclosure there. But numerous Missouri cases have held that testimony about late disclosure *is* outside the jury's common knowledge and *will assist* the jury in understanding children's late disclosure. Writ granted.

Koelling v. Mercy Hospitals East Communities, 2018 WL 3978144 (Mo. App. E.D. Aug. 21, 2018):

Holding: Trial court abused discretion in medical malpractice case in not allowing Plaintiff to cross-examine retained defense Expert about the fact that Expert had been a defendant in numerous medical malpractice cases himself, and had hostility about such cases because of this; this fact was relevant to his bias against medical malpractice claims.

Discussion: A witness may be impeached on cross-exam through use of evidence showing witness' bias, prejudice or interest. The jury is entitled to know information that might impact credibility and weight to give to testimony. Expert had testified in his pretrial deposition that the prior medical malpractice cases against him made him angry at the legal system, and he did not believe the cases were resolved fairly. While a trial court can properly limit cross-examination regarding bias and prejudice, it is not within the trial court's discretion to exclude it completely. By prohibiting Plaintiff from asking anything about Expert's prior litigation experience, the trial court completely foreclosed Plaintiff's ability to show bias because of this.

State v. Rogers, 2017 WL 4247476 (Mo. App. E.D. Sept. 26, 2017):

Holding: Where Expert from Child Advocacy Center initially testified in child sex case about general characteristics of victims of child sexual abuse, but then testified to specific examples of how Child's behavior and statements fit the general description, including statements in Child's CAC video interview, this particularized testimony invaded the province of the jury, and improperly bolstered child's credibility.

Discussion: Experts in child sex cases may give general testimony about the behavior and characteristics commonly seen in child sex abuse victims, but cannot give particularized testimony about a specific victim's credibility. Particularized testimony usurps the fact-finding role of the jury and invests the Expert's testimony with scientific cachet on the central issue of the victim's credibility. Here, Expert initially gave generalized testimony. But then Prosecutor asked Expert repeated questions about Child's video interview and how Child's statements or behavior fit the profile of a sex abuse victim. Further, the phrase "indicator of reliability" appears 16 times in the Prosecutor's exam of Expert. Jurors would plainly understand reliability as a synonym for credibility. The Prosecutor's extensive exam of Expert about reliability was wholly

improper. Defendant was prejudiced because evidence of guilt was not overwhelming and case hinged on Child's credibility. New trial ordered.

Will v. Pepose Vision Institute, 2017 WL 2267429 (Mo. App. E.D. May 23, 2017):
Holding: In case of first impression, trial court abused discretion in excluding evidence that defendant attempted to influence plaintiff's expert by contacting expert's supervisor (but not prejudicial in this case); general rule in a civil case is that evidence that a litigant or his agent attempted to influence or suppress a witness is admissible as an admission or as an indication of the litigant's consciousness that his case is weak, unfounded, false or fraudulent.

State v. Hancock, 2020 WL 4462680 (Mo. App. S.D. Aug. 4, 2020):
Holding: (1) Even though trial court mistakenly said the time for filing a New Trial Motion was longer than that allowed in Rule 29.11(b) and Defendant relied on that advice, courts aren't authorized to extend the time for filing a New Trial Motion; Defendant's late-filed New Trial Motion waived preserved review for appeal; (2) even though Defendant made an Offer of Proof on the admissibility of his Voice Identification Expert, where the Offer was made using an affidavit from the Expert (in order to save money) rather than calling the Expert to testify, the trial court did not abuse discretion in finding that Offer was "hearsay," and also finding that the affidavit did not demonstrate the "reliability" of Expert's testimony under Sec. 490.065.2; (3) where Defendant sought to call a gun shop owner to testify as an Expert on gun color and barrel length, this wasn't admissible because jurors' could use their own observations and common sense to determine these matters, so the testimony wasn't necessary or helpful to jurors under Sec. 490.065.2(1).
Discussion: Two weeks before trial, Defendant sought to endorse a Voice Identification Expert. The trial court denied the request but said Defendant could make an Offer of Proof at trial. At trial, Defendant, citing cost concerns, presented an affidavit from Expert as the Offer of Proof. The trial court denied the Offer as "hearsay," but also ruled the Offer didn't prove Expert's testimony was "reliable" under Sec. 490.065.2. Appellate court holds trial court did not abuse discretion in finding Offer to be "hearsay." Had Defendant hoped by this method to obtain appellate review of this testimony without even trying to offer it in admissible form at trial, he effectively sought an advisory opinion, which this Court will not give. Where evidence is excluded by pretrial ruling, proper procedure contemplates an attempt to admit the evidence at trial, and if an objection is sustained, then an Offer of Proof.

State v. Marshall, 2020 WL 889122 (Mo. App. W.D. Feb. 25, 2020):
Holding: In child sex case, Expert's testimony that victims delay in reporting abuse was admissible as based on "reliable principles" under Sec. 490.065.2(1).
Discussion: *Daubert* factors themselves are not controlling in applying Sec. 490.065. Although Sec. 490.065 is based on Federal Rule of Evidence 702, Rule 702 itself makes clear that not all expert testimony must satisfy the *Daubert* factors. The U.S. Supreme Court has held that *Daubert* factors may not be relevant where experts testify based on "technical" or "other specialized knowledge" as opposed to "scientific" knowledge. Importantly, Expert here testified only to general behaviors seen in victims; Expert did

not give particularized testimony about the specific Victim in case. Rule 702 recognizes that "generalized" testimony may be subject to a different reliability analysis than particularized testimony about specific facts in litigation. Regarding generalized testimony, it is not meaningful to question the replicability of Expert's analysis, the error rate of that analysis, or the standards and controls governing that analysis. A different reliability analysis is appropriate with respect to non-scientific, generalized testimony.

Linton by Linton v. Carter, 2020 WL 6572769 (Mo. App. W.D. Nov. 10, 2020):
Holding: Expert-Doctor's opinion as to cause of injury at issue was not admissible where not based on a reasonable degree of medical certainty; Expert testified only to "possible" causes of injury or what "could have" caused injury.

State v. Capozzoli, 2019 WL 2504199 (Mo. App. W.D. June 18, 2019):
Holding: (1) Even though §490.065.2(3)(b) prohibits an expert from stating an opinion "whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged," Officers in DWI trial could testify that Defendant was "intoxicated" because intoxication is a "physical condition" characterized by unsteadiness on feet, slurred speech, and impairment of reflexes; and (2) no Missouri appellate court has addressed the admissibility of "drug recognition officer/experts" under the new (Daubert) standard for admissibility, §490.065.2, but court does not reach issue because Defendant suffered no prejudice since blood test results showing drugs were also admitted.
Discussion: "Mental state" is the *mens rea* element of a crime. Defendant argues that the "intoxicated condition" element of DWI constitutes a "mental condition." It is unclear what criminal offenses the Legislature had in mind when it included "mental condition" in the proscription on expert testimony where it is an element of the crime charged. However, we do not believe that intoxication is a mental condition about which an expert may not testify in a DWI case, because intoxication has been characterized as a "physical condition.

State v. McWilliams, 2018 WL 4999171 (Mo. App. W.D. Oct. 16, 2018):
Holding: Where in child sex case Prosecutor repeatedly asked Expert Forensic Interviewer about the "significance" of Child Victim giving "idiosyncratic details" of the alleged offense, and about the significance that Child Victim "correcting" some of her answers, trial court abused discretion in admitting this testimony because, taken as a whole, it was particularized testimony that was designed to comment on Child Victim's credibility.

State v. Carter, 2018 WL 4567556 (Mo. App. W.D. Sept. 25, 2018):
Trial court did not abuse discretion in prohibiting Defendant from cross-examining State's fingerprint expert with NAS Report "Strengthen Forensic Science in the U.S.: A Path Forward," because State's expert denied the report was "authoritative" and even though Sec. 490.150 states that reports done under authority of Congress "shall be evidence to the same extent that authenticated copies of the same would be," this statute deals with authentication of documents, not the authoritativeness of documents.

Facts: The trial court granted State's motion in limine to preclude Defendant from cross-examining State's fingerprint expert with an NAS Report. Defendant sought to admit the report under Sec. 490.150, on grounds it was printed under the authority of Congress.
Holding: A text or treatise can be used to examine an expert where there is evidence that the text or treatise is "authoritative." This can be established three ways: (1) by concession of the expert herself; (2) by judicial notice; or (3) by other experts. Here, the State's expert denied that the NAS Report was "authoritative" in her field, and said the only authoritative materials were those published by the FBI or Justice Department. Thus, the report wasn't admissible under the first circumstance. Defendant claims Sec. 490.150 allows judicial notice of the report. Sec. 490.150 provides that documents published under "authority of congress…shall be evidence to the same extent that *authenticated* copies of the same would be." Defendant confuses authentication with authoritativeness. The *authentication* of a document, here the NAS Report, provides no substantive support to the relevant issue of whether the report is *authoritative*. Even assuming Defendant proved the report was authentic under Sec. 490.150, he still needed to prove it was authoritative within the expert's field. Defendant could have called other experts to testify to its authoritative nature, but did not.

State v. Ellis, 2016 WL 7438738 (Mo. App. W.D. Dec. 27, 2016):
Holding: (1) Trial court erred under "rule of completeness" when it refused to admit the entirety of Defendant's videotaped statement to police on grounds that his statement was not a "confession;" the rule of completeness applies to "admissions," as well as "confessions" (but reversal not required here); and (2) trial court erred in child sex case in allowing Prosecutor to question Expert whether it means Child is "lying" because she told different, inconsistent stories; this improperly commented on Child's credibility, but reversal not required because Defendant cross-examined Expert on Child's credibility, too.
Discussion: (1) The "rule of completeness" applies to both "confessions" (statement where Defendant admits guilt) and "admissions" (statement of Defendant which tends to incriminate, but is not a direct confession of guilt). When the State introduces part of a confession or admission into evidence, a defendant is authorized to introduce the remaining portions, even though they are "self-serving," where admission of the statement in edited form distorts the meaning of the statement or excludes information which is substantially exculpatory. The trial court retains discretion, however, to exclude unduly prejudicial or irrelevant portions. Here, Defendant failed to explain how the excluded portions were needed to avoid distortion or were substantially exculpatory to portions admitted by the State; (2) Experts can testify in child sex cases about generalized behaviors of child sex abuse victims, but cannot give particularized testimony on a Child-Witness' credibility. Expert should not have been allowed to opine whether it means that a victim is or is not lying if a generalized behavior is exhibited. Such testimony, though in generalized form, plainly comments on credibility. Experts are not allowed to give opinions on credibility. However, reversal is not required here because Defendant cross-examined expert on Child's credibility, too, by asking Expert to confirm that just because Child exhibited certain behaviors does not mean that sexual abuse occurred. Defendant "was as guilty of using [Expert] to elicit improper expert testimony commenting on credibility as was the State."

U.S. v. Ausby, 2019 WL 984112 (D.C. Cir. 2019):
Holding: Expert's false testimony about microscopic hair comparisons as being identical warranted new trial.

Han Tak Lee v. Houtzdale, 2015 WL 4925993 (3d Cir. 2015):
Holding: Petitioner was entitled to habeas relief where his conviction was based on fire-science (arson) and gas-chromatography evidence that was later discredited in the scientific community.

U.S. v. Garcia, 2019 WL 1275330 (7th Cir. 2019):
Holding: Officer's "expert testimony" about meaning of cryptic phone calls between Defendant and drug dealer was merely "educated speculation" rather than proof beyond a reasonable doubt to support conviction for drug dealing.

U.S. v. Wells, 102 Crim. L. Rep. 306 (9th Cir. 12/19/17):
Holding: Expert testimony that Defendant met "criminal profile" of a workplace shooter improperly admitted to show guilt, i.e., that he acted in accord with the general profile.

U.S. v. Shipp, 110 Fed. R. Evid. Serv. 1537 (E.D. N.Y. 2019):
Holding: Ballistics expert can only testify that firearm could not be excluded as source of bullet fragment, not that the firearm was the source of the bullet; this is because the President's Council of Advisors on Science and Technology have cast doubt on reliability of theory behind matching pieces of ballistics evidence.

State v. Edwards, 101 Crim. L. Rep. 8 (Conn. 4/11/17):
Holding: Police officers who testify to cell tower location data should be considered experts and their testimony judged scientifically sound before admission.

Jones v. U.S., 2019 WL 1066182 (D.C. 2019):
Holding: Expert's false and misleading testimony about accuracy of microscopic hair comparisons warranted new trial.

State v. Tyler, 2015 WL 3958498 (Iowa 2015):
Holding: Medical examiner's opinion was not sufficiently based on scientific evidence to assist jury, and thus was not admissible, where he admitted that his opinion that a baby's death was a homicide (by drowning in a bathtub) was primarily based on Defendant's inconsistent statements given to police and not on the actual autopsy.

Tigue v. Com., 2018 WL 7814537 (Ky. 2018):
Holding: Expert testimony on false confessions was admissible in hearing on motion to suppress Defendant's confession.

Com. v. Camblin, 2015 WL 3631943 (Mass. 2015):
Holding: Trial court should have held a *Daubert* hearing to determine whether source code of breath test machine functioned in a manner that reliably produced accurate results.

People v. Lerma, 98 Crim. L. Rep. 418 (Ill. 1/22/16):
Holding: Expert testimony on reliability of eyewitness identification is admissible even in cases where the Defendant was not a complete stranger to the eyewitness.

State v. Simms, 98 Crim. L. Rep. 591 (N.J. 3/15/16):
Holding: Prosecutors cannot ask experts hypothetical questions which essentially "sum up" the Gov't's entire case, and elicit an opinion indicating that the Defendant is guilty; here, the Prosecutor asked expert a 10-paragraph hypothetical question about a "hypothetical transaction" containing the facts of the case about a transaction on a street and whether this would be a drug deal.

State v. Cain, 2016 WL 958914 (N.J. 2016):
Holding: Prosecutor cannot ask expert lengthy hypothetical which embodies all the facts of the crime, which leads expert to give opinion on Defendant's state of mind in drug case, i.e., whether drugs seized from Defendant were possessed with intent to distribute.

State v. McGrady, 99 Crim. L. Rep. 343 (N.C. 6/10/16):
Holding: North Carolina adopts *Daubert* standard for expert testimony.

State v. Henley, 103 Crim. L. Rep. 402 (Or. 7/19/18):
Holding: State's forensic interviewer's testimony in child sex case about how adults "groom" children was scientific evidence that required proof of scientific validity before it can be admitted; even though the testimony wasn't presented as "scientific," the "grooming" testimony coming from an interviewer who had interviewed more than 600 children gave the testimony scientific cachet; new trial ordered.

State v. Sarkisian-Kennedy, 2020 WL 399105 (Vt. 2020):
Holding: Horizontal gaze nystagmus (HGN) test is not admissible without expert testimony.

People v. Ramirez, 2016 WL 462647 (Cal. App. 2016):
Holding: Officer's expert testimony about how various persons had aligned themselves with various street gangs was conclusory and insufficient to establish that the umbrella gang had committed nonparty gang members' crimes.

People v. Murphy, 2019 WL 2184854 (Colo. App. 2019):
Holding: Officer's testimony that "body language" of witness showed deception was improper lay testimony, even though Officer said it was based on his training and experience.

People v. Froehler, 2015 WL 4571431 (Colo. App. 2015):
Holding: Officer's testimony about a law-enforcement-developed software program used to search Defendant's computer was expert testimony, and not admissible as lay testimony; the general public could not be familiar with the software because it is not even available to the public.

People v. Pike, 2016 WL 359117 (Ill. App. 2016):
Holding: Expert testimony that Defendant could not be excluded as source of DNA, but that 50% of rest of population could also not be excluded, was irrelevant, because the probability of inclusion of 50% of the population did not tend to make Defendant's identification as the perpetrator more or less probable.

People v. Days, 2015 WL 5124966 (N.Y. App. 2015):
Holding: Expert testimony on false confessions should have been allowed.

People v. Collins, 2015 WL 4077176 (N.Y. Supp. 2015):
Holding: "High sensitivity" DNA analysis was not generally accepted as reliable in the forensic community to analyze small DNA deposits; thus, this type of DNA test is not admissible under *Frye*.

Ex Post Facto

State v. Campbell, 2018 WL 3978146 (Mo. App. E.D. Aug. 21, 2018):
Holding: (1) Even though Defendant-Juvenile committed the charged first degree murder in 2011, and Sec. 565.033 (which specifies certain procedures and possible less than life without parole sentences for first degree murder) was not enacted until 2013, application of Sec. 565.033 to Defendant-Juvenile was not *ex post facto* because Sec. 565.033 did not increase the penalty for first degree murder in effect at the time of the offense and, in fact, created the possibility of a lower sentence (which Defendant, in fact, received); and (2) although Sec. 565.033 permits a sentence of LWOP for juveniles convicted of first degree murder, a trial court does not have authority to impose LWOP unless the State had filed a notice of intent to seek LWOP pursuant to Sec. 565.034.1.

State v. Ingalsbe, 2018 WL 3991235 (Mo. App. S.D. Aug. 21, 2018):
Holding: Where Defendant committed first degree sexual misconduct, Sec. 566.092, in 2016, the offense at that time was a Class B misdemeanor with a maximum punishment of six months, and the trial court plainly erred in enhancing the sentence to one year under Sec. 566.093.2, which took effect Jan. 1, 2017, because application of the post-crime enhancement provision to Defendant was ex post facto.
Discussion: The State pleaded, and the trial court found, that Defendant was subject to enhancement under Sec. 566.093.2, effective Jan. 1, 2017, because he had previously been found guilty of another offense under Sec. 566 or an offense in another jurisdiction that would qualify as an offense under Sec. 566. But the trial court's reliance on a penalty provision that was not in effect at the time of the crime violates ex post facto and

constitutes manifest injustice. Defendant can only be sentenced to the maximum in effect at the time of his offense.

State v. Cruz-Basurto, 2019 WL 1333110 (Mo. App. W.D. March 26, 2019):
Notable dissenting opinion: A dissenting judge argues that where Defendant's child sex offenses were charged as occurring between 2012 and 2014, and the pre-2013 version of Sec. 558.026.1 allowed a judge discretion to make the sentences concurrent or consecutive (whereas the post-2013 version did not), trial court plainly erred in applying the harsher post-2013 version at sentencing because this was *ex post facto*. (The majority did not address this issue because it wasn't raised by Defendant/Appellant.)

Hinojosa v. Davey, 98 Crim. L. Rep. 7 (9th Cir. 9/25/15):
Holding: Statutory change that eliminated "good time" credits for gang members was unconstitutionally ex post facto as applied to prisoners who committed their offenses before the statutory change; the change had the effect of increasing those prisoners' sentences.

Gilman v. Brown, 2014 WL 9953246 (E.D. Cal. 2014):
Holding: A ballot initiative which granted Governor power to reverse Parole Board decisions was ex post facto as applied to inmates convicted before passage of the initiative; although the State claimed the initiative merely transferred power from the Parole Board to the Governor, the Governor in practice had reversed 70% of grants of parole, and the ballot summary stated its purpose was to allow Governor to block parole.

Belleau v. Wall, 97 Crim. L. Rep. 739 (E.D. Wis. 9/21/15):
Holding: Where (1) Defendant was convicted of sex offense in 1994, (2) after he finished his sentence, he was civilly committed as a sexually violent person (SVP), and (3) three years before his SVP release, the State enacted a law requiring lifetime GPS monitoring of those released from SVP commitment, application of GPS law to him was ex post facto since it increased the punishment for the 1994 offense; like probation, parole or supervised release, GPS tracking constitutes "punishment" through technology, not a nonpunitive civil purpose; GPS tracking also implicates 4th Amendment issues.

Hill v. Snyder, 103 Crim. L. Rep. 517 (6th Cir. 8/14/18):
Holding: Where a sentence is struck down as unconstitutional and a new sentence imposed, Defendant must be given the "good time credits" that accrued during first sentence; law taking them away was ex post facto.

People v. Trujeque, 2015 WL 3405993 (Cal. 2015):
Holding: Where charges against Defendant had previously been dismissed, retroactive application of a new statute allowing State to file charges again if the dismissals were due to "excusable neglect" violated ex post facto clause.

Com. v. Rose, 2015 WL 7283338 (Pa. 2015):
Holding: Where there was a 14-year delay between assault on Victim and Victim's death, Defendant charged with murder must be sentenced under law in effect at time of the assault; to apply later sentencing laws would be ex post facto.

People v. Rojas, 2015 WL 3826839 (Cal. App. 2015):
Holding: Even though the information charged Defendant with a child sex crime committed "on or after" the effective date of a new statute, jury instruction which allowed conviction for acts "on or after" a date a year before the new statute took effect violated ex post facto.

State v. Elward, 2015 WL 238292 (Wis. App. 2015):
Holding: A $200 DNA surcharge on misdemeanor defendants who committed their crimes before the effective date of the surcharge was a fine, not a fee, and was ex post facto as applied to them; the surcharge bore no relation to the cost of a DNA test because the defendants were not required to take a DNA test, and so the State was receiving money for nothing, which made the surcharge a punishment without any type of regulatory goal.

Expungement

S.E.M. v. St. Louis County, Mo., 2019 WL 6314542 (Mo. App. E.D. Nov. 26, 2019):
(1) The August 28, 2018, expungement law, Sec. 610.140, applies retroactively and replaces all prior versions because it is a remedial statute; this means it applies to petitions filed before it was enacted, as well; and (2) even though Petitioner had a misdemeanor conviction within 7 years after the felony he sought to expunge, the August 28, 2018, statute looks backward from "the time the petition is filed," and if a Petitioner does not have another conviction within that prior 7 years, the felony conviction may be expunged.
Facts: Petitioner was convicted of two felonies and completed all sentences for them in February 1993. In April 1993, Petitioner was convicted of misdemeanor stealing. Petitioner sought to expunge the two felonies in June 2018. Meanwhile, a new version of the expungement law took effect in August 2018.
Holding: (1) The first question is which expungement law applies. Remedial or procedural statutes apply retroactively. The August 2018 expungement law is remedial and so applies to Petitioner's petition. (2) The State argues Petitioner is never eligible for expungement because he had a new conviction within 7 years after the felonies he seeks to expunge. But Sec. 610.140.5 (August 2018) states that the relevant time period counts from when "the time the petition is filed." The statute focusses on the 7 years immediately before the filing of the petition. In other words, the time period specified looks backward 7 years to the time immediately before filing. Since Petitioner didn't have any convictions during that 7 year backwards-looking time, he is eligible for expungement.

R.H. v. Mo. State Hwy. Patrol Criminal Records Repository, 2019 WL 2932226 (Mo. App. E.D. July 9, 2019):
Holding: (1) Defendant's (Petitioner's) conviction for second-degree burglary was eligible for expungement under Sec. 610.140, because this is not one of the listed ineligible offenses; and (2) even though Defendant was convicted of a drug offense in January 1973, where he did not complete probation for the earlier second-degree burglary offense until December 1973, the drug offense occurred "before" the end of probation for second-degree burglary, so Defendant met the requirement that he not have another felony offense within 7 years of the offense he seeks to expunge under 610.140.5; the 7-year period began when he completed probation, not the earlier date of conviction.

W.C.H. v. State, 2018 WL 1277865 (Mo. App. E.D. March 13, 2018):
Even though Petitioner for expungement of a felony received a misdemeanor conviction while he was still on probation for the felony, where more than 20 years passed after Defendant completed probation and Defendant had no other convictions during that time, he was eligible for expungement under Sec. 610.140, since the time in which the person must not have another conviction began when the probation was completed.
Facts: Petitioner was convicted of felony passing a bad check in April 1986, and received an SES with 5 years probation. In October 1986, he was convicted of misdemeanor DWI. In 1991, he completed his felony probation, and has had no conviction since. The State contends that because he received the misdemeanor conviction less than six months after the felony, he is not eligible for expungement under 610.140.
Holding: Sec. 610.140.5 allows expungement for a felony if 20 years has passed since the person making the application has completed probation, and the person has not been found guilty of another felony or misdemeanor "during the time period specified for the underlying offense." The "time period specified" for the underlying offense means the time since probation expired, not the time from conviction. Thus, Petitioner's time period began in 1991. Because Petitioner's DWI conviction occurred in October 1986 – outside "the time period specified" – Petitioner met the criteria in Sec. 610.140.5. Expungement granted.

Perkins v. Bridgeton Police Dept., 2018 WL 1385392 (Mo. App. E.D. March 20, 2018):
Holding: Even though Defendant's crime could have been charged as fraudulent use of a credit device under Sec. 570.130 (which offense would have been eligible for expungement), where Defendant was charged and convicted of forgery under Sec. 570.090, Defendant's offenses were not eligible for expungement under Sec. 610.140 RSMo. Supp. 2013, because that statute excludes conviction for forgery.
Discussion: Defendant argues that because her convictions for forgery could have been charged as fraudulent use of a credit device, which offense is specifically listed as an offense eligible for expungement under Sec. 610.140 RSMo. Supp. 2013, she should be able to expunge her forgery convictions. However, the legislature decided that forgery is an offense for which expungement is not available. The prosecution chose to charge Defendant with forgery. A prosecutor has broad discretion under what statutes to charge

a defendant. The court cannot look beyond the legislature's plain enumeration of offenses that are not eligible for expungement.

Bright v. Ray, 520 S.W.3d 482 (Mo. App. E.D. May 23, 2017):
Holding: Where Petitioner was originally charged with DWI but pleaded guilty to reduced charge of "careless and imprudent driving," Petitioner was not eligible for expungement under Sec. 577.054 because the offense he pleaded guilty to is not an "alcohol-related driving offense" within the meaning of 577.054.

Doe v. St. Louis County Police Dept., 2016 WL 7321749 (Mo. App. E.D. Dec. 13, 2016):
Discussion: (1) Where police misunderstand the law and arrest someone for acts that do not constitute a crime, the arrest is based on "false information," so Defendant is entitled to expungement of the arrest records under Sec. 610.122; (2) Under Sec. 571.107.2, it is not a criminal act for a person with a concealed carry permit to take a gun into an airport inspection area; thus, Defendant, who had a concealed carry permit but who was arrested by police for having a gun in his backpack at St. Louis Airport, was entitled to expungement of his arrest record because his arrest was based on "false information."
Discussion: As relevant here, Sec. 610.122 allows arrest records to be expunged if the arrest was based on "false information." This cases raises the question of whether officers rely on "false information" when they mistakenly believe certain conduct constitutes a crime, even though the facts relief upon are accurate. "False information" is not defined in Sec. 610.122. However, it would be inconsistent with the remedial purpose of the statute to prevent a person from having their arrest record expunged based on an officer's mistaken understanding of the law. "False information" should include situations where an officer relies on a mistaken belief that conduct is illegal, when it is not. Otherwise, citizens who have not violated the law would be saddled with an erroneous arrest record.

Bright v. Molenkamp, 2016 WL 617485 (Mo. App. E.D. Feb. 16, 2016):
Holding: (1) Even though Sec. 544.054.1 states that after 10 years a person convicted of a first alcohol-related driving offense may apply "to the court in which he or she pled guilty" for expungement, a "municipal court" is not authorized to hear expungements, because such courts can only hear municipal ordinance violations, Sec. 479.020.1; instead, the expungement petition must be filed in the *circuit court* in which the municipal division is located; "municipal courts" are divisions of the circuit court, Sec. 489.020.5; (2) Because the "municipal court" did not have jurisdiction to hear the expungement action, the appellate court lacks jurisdiction to hear an appeal from the judgment.

G.E.D. v. Mo. State Highway Patrol, 2020 WL 90643 (Mo. App. S.D. Jan. 8, 2020):
Holding: Even though Petitioner (1) completed a felony sentence in 2003; (2) was convicted of a misdemeanor in 2007 (less than seven years later); and filed a petition to expunge the felony in 2018, Petitioner is eligible for expungement of the felony because the 7-year "good behavior" period for not having other convictions, Sec. 610.140 (2018)

"looks back" seven years from the date the petition for expungement is filed; it does not look forward from the date of the felony.
Discussion: The issue is whether the 7-year good-behavior provision of Sec. 610.140.5(2)(2018) is measured forward from the time Petitioner completed disposition of the conviction to be expunged, or backward from the time the petition for expungement is filed. MSHP relies on a case before the 2018 version of Sec. 610.140, *W.C.H. v. State*, 546 S.W.3d 612 (Mo. App. E.D. 2018). *W.C.H.* is not controlling because the 2018 version of Sec. 610.140 is different. MSHP claims there is "inconsistency" between the three districts of the Court of Appeals on this issue. But there isn't. All three districts have ruled explicitly or implicitly that the 2018 statute "looks back" 7 years from the time of filing.

L.F.W. v. Mo. State Hwy. Patrol Crim. Records Repository, 585 S.W.3d 846 (Mo. App. S.D. Oct. 10, 2019):
Holding: (1) Defendant/Petitioner's arrest record for not registering a commercial vehicle was not eligible for expungement, because Defendant had a commercial driver's license; Secs. 610.140.2, 610.140.2(10) and 610.140.6 state that violations regarding operation of vehicles are not eligible for expungement "when committed by an individual who has been issued a CDL or is required to possess a CDL;" and (2) where Defendant/Petitioner in 2018 sought expungement of a seatbelt and a defective equipment conviction which occurred in 2016, the petition must be dismissed as premature, since Sec. 610.140 provides that at least three years pass after completing any disposition, before filing a petition to expunge a misdemeanor, municipal ordinance or infraction.

State ex rel. W.D.C. II v. McElwee, 2019 WL 4247060 (Mo. App. S.D. Sept. 6, 2019):
Holding: (1) Where Petitioner filed an expungement petition under Sec. 610.140 but Respondent-Circuit Clerk placed the case "on hold" because Petitioner did not serve all named defendants on the petition, writ of mandamus issues to lift the hold because Sec. 610.140.5 provides that the circuit clerk shall give notice of the filing to the prosecutor who prosecuted the offense; (2) issuance of a 30-day summons to Petitioner's counsel for service on the prosecutor does not comply with the Clerk's duty to notify the prosecutor.
Discussion: Sec. 610.140.5 creates a ministerial duty on the clerk to give notice to the prosecutor. Respondent-Clerk has refused to do this after preparation of the 30-day summons and issuance of that summons to Petitioner's counsel for service. Issuance of a 30-day summons to Petitioner's counsel for service does not comply with Sec. 610.140's requirement that the Clerk give notice to the prosecutor.

W.S. v. Jackson Cnty. Prosecutor, 2020 WL 420778 (Mo. App. W.D. Jan. 28, 2020):
Holding: Even though Petitioner, who sought to expunge a felony conviction from 2000, had subsequent misdemeanor convictions in 2003 and 2005, he was eligible for expungement because the 7-year period for not having another conviction, Sec. 610.140.5, looks backward from the time of filing of the petition in 2018, not forward from the date of the offense.

R.F. v. Owen, 2020 WL 1150286 (Mo. Ap. W.D. March 10, 2020):
Holding: Even though Sec. 571.101.2 disqualifies a person from getting a concealed carry permit if they have a prior felony conviction, where Petitioner subsequently had his conviction expunged under Sec. 610.140, Petitioner was not "automatically" disqualified but Sec. 610.140.9 specifically allows a Sheriff to use an expunged offense as "a factor" to consider in whether to grant or deny a permit.

T.V.N. v. Mo. State Hwy Patrol Crim. Justice Information Serv., 2019 WL 5874670 (Mo. App. W.D. Nov. 12, 2019):
Holding: (1) Even though Sec. 610.122.2(1) states that a person is eligible for expungement of an arrest record only if he "has" no prior convictions, (2) Petitioner sought to expunge a 2016 arrest record for which he was never charged, and (3) Petitioner previously expunged a 2011 speeding conviction, Petitioner was eligible to expunge the 2016 arrest record, because his 2011 speeding conviction had been expunged, so – at the time he filed for the 2016 expungement -- it was as if the speeding conviction never existed.
Discussion: The State argues Petitioner is never eligible for expungement of the 2016 arrest record because he had a prior speeding conviction. Sec. 610.122.2(1) states that a person is not eligible to expunge an arrest record unless he "has no prior" convictions. The word "has" is in the present tense. Petitioner had previously expunged the 2011 speeding conviction. Thus, he no longer "has" it. Sec. 610.140.8 states that the effect of expungement shall be to restore a person to the status he had "as if such events [convictions] had never taken place." Thus, at the time Petitioner filed for expungement of the 2016 arrest record, it was as if the 2011 speeding conviction had never taken place.

J.A. v. Mo. Dept. of Corrections, 2019 WL 6843497 (Mo. App. W.D. Dec. 17, 2019):
Holding: Even though Petitioner, who was seeking to expunge a drug conviction from 1970, had a second drug conviction in 1976, he was eligible for expungement because Sec. 610.140.5(1) makes the seven-year period without a conviction be seven years looking backward from the date the petition is filed (which was in 2018), not seven years looking forward from the date of the conviction to be expunged; because Petitioner had no convictions from 2011 to 2018, he was eligible for expungement of the 1970 conviction.

S.Y. v. Askren, 2019 WL 4017780 (Mo. App. W.D. Aug. 27, 2019):
Holding: Even though expungement-Petitioner had a second misdemeanor conviction within three years after the misdemeanor she sought to expunge, where she had not had a conviction within the three years prior to her filing her petition, she was eligible for expungement, because the applicable time period under Sec. 610.140.5(1) and (2) for not having a conviction is the three years immediately prior to the petition.

R.G. v. Missouri State Highway Patrol, 2019 WL 2256855 (Mo. App. W.D. May 28, 2019):
Even though Petitioner had a second misdemeanor conviction within three years of the conviction he sought to expunge, where Petitioner had not had any convictions for three years prior to the time he sought expungement, he was eligible for expungement under

§610.140.5 because the relevant period for not having new convictions is the time immediately before the expungement petition.
Facts: Petitioner was convicted of a misdemeanor in 2010, and a second misdemeanor in 2012. He sought to expunge both convictions. The State claimed the 2010 conviction was not eligible for expungement because Petitioner had another conviction within three years of it.
Holding: §610.140.5(1) and (2) provide that a conviction may be eligible for expungement if "[a]t the time the petition is filed, it has been at least 7 years if the offense is a felony, or at least 3 years if the offense is a misdemeanor," and the person has not been found guilty of a new offense "during the time period specified for the underlying offense." This language means that a court takes the date the petition is filed and looks back 3 years to determine if the conviction seeking to be expunged occurred within or before that 3 years; then the court looks at that same 3 years to make sure no other felony or disqualifying misdemeanor was committed therein. Thus, the lookback period in Petitioner's case was May 5, 2018 (the day the petitioner was filed) back to May 5, 2015, during which time he had no other convictions. This reading of the statute is consistent with legislative intent because it is that period of time that would determine if Petitioner has changed his behavior and deserves the second chance provided by the statute.

Fay v. Stephenson, 2018 WL 2921825 (Mo. App. W.D. June 12, 2018):
Holding: (1) Even though Plaintiff-Prospective Candidate had received a pardon from the Governor for a prior felony, Plaintiff was not eligible to run for public office because Sec. 115.306.1 disqualifies anyone has "pled guilty" to a felony; the pardon did not extinguish the fact that Plaintiff had "pled guilty" in the past (even though the pardon extinguished the conviction) (2) appellate court suggests Supreme Court should revisit this issue, however, because the case law which places emphasis on the language used in a statute – "pled guilty" vs. "conviction" – allows the legislature to dictate the effect of a pardon despite the fact that the Art. IV, Sec. 7, gives the pardon power to the Executive.

J.B. v. State, 2015 WL 1035487 (Ind. App. 2015):
Holding: Defendant, who was convicted of a misdemeanor but whose conviction was later dismissed upon completion of his sentence, was entitled to expungement of his records; because the Legislature intended to eliminate the stigma of conviction, it would be meaningless if Defendant's case were dismissed but the public would still have access to the records regarding the conviction.

Extradition

In re Extradition of Ferriolo, 2015 WL 5165244 (M.D. Fla. 2015):
Holding: Where Italy sought extradition of Defendant, a finding of probable cause to believe Defendant committed crime was precluded by Italy's failure to submit English translation of relevant criminal statutes.

Eyewitness Identification & Related Issues
(Note: Indexed under various subjects before 2016; e.g., Evidence, Experts, Jury Instructions, Suppression Issues)

State v. Carpenter, 2020 WL 5200894 (Mo. banc Sept. 1, 2020):
Trial court abused discretion in excluding Defendant's eyewitness identification Expert, because such testimony is now admissible under Sec. 490.065.2, in that it is scientific expert testimony which will help the trier of fact understand the evidence.
Facts: Defendant was charged with a robbery, where the key question was Victim's identification of Defendant as the robber. Victim testified he was "100% certain" Defendant was the robber. Defendant sought to call an eyewitness identification Expert to testify as to reliability issues with "show-up" identifications. The trial court excluded the Expert on grounds that such testimony is inadmissible under cases such as *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988) and its progeny.
Holding: Law and science have changed since 1988. *Lawhorn* has been superceded by Sec. 490.065.2, which allows expert testimony if the Expert is qualified; the testimony will help the jury understand the evidence; the testimony is based on sufficient facts, reliable principles, and reliably applied principles. Expert testimony about the reliability of eyewitness identifications meets these requirements. Since 1988, there has emerged a "near perfect scientific consensus" concerning the potential unreliability of eyewitness identification. The question is whether the jury would be better off with this information than without it, i.e., whether it would help the jury understand and evaluate the evidence. The answer is yes. The State argues the Expert is making an impermissible comment on Victim's credibility. But the State misconstrues "credibility" with "accuracy." Victim was telling the truth as he believed it to be. Jurors tend to give great weight to victim's confidence in their identification. But science has shown that eyewitness testimony is not reliable even when victims think they are telling the truth. The Expert did not attempt to say that this particular Victim wasn't accurate; that is the sole province of the jury. But the expert could testify generally about scientific evidence showing eyewitness identifications are unreliable. The availability of cross-examination, closing argument, and MAI-CR 310.02 on expert identification are not sufficient justifications to exclude expert testimony that would help the jury.
Editor's note: The dissenting opinion – although agreeing with the general proposition that eyewitness testimony is now admissible under Sec. 490.065.2 – would hold that because the offer of proof on the Expert included both admissible and inadmissible portions, the trial court did not abuse discretion in excluding the Expert. "Going forward,

practitioners should take caution that expert testimony about eyewitness identification must comport with the facts and evidence in the case to be admissible, and practitioners and circuit courts should carefully examine the relevance of the testimony to ensure its admissibility."

People v. Lerma, 98 Crim. L. Rep. 418 (Ill. 1/22/16):
Holding: Expert testimony on reliability of eyewitness identification is admissible even in cases where the Defendant was not a complete stranger to the eyewitness.

State v. Mahmoud, 99 Crim. L. Rep. 643 (Me. 8/16/16):
Holding: Maine overturns judicial ban on trial judges giving instructions on fallibility of eyewitness identification in light of growing scientific research questioning reliability of eyewitness identification.

Com. v. Bastaldo, 2015 WL 3885652 (Mass. 2015):
Holding: A cross-racial eyewitness jury instruction must be given unless all parties agree there was no cross-racial identification; this avoids the need for the judge to determine if the identification actually was cross-racial or whether jurors might perceive it to be.

Com. v. Thomas, 100 Crim. L. Rep. 409 (Mass. 2/13/17):
Holding: Police were unduly suggestive in showing photos of guns to Witness and making comments such as "Looks just like it, huh," and "We're smarter than you think, aren't we."

State v. Jones, 98 Crim. L. Rep. 371 (N.J. 1/20/16):
Holding: When evaluating the reliability/suggestibility of a showup identification, the court should consider only the reliability/suggestibility of the showup itself, and not extrinsic evidence of the guilt of Defendant.

People v. Boone, 102 Crim. L. Rep. 278 (N.Y. 12/14/17):
Holding: Where identifying-Witness and Defendant are of different races, Defendant is entitled to instruction on lack of reliability of cross-racial identification.

People v. Marshall, 2015 WL 9090609 (N.Y. 2015):
Holding: Court must hold a pretrial hearing to determine if out-of-court identification procedure used by Prosecutor or police was unduly suggestive, regardless of whether the identification was for trial preparation or another purpose.
People v. Cruz, 2015 WL 3461792 (N.Y. App. 2015):
Holding: A showup identification conducted one hour after a robbery is not admissible; there were no exigent circumstances requiring a showup.

People v. Jackson, 2015 WL 6875461 (N.Y. Sup. 2015):
Holding: Police identification procedure consisting of a single, unpreserved photo of Defendant taken on Officer's cell phone and shown to Witness two hours after alleged assault was unduly suggestive.

Factual Basis

Booker v. State, 2018 WL 2928024 (Mo. banc June 12, 2018):
Holding: "Factual basis" is a distinct concept from a "knowing and voluntary plea."
Discussion: Although Movant (Defendant) phrases his claim as a lack of "factual basis," his real claim is that his plea was not knowing and voluntary due to lack of understanding, not lack of "factual basis." Movant's confusion is understandable. Missouri courts have routinely used "factual basis" synonymously and interchangeably with a "knowing and voluntary plea." Numerous appellate decisions state that a "factual basis is established where the information or indictment clearly charges the defendant with all the elements of the crime, the nature of the charge is explained to the defendant, and the defendant admits guilt." While these events may establish a plea was knowing and voluntary, they go beyond what is required for a sufficient factual basis – simply the facts admitted establish the defendant's commission of the relevant offense. Factual basis serves as a safeguard to prevent a defendant from pleading guilty without realizing his conduct does not actually fall within the charge. Therefore, while a sufficient factual basis can be an important factor in a voluntariness determination, whether a plea is knowing and voluntary is determined from the record as a whole. The use of "factual basis" synonymously with "knowing and voluntary plea" is a misapplication of the law. Any case law to the contrary should no longer be followed.

Martin v. State, 2019 WL 761705 (Mo. App. S.D. Feb. 21, 2019):
Holding: A claim that there is no "factual basis" for a plea under Rule 24.02(e) is no longer cognizable in a Rule 24.035 case; rather, the claim must be that the guilty plea was not knowing and voluntary because the Movant did not understand the elements of the crime she was admitting.
Discussion: Rule 24.035 Movant claims on appeal that there is no factual basis for her plea as required by Rule 24.02(e). However, *Booker v. State*, 552 S.W.3d 522 (Mo. banc 2018), held that a sufficient factual basis is not constitutionally required. *Booker* held that Missouri courts had confused the concept of "factual basis" with "knowing and voluntary plea." The essential inquiry in a 24.035 case is whether a guilty plea was knowing and voluntary. While a sufficient factual basis can be an important factor in a voluntariness determination, whether a plea is knowing and voluntary is determined from the record as a whole. Rather than claim insufficient factual basis, a Movant should claim that her plea was unknowing and involuntary because she did not understand the elements of the crime she was admitting.

Huston v. State, 2017 WL 3850742 (Mo. App. W.D. Sept. 5, 2017):
Holding: Even though (1) the plea judge asked Movant if she sold drugs "near schools," and (2) read the charged offense that she sold drugs at a certain address, which was "within 2000 feet for the real property" of a school and asked she was guilty of that, to which she responded yes, this was an insufficient factual basis to show that Movant *knew* she sold drugs within 2000 feet of a school as required by Sec. 195.214.1.
Discussion: A conviction under Sec. 195.214.1 requires proof that a defendant knows at the time of distribution that she was within 2000 feet of a school. The plea colloquy does not show that Movant knew at the time of the drug sale that she was within 2000 feet of a

school. Rather, the plea colloquy shows, at most, that the *address* from which she sold drugs was within 2000 feet of a school, but does not establish that at the time of sale, Movant knew she was within 2000 feet of a school. Thus, the plea colloquy failed to comply with Rule 24.02(e)'s requirement for a factual basis, and Movant's plea was not knowingly and voluntarily entered.

Sanders v. State, 2017 WL 770967 (Mo. App. W.D. Feb. 28, 2017):
Where 24.035 Movant had previously been convicted of endangering welfare of a child, Sec. 568.045, which may have been non-sexual in nature, and later pleaded guilty to failure to register as a sex offender because of this offense, Movant was entitled to evidentiary hearing on claim that his plea counsel was ineffective in failing to inform him that he didn't have to register and had a complete defense to the registration charge, and that the charge lacked a factual basis.
Discussion: The judge, in denying Movant's claims, relied on Sec. 589.400.1(7) for the proposition that Movant was required to register; that section requires anyone who has been or is required to register under federal law to register in Missouri. However, the State charged Movant with violating Sec. 589.400.1(1), which requires registration for offenses committed under Chapter 566 RSMo. Nothing within the charging documents or at the plea hearing indicates that the child endangerment charge was sexual in nature. Although the judge may have had some information outside the record to show it was sexual, given that child endangerment alone does not require registration, and that was the basis for the registration charge, Movant is entitled to a hearing to determine if counsel was ineffective and if there was a factual basis for his plea.

Berea v. Moorer, 2016 WL 3348411 (Ohio App. 2016):
Holding: Where trial court failed to comply with statute which required that it give an explanation of circumstances before accepting a no contest plea, this was a failure to establish facts necessary to support a conviction to which jeopardy attached; thus, State is precluded by double jeopardy from getting a second opportunity to prove guilt.

Findings of Fact, Conclusions of Law (Rules 24.035 and 29.15)

Rogers v. State, 2020 WL 6139863 (Mo. App. E.D. Oct. 20, 2020):
Holding: Where the motion court issued Findings on only three of Movant's four Rule 24.035 claims, there is no "final judgment" for purposes of appeal because not all claims were disposed of; case dismissed and remanded with directions to rule on all claims.

McAllister v. State, 561 S.W.3d 492 (Mo. App. E.D. Nov. 20, 2018):
Holding: Where Movant's amended 29.15 motion raised four claims on which the motion court failed to issue findings, there is no final judgment disposing of all claims, and the appeal must be dismissed.

Conn v. State, 564 S.W.3d 386 (Mo. App. E.D. Nov. 27, 2018):
Holding: Where Movant's 24.035 motion asserted three claims, but the court failed to issue Findings on one of the claims, there is no "final judgment" because the Findings did not resolve all claims and issues, so the appeal must be dismissed.

Welch v. State, 2018 WL 3117904 (Mo. App. E.D. June 26, 2018):
Holding: Even though Sec. 559.115.8 provides that a defendant convicted of first-degree statutory rape or first degree statutory sodomy is not eligible for a 120-day program under 559.115.3 and Movant said at sentencing that he was satisfied with his plea counsel, Movant was entitled to remand for Findings on his claim that plea counsel misadvised him into believing he could receive a 120-day program, because the motion court must issue Findings on all issues, Rule 24.035(j), and the plea court itself had said it was possible Movant could get probation.

Sanders v. State, 564 S.W.3d 380 (Mo. App. S.D. Nov. 26, 2018):
Holding: Where (1) the issue in Movant's 29.15 case was whether trial counsel was ineffective in not objecting to the jury instructions in a multiple-act child sex case on grounds that the instructions did not sufficiently distinguish each charged act, and (2) trial counsel had expressed some strategic reasons for not objecting, the motion court's Finding that it was "compelled," as a matter of law, to find counsel ineffective under *Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016)(which held that a Movant might be prejudiced when counsel fails to object in a similar situation), was clearly erroneous; *Hoeber* did not bind all fact-finders in all circumstances as a matter of law; case remanded for Findings on whether counsel's choices "objectively reasonable."

Hounihan v. State, 2018 WL 6258890 (Mo. App. S.D. Nov. 27, 2018):
Holding: Where motion court denied Movant's 29.15 claim that appellate counsel was ineffective in not raising that the evidence was insufficient to convict of driving while revoked as a class D felony (as opposed to a misdemeanor), the motion court clearly erred in denying the claim on grounds that postconviction counsel was the "first to notice" the issue; case remanded for Findings as to whether appellate counsel's failure to raise the issue was "objectively reasonable" – appellate counsel's subjective intent aside.

Straub v. State, 523 S.W.3d 602 (Mo. App. S.D. July 11, 2017):
Where 24.035 Movant claimed that his guilty plea was involuntary because plea counsel had mistakenly advised him that he would be eligible for placement in a sex offender program and probation, but motion court denied relief on grounds that it was not reasonable for Movant to believe he would receive probation, case must be remanded for additional Findings because motion court's Findings are not responsive to the precise claim raised.
Facts: Movant pleaded guilty to attempted rape in the first degree. The plea agreement called for a cap of 25 years and counsel "may argue for any sentence." Plea counsel told Movant that he was eligible for a sex offender program followed by release on probation, and that counsel would argue for this. In fact, Secs. 559.115 and 566.030.4 prohibit probation for this offense; the prosecutor said this at the plea. The court denied probation. Movant filed 24.035 motion in which he claimed his plea was involuntary

because of counsel's mistaken advice. Motion court denied relief. Motion court found that plea counsel *had given mistaken advice*, but denied relief on grounds that it was not reasonable for Movant to believe he would receive probation for this offense based on prosecutor's statement at the plea.
Holding: The motion court's Findings do not address the precise claim raised by Movant. There are no factual Findings that would support a conclusion that Movant did not reasonably rely on plea counsel's mistaken advice about probation eligibility. Appellate court cannot presume this factual Finding, which requires a credibility determination. The motion court made no factual Findings regarding Movant's beliefs when he pled guilty. Remanded to motion court for additional Findings.

Pendleton v. State, 2019 WL 1333108 (Mo. App. W.D. March 26, 2019):
Holding: (1) Where Movant pleaded in an amended motion and presented testimony that he mailed his *pro se* 24.035 motion before the due date but it was not filed on time due to circumstances beyond his control, but (2) the motion court simply denied the motion on grounds it was "untimely," the Findings are inadequate to allow for meaningful appellate review of this issue; case remanded for specific Findings on whether Movant's case falls within recognized exception to timeliness.

Forfeiture

U.S. v. $11,500 in U.S. Currency, 101 Crim. L. Rep. 600 (9th Cir. 9/5/17):
Holding: 21 USC 881(a)(6), which allows the Gov't to seize money that is intended to be used in a drug transaction, did not allow Gov't to seize the bail money which Husband posted for Wife, even though both Husband and Wife were drug addicts; it was speculative to look forward or backward in time to assume that they intended to use this money to buy drugs; forfeiture requires they take some action manifesting an intent.

Com. v. 1997 Chevrolet, 101 Cirm. L. Rep. 207 (Pa. 5/25/17):
Holding: Forfeiture of property that wasn't significantly related to the underlying crime violated 8th Amendment.

Guilty Plea

State v. Rohra, 545 S.W.3d 344 (Mo. banc May 1, 2018):
Holding: Where (1) the information charged Defendant with unlawful possession of a firearm because he had a prior felony "conviction," and (2) Defendant pleaded guilty to unlawful possession of a firearm, Defendant, by pleading guilty, waived his argument that the prior felony did not count as a "conviction" because it was a deferred prosecution under Oklahoma law; and (2) even though a direct appeal from a guilty plea lies if the charging document is insufficient, Defendant's claim on appeal is not a challenge to the sufficiency of the information but is a substantive legal argument over the meaning of the word "conviction" in Sec. 571.070, which was waived by the guilty plea.

Ryan v. State, 2018 WL 2311275 (Mo. banc May 22, 2018):
Holding: (1) "Group guilty pleas" are discouraged and may be a relevant factor in determining if a plea is voluntary, but the mere fact that a plea was taken in a "group" does not, *per se*, render the plea involuntary; (2) to the extent that a Movant wants a court to consider the relevance of a "group plea" as to voluntariness or so as to require an evidentiary hearing, a "group plea" issue must be pleaded in an amended motion.

Booker v. State, 2018 WL 2928024 (Mo. banc June 12, 2018):
Holding: "Factual basis" is a distinct concept from a "knowing and voluntary plea."
Discussion: Although Movant (Defendant) phrases his claim as a lack of "factual basis," his real claim is that his plea was not knowing and voluntary due to lack of understanding, not lack of "factual basis." Movant's confusion is understandable. Missouri courts have routinely used "factual basis" synonymously and interchangeably with a "knowing and voluntary plea." Numerous appellate decisions state that a "factual basis is established where the information or indictment clearly charges the defendant with all the elements of the crime, the nature of the charge is explained to the defendant, and the defendant admits guilt." While these events may establish a plea was knowing and voluntary, they go beyond what is required for a sufficient factual basis – simply the facts admitted establish the defendant's commission of the relevant offense. Factual basis serves as a safeguard to prevent a defendant from pleading guilty without realizing his conduct does not actually fall within the charge. Therefore, while a sufficient factual basis can be an important factor in a voluntariness determination, whether a plea is knowing and voluntary is determined from the record as a whole. The use of "factual basis" synonymously with "knowing and voluntary plea" is a misapplication of the law. Any case law to the contrary should no longer be followed.

State ex rel. Delf v. Missey, 518 S.W.3d 206 (Mo. banc May 30, 2017):
Even though Defendant entered into a binding plea agreement under Rule 24,02(d)(1)(c) which called for 7-years SES and 5 years probation, trial court was allowed to impose as a condition of probation a 120-day shock incarceration in county jail, and this did not violate the plea agreement; this is because a condition of probation is different than a sentence; although the parties could have specifically made the plea agreement contingent on Defendant not having to serve shock incarceration, the parties did not here.
Facts: Defendant and State entered into a binding plea agreement under Rule 24.02(d)(1)(c) which called for Defendant to receive 7-years SES and 5 years probation. After receiving the SAR, the trial judge said he would impose as a special condition of probation a 120 day shock incarceration in the county jail. Defendant objected to that because of the "binding" plea, and sought to enforce the plea agreement or withdraw the plea. After the trial court overruled that, Defendant sought a writ of prohibition.
Holding: Rule 24.02(d)(1)(c) provides a prosecutor can agree to a specific *sentence*. Here, the parties reached agreement as to a specific *sentence,* but that differs from conditions of probation. Probation and terms of probation are not a "sentence." Here, the trial court imposed the precise *sentence* agreed upon, but with the *condition of probation* of 120-days shock incarceration. Sec. 559.021.1 grants a circuit court the authority to

determine conditions of probation. Defendants can plea bargain for special conditions of probation, and if Defendant here had bargained for no shock incarceration, that would be enforceable or she would be allowed to withdraw her plea. But the agreement doesn't reflect that. Even though Defendant rejected two prior jail-time offers, the parties did not take any steps to memorialize that the agreement reached would include no shock incarceration. Writ of prohibition denied.

State v. DePriest, 2017 WL 770975 (Mo. banc Feb. 28, 2017):
(1) Movants (Brother and Sister) were entitled to evidentiary hearing on claim that plea counsel (who had represented both of them) operated under an actual conflict of interest which adversely affected his representation where (a) counsel knew the evidence against Brother was strong, but the evidence against Sister was weaker, (b) counsel advised rejecting various plea offers that would have benefited one over the other, and (c) counsel eventually recommended accepting a plea offer that required both of them to plead guilty together, even though the offer appeared to favor Sister. (2) Prejudice is presumed in a guilty plea case where a Movant shows that a conflict of interest actually affected the adequacy of representation. (3) "Group guilty pleas" are disfavored and should be "consigned to judicial history."
Facts: Brother and Sister were charged with various drug offenses. They were jointly represented by Attorney. Attorney recognized that the evidence against Brother was stronger, and the evidence against Sister weaker. The State initially offered both Brother and Sister a 10-year deal. Attorney told them to reject it. Later, the State made other plea offers, including one in which Sister would be required to testify against Brother; Attorney told Sister not to accept that offer. Later, Sister was jailed on an unrelated charge. The State offered to let Sister bond out on that charge *only if both* she and Brother pleaded guilty in the drug cases. Attorney told them both to plead guilty. Brother's plea was an "open" plea but was relying on Sister being able to bond out on the unrelated charge. Sister's plea dismissed certain charges and allowed her to bond out on the other charge, but was also open. The plea was at a "group guilty plea" with numerous other defendants also pleading guilty at the same time and being questioned by the judge as a group. Brother and Sister later filed separate 24.035 motions, alleging Attorney was operating under an actual conflict of interest in representing both of them. The motion court denied the claim without an evidentiary hearing.
Holding: The motion court denied a hearing on grounds that Movants had not shown prejudice, in that they had not shown that there is a reasonable probability that but for counsel's errors they would rejected pleading guilty and insisted on going to trial. But this is the wrong standard for conflict of interest claims in a guilty plea. A movant who shows that a conflict of interest actually affected the adequacy of representation need not show prejudice. Prejudice is presumed because the right to unconflicted counsel is an essential aspect of the Sixth Amendment right to counsel. Actual conflicts of interest in guilty plea proceedings cause counsel to refrain from doing things, such as in pretrial negotiations. To assess the impact of such a conflict on the attorney's options, tactics and decisions in plea negotiations would be impossible. (The standard for conflict of interest at trial is that counsel must have done something or foregone doing something at trial, which was detrimental to the movant and advantageous to the one with antagonistic interests.) Here, Movants pleaded facts alleging that counsel was acting under an actual

conflict of interest that adversely affected his performance. Case remanded for an evidentiary hearing.
Concurring Opinion: Judge Wilson questions the adequacy of the amended motions, and expresses his view that the civil pleading requirements of Rule 55 should apply to Rule 24.035 and 29.15 amended motions. "[E]ven if Rule 55 does not compel postconviction counsel to take this approach, postconviction clients would be better served if their counsel did so."

Parsons v. State, 2019 WL 2094873 (Mo. App. E.D. May 14, 2019):
Even though Defendant/Movant was allowed to withdraw his guilty plea before sentencing to a DWI charge on grounds that it would violate Double Jeopardy to convict him of DWI and second-degree assault of a law enforcement officer (for hitting the officer with his vehicle), he was prejudiced by defense counsel's failure to correctly advise him that he could be convicted of only one of the offenses if he went to trial, because Defendant/Movant would not have pleaded guilty but would have gone to trial if he knew this.
Facts: Defendant/Movant was charged with DWI and second-degree assault on a law enforcement officer for hitting the Officer with his vehicle. Defendant/Movant rejected an 11 year plea offer, and entered "blind pleas" to both charges. Before sentencing, it was discovered that conviction for both charges would violate Double Jeopardy since DWI was an included element of the assault charge. Defendant/Movant was allowed to withdraw his DWI plea. He was then sentenced to 12 years. He filed a 24.035 motion claiming counsel was ineffective for not advising him that if he went to trial, he could only be convicted of one of the charges, and faced a maximum of 15 years. He claimed he would have gone to trial if counsel had told him this. The motion court ruled that he wasn't prejudiced because he was permitted to withdraw his DWI plea.
Holding: The fact that Defendant/Movant rejected an 11 year offer supports the notion that there is a reasonable probability he would have chosen to go to trial if he had known he faced no more than 15 years at trial, since he would be convicted of either the DWI or assault, but not both at trial. 11 is not that different than 15, but very different than the 30 years he thought he faced at trial if convicted and sentenced to both. Counsel's mistake as to Double Jeopardy skewed the plea bargaining process by squandering any leverage he had to elicit an acceptable plea offer. Setting aside the DWI plea did not remedy the involuntary nature of the plea to assault under the mistaken advice of counsel about what would happen at trial. Assault conviction vacated.

Stuart v. State, 565 S.W.3d 766 (Mo. App. E.D. Jan. 29, 2019):
Holding: (1) Where 24.035 Movant pleaded guilty to a plea agreement for long-term treatment, but the DOC later determined that Movant was not eligible for the program, Movant's plea was involuntary because the long-term treatment statute, Sec. 217.362, requires that the trial judge verify a defendant's eligibility for the program before sentencing him to it; (2) Movant's plea counsel was ineffective in advising him he would be placed in long-term treatment as part of his plea agreement, when, in fact, he wasn't eligible for the program; and (3) motion court's denial of postconviction relief on grounds that Movant would only be sentenced to long-term treatment "if eligible" is clearly erroneous because he was sentenced to seven-years "with" long-term treatment.

Wilson v. State, 2019 WL 923598 (Mo. App. E.D. Feb. 26, 2019):
Holding: Even though (1) the motion court should have granted an evidentiary hearing to 24.035 Movant on his claim that plea counsel was ineffective in advising him he would receive 3-years' credit for an Illinois sentence (when such credit was not legally available under Missouri law), and (2) the motion court should not have granted relief in the absence of a hearing, where the motion court nevertheless reduced Movant's sentence by three years to account for the Illinois sentence, Movant suffered no prejudice on his claim that his plea was involuntary.

Williams v. State, 2018 WL 2306687 (Mo. App. E.D. May 22, 2018):
Where Movant's plea agreement called for Movant to be placed in Long Term Drug Program (LTDP) and the court sentenced him to LTDP, but when Movant got to DOC he was determined to be ineligible for LTDP, Movant's plea was involuntary because he pleaded guilty in exchange for LTDP and reasonably relied on his attorney's advice that he would be placed in LTDP.
Discussion: The motion court denied relief on grounds that Movant's testimony that he would not have pleaded guilty if he knew he would not receive LTDP was not credible, since Movant was facing a longer sentence if convicted at trial. But mistaken beliefs about sentencing affect a Movant's ability to knowingly enter a plea if the mistake is reasonable and based on positive representation upon which a Movant is entitled to rely. Here, the record shows the plea agreement was for LTDP. And Movant's counsel told him he would be placed in LTDP. Movant was entitled to rely on these representations. Conviction vacated.

Miller v. State, 2016 WL 2339049 (Mo. App. E.D. May 3, 2016):
(1) Movant was entitled to evidentiary hearing on his claim that his plea counsel was ineffective in failing to object to a "group plea" procedure which rendered his plea involuntary; "group pleas" are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea; (2) redacted transcripts on appeal violate Rule 81.15(b), which requires an accurate transcript be provided for appeal; transcripts must provide all parts of the proceeding.
Facts: Movant pleaded guilty in two separate cases, involving two different counties and two different defense counsel, at a "group guilty plea" involving six unrelated defendants. He filed a 24.035 motion, contending that his counsel were ineffective in failing to object to the "group plea" procedure, which rendered his pleas involuntary. The motion court denied the claim without a hearing.
Holding: (1) In at least 10 prior cases, the Eastern District has condemned the practice of "group" guilty pleas, but this has fallen on "deaf ears." "[T]he attorneys practicing in this courtroom either have tuned us out or they fear retribution from the trial judge for raising objections to this procedure." While the Supreme Court has held that group pleas are not automatically impermissible, they are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea. Defense counsel may be ineffective in failing to object to "group pleas." Counsel's failure to object, in and of itself, is sufficient to warrant a

hearing. (2) On a separate matter, a redacted transcript of the "group plea" was submitted on appeal. Rule 81.15(b) requires a true and accurate transcript be submitted. "This court should never be provided redacted transcripts."

Martin v. State, 2019 WL 761705 (Mo. App. S.D. Feb. 21, 2019):
Holding: A claim that there is no "factual basis" for a plea under Rule 24.02(e) is no longer cognizable in a Rule 24.035 case; rather, the claim must be that the guilty plea was not knowing and voluntary because the Movant did not understand the elements of the crime she was admitting.
Discussion: Rule 24.035 Movant claims on appeal that there is no factual basis for her plea as required by Rule 24.02(e). However, *Booker v. State*, 552 S.W.3d 522 (Mo. banc 2018), held that a sufficient factual basis is not constitutionally required. *Booker* held that Missouri courts had confused the concept of "factual basis" with "knowing and voluntary plea." The essential inquiry in a 24.035 case is whether a guilty plea was knowing and voluntary. While a sufficient factual basis can be an important factor in a voluntariness determination, whether a plea is knowing and voluntary is determined from the record as a whole. Rather than claim insufficient factual basis, a Movant should claim that her plea was unknowing and involuntary because she did not understand the elements of the crime she was admitting.

State ex rel. Bollinger v. Bernstein, 2016 WL 6750712 (Mo. App. S.D. Nov. 15, 2016):
Holding: (1) Where Defendant pleaded guilty to an offense charged by traffic ticket, was sentenced to a fine, and a written judgment and sentence was entered, the judgment in the criminal case was "final" and the trial court could not, *sua sponte*, set it aside later the same day without stating any grounds for doing so; (2) even though Rule 29.13(a) allows a trial court to set aside a criminal judgment within 30 days of entry if either the facts stated in the indictment or information did not constitute an offense *or* the court lacked jurisdiction, where the trial court waited 16 months to claim that it had lacked jurisdiction because the State had not filed an information (and also claimed Defendant had not paid the fine) but then abandoned that argument on appeal, the Rule did not authorize setting aside the final judgment. Writ of prohibition prohibiting setting aside the plea made permanent.

Huston v. State, 2017 WL 3850742 (Mo. App. W.D. Sept. 5, 2017):
Holding: Even though (1) the plea judge asked Movant if she sold drugs "near schools," and (2) read the charged offense that she sold drugs at a certain address, which was "within 2000 feet for the real property" of a school and asked she was guilty of that, to which she responded yes, this was an insufficient factual basis to show that Movant *knew* she sold drugs within 2000 feet of a school as required by Sec. 195.214.1.
Discussion: A conviction under Sec. 195.214.1 requires proof that a defendant knows at the time of distribution that she was within 2000 feet of a school. The plea colloquy does not show that Movant knew at the time of the drug sale that she was within 2000 feet of a school. Rather, the plea colloquy shows, at most, that the *address* from which she sold drugs was within 2000 feet of a school, but does not establish that at the time of sale, Movant knew she was within 2000 feet of a school. Thus, the plea colloquy failed to

comply with Rule 24.02(e)'s requirement for a factual basis, and Movant's plea was not knowingly and voluntarily entered.

Johnson v. State, 2017 WL 4242031 (Mo. App. W.D. Sept. 26, 2017):
Holding: Even though (1) plea court set aside Defendant's guilty plea after he said in his SAR that he did not commit the offense; (2) jeopardy generally attaches after a plea has been unconditionally accepted; and (3) Defendant later pleaded guilty to a less favorable plea offer, Defendant's right to be free from double jeopardy was not violated by entry of the second plea because Defendant never objected to the first plea being set aside and never sought to have the first plea reinstated, so he effectively consented to the withdrawal of his first plea.

Sanders v. State, 2017 WL 770967 (Mo. App. W.D. Feb. 28, 2017):
Where 24.035 Movant had previously been convicted of endangering welfare of a child, Sec. 568.045, which may have been non-sexual in nature, and later pleaded guilty to failure to register as a sex offender because of this offense, Movant was entitled to evidentiary hearing on claim that his plea counsel was ineffective in failing to inform him that he didn't have to register and had a complete defense to the registration charge, and that the charge lacked a factual basis.
Discussion: The judge, in denying Movant's claims, relied on Sec. 589.400.1(7) for the proposition that Movant was required to register; that section requires anyone who has been or is required to register under federal law to register in Missouri. However, the State charged Movant with violating Sec. 589.400.1(1), which requires registration for offenses committed under Chapter 566 RSMo. Nothing within the charging documents or at the plea hearing indicates that the child endangerment charge was sexual in nature. Although the judge may have had some information outside the record to show it was sexual, given that child endangerment alone does not require registration, and that was the basis for the registration charge, Movant is entitled to a hearing to determine if counsel was ineffective and if there was a factual basis for his plea.

*** Class v. U.S., ___ U.S. ___, 138 S.Ct. 798 (U.S. Feb. 21, 2018).**
Holding: A guilty plea does not bar federal defendants from appealing that the statute under which they were convicted was unconstitutional.

* **Kernan v. Cuero, ___ U.S. ___, 138 S.Ct. 4 (U.S. Nov. 6, 2017):**
Holding: State court's ruling allowing Petitioner to withdraw his guilty plea, instead of ordering specific performance of plea agreement, after State was allowed to file an amended information after plea but before sentencing which pleaded an additional prior offense which enhanced Defendant's sentence, was not contrary to any prior holding of U.S. Supreme Court; *Santobello v. New York*, 404 U.S. 257 (1971), held that the relief in similar situations is left to the discretion of state courts; thus, Petitioner is not entitled to habeas corpus relief of specific performance.

*** Lee v. U.S., ___ U.S. ___, 137 S.Ct. 1958 (U.S. June 23, 2017):**
Holding: Defendants who plead guilty based on bad advice about immigration consequences can show prejudice to set aside their pleas by showing a reasonable

likelihood that they would not have pleaded guilty but would have gone to trial, even though they almost certainly would have been convicted at trial; such defendants, to show prejudice, need not show that they likely would have obtained a favorable result at trial.

U.S. v. King-Gore, 102 Crim. L. Rep. 205 (D.C. Cir. 11/28/17):
Holding: Gov't breached plea agreement (entitling Defendant to resentencing) when it referred to Defendant's statements about selling drugs made during a Gov't debriefing in which Gov't promised not to use any statements Defendant made against him.

U.S. v. Newman, 98 Crim. L. Rep. 185 (D.C. Cir. 11/17/15):
Holding: Even though counsel did not give "wrong" immigration advice to Defendant until after a guilty plea but before sentencing, Defendant was still prejudiced by counsel's wrong advice because he could have moved to withdraw his guilty plea before sentencing if he had known correct immigration information.

U.S. v. Ruiz, 97 Crim. L. Rep. 409 (1st Cir. 6/23/15):
Holding: Fed. Rule 11(d)(1) gives Defendant absolute right to withdraw guilty plea before a judge accepts it, even though Defendant missed the 14-day deadline for objecting to a magistrate's recommendations.

U.S. v. Edgell, 2019 WL 322681 (4th Cir. 2019):
Holding: Gov't breached plea agreement where it had agreed to stipulate that Defendant's drug quantify was less than 5 grams, but then argued it was a higher amount at sentencing (which tripled Defendant's sentence under Guidelines).

U.S. v. Warner, 2016 WL 1660200 (4th Cir. 2016):
Holding: Where plea agreement called for Gov't to tell court that a sentencing enhancement did not apply, Gov't breached agreement by advising court that it had changed its mind about the applicability of the enhancement, even though Gov't also asked court to still honor the agreement.

U.S. v. Williams, 2016 WL 2640563 (5th Cir. 2016):
Holding: Where Gov't breached plea agreement calling for Gov't to recommend sentence at low end of sentencing range, Defendant was entitled to choice of remedy of resentencing before a different judge with Gov't making the low end recommendation, or withdrawal of his guilty plea.

U.S. v. Bethea, 103 Crim. L. Rep. 114 (7th Cir. 4/26/18):
Holding: Even though Defendant consented to having his guilty plea by videoconference, this violates Federal Rule of Criminal Procedure which states that a felony Defendant "must be present" at his initial appearance, arraignment and plea; nothing can substitute for a face-to-face encounter between a judge and Defendant; sentence vacated.

U.S. v. Harrington, 99 Crim. L. Rep. 638 (7th Cir. 8/19/16):
Holding: Even though (1) Snitch-witness received a plea deal to testify against a defendant, and (2) the defendant ended up being acquitted, trial judge had no authority to subsequently reject the plea deal on grounds that Snitch-witness' testimony wasn't good enough to obtain a conviction; to hold otherwise would give Snitch-witnesses stronger incentive to exaggerate and lie.

U.S. v. Nickle, 98 Crim. L. Rep. 619 (9th Cir. 3/21/16):
Holding: Judge has no authority to reject a guilty plea because he wants Defendant to state and admit extra details beyond the statutory elements of the crime; a judge can reject a plea only if Defendant is disputing guilt or doesn't understand the charges.

U.S. v. Chan, 97 Crim. L. Rep. 532 (9th Cir. 7/9/15):
Holding: Even though *Padilla* is not retroactive, Defendant, whose conviction was final before *Padilla*, can withdraw her plea due to counsel's affirmative misrepresentations about immigration consequences; the law at time of Defendant's plea was clear that counsel can be ineffective for affirmative misrepresentations of any kind that render plea involuntary; case need not be decided on basis of *Padilla* (failure to warn of immigration consequences) but on law of affirmative misrepresentation.

Almanza-Arenas v. Lynch, 98 Crim. L. Rep. 285 (9th Cir. 12/28/15):
Holding: Where California vehicle statute criminalized conduct that would both constitute a crime of moral turpitude and would not constitute such a crime, the statute did not categorically create a crime involving moral turpitude; thus, the statute cannot render an alien ineligible for cancellation of removal.

U.S. v. Doe, 101 Crim. L. Rep. 513 (10th Cir. 8/4/17):
Holding: Defendant who had cooperated with Gov't in other criminal cases was entitled to review of his claim that Gov't reneged on plea deal by not filing motion for substantial assistance reduction.

Ariz. State Bar Comm. on Rules of Prof. Conduct, Op. 15-01 (June 2015), 97 Crim. L. Rep. 414: Arizona adopts rule that forbids defense counsel from advising Defendants from entering into plea agreements that waive claims of ineffective counsel, and forbids prosecutors from proposing such deals.

Editor's Note: Missouri Formal Opinion 126 is similar.

Hollie v. State, 2015 WL 5608239 (Miss. 2015):
Holding: Where trial court had ordered a competency evaluation for capital Defendant, there was reason to believe such an evaluation was warranted and court should not have accepted Defendant's guilty plea without doing the evaluation.

State v. Langley, 2016 WL 1128273 (Mont. 2016):
Holding: Ambiguity in a plea agreement must be construed against the State and in favor of Defendant, even where the agreement was drafted by defense counsel.

State v. Valadez, 2016 WL 325524 (Wis. 2016):
Holding: Defendant-Lawful Permanent Resident met her burden to show that her guilty pleas likely would result in her exclusion from re-entry into U.S. such as to allow her to withdraw her pleas for not being given immigration-consequences-warnings as required by statute; this was true even though Defendant had not actually been excluded yet; Defendant should not be required to leave the U.S. and then be denied re-entry before being able to withdraw her plea.

Buffey v. Ballard, 2015 WL 7103326 (W.Va. 2015):
Holding: *Brady* applies to plea negotiation stage, and Defendant may withdraw a guilty plea based upon Prosecutor's failure to disclose favorable evidence.

People v. Asghedom, 2015 WL 9598274 (Cal. App. 2015):
Holding: Trial court abused discretion in finding that Defendant would still have pleaded guilty if he had been advised of immigration consequences of his plea; Defendant was a first time drug offender and likely would still have received probation even if he had gone to trial, and was 20 years old and had been in U.S. since age 12.

People v. Gonzalex, 2016 WL 542842 (Cal. App. 2016):
Holding: Where a new sentencing reform law allowed Defendant to receive a favorable resentencing to a misdemeanor, Defendant was entitled to relief even though his plea agreement expressly called for a felony sentence; further, the State could not vacate the conviction and reinstate more serious charges, because nothing in the sentencing reform law allowed a trial court to vacate a conviction or allow Prosecutor to withdraw from a plea agreement.

Amin v. Superior Court, 2015 WL 3866903 (Cal. App. 2015):
Holding: Prosecutor who negotiated plea bargain was required to bear risk of any mistake of fact as to what was included in the agreement, and thus, could not move to rescind the agreement later; the agreement resolved all "charged and uncharged" sex incidents described in certain police reports, but prosecutor later sought more charges for some incidents that were described in the reports, but which prosecutor apparently had mistakenly thought were not in the police reports.

People v. McClendon, 2015 WL 5016612 (Ill. App. 2015):
Holding: Denial of Defendant's timely and unopposed motion to withdraw guilty plea was not warranted; judicial discretion should not be used to override prosecutorial discretion in the absence of compelling reasons.

State v. Nkiam, 2015 WL 7003416 (N.C. App. 2015):
Holding: Plea counsel was ineffective in advising Defendant that he faced only a risk of deportation if he pleaded guilty, when deportation was, in fact, presumptively mandatory.

Berea v. Moorer, 2016 WL 3348411 (Ohio App. 2016):
Holding: Where trial court failed to comply with statute which required that it give an explanation of circumstances before accepting a no contest plea, this was a failure to

establish facts necessary to support a conviction to which jeopardy attached; thus, State is precluded by double jeopardy from getting a second opportunity to prove guilt.

State v. Tutt, 2015 WL 8534501 (Ohio App. 2015):
Holding: Court filed to comply with guilty plea colloquy requirements when it failed to inform Defendant that he was subject to mandatory prison term.

Ex Parte Cox, 98 Crim. L. Rep. 418 (Tex. App. 2016):
Holding: Where Defendant pleaded guilty to two counts in return for a reduced sentence on the second count only, but later it was determined that the second count was not a crime, Defendant should be allowed to withdraw his plea to the first count; the entire plea bargain is void where the terms on counts are intertwined; here, the plea to the first count, in effect, became a guilty plea to the maximum sentence without any consideration from the State.

State v. Finley, 2015 WL 5725173 (Wis. App. 2015):
Holding: Reducing Defendant's sentence to the maximum he was incorrectly told he faced does not cure violation of Defendant's due process rights for entering a plea that was not voluntary, knowing and intelligent, because he was misinformed of the maximum punishment.

N.Y. State Bar Ass'n Comm. on Prof. Ethics Op. 1098 (6/10/16):
Holding: New York ethics committee holds that it is unethical for prosecutors to structure plea bargains that require defendants to give up right to pursue ineffective assistance of counsel claims.

Immigration & Related Issues

Lopez-Matias v. State, 2016 WL 7212407 (Mo. banc Dec. 8, 2016):
(1) Sec. 544.455, which prohibits bail for Alien-Defendants unless they can prove their lawful presence in the U.S., is unconstitutional under Art. I, Sec. 20, Mo.Const., which which provides that "all persons" shall be entitled to bail except for capital cases; (2) trial court may deny bail to Alien-Defendant only after making an individualized determination that Alien-Defendant may pose a danger to victim or public, or be a flight risk.
Facts: Alien-Defendant was charged with possessing a forged social security card. The trial court categorically denied bail under Sec. 544.455, which provides that there shall be a "presumption" that releasing an Alien on bail will not reasonably assure his appearance, and that the Alien shall not be allowed bail unless they can prove their "lawful presence" in U.S. Alien sought relief from appellate court under Rule 33.09.
Holding: Art. I, Sec. 20, Mo.Const., provides that "all persons" shall be bailable, except in capital cases. Sec. 544.455 violates Art. I, Sec. 20, because it denies the right to bail to an entire class of persons who are not able to establish their "lawful presence." The State claims that Sec. 544.455 is constitutional under Art. I, Sec. 32, Mo.Const., which allows

a court to deny bail if a defendant poses a danger to anyone or the community. The State is not wrong to suggest that Art. I. Sec. 32, authorizes a trial court to deny bail in a proper case, but it does not authorize denying bail to an entire class of persons without individualized examination of each person's case. The right to bail is subject to reasonable conditions. The fact that a person is an alien may or may not suggest that the person poses a particular danger or flight risk. Case remanded to trial court to conduct individualized determination whether Alien-Defendant should be granted bail.

State v. William, 2016 WL 6585981 (Mo. App. W.D. Nov. 8, 2016):
Holding: (1) Under Sec. 476.803, which requires courts to appoint qualified interpreters for non-English speaking defendants or witnesses, a trial court has discretion to decide whether an individual is a non-English speaker, thus mandating appointment of an interpreter; (2) where the record indicated that Defendant understood some English and conversed on-the-record with the trial court in English, trial court did not abuse its discretion in finding that Defendant had the ability to speak and understand English, and in not appointing an interpreter.

*** Barton v. Barr, ___ U.S. ___, 140 S.Ct. 1442 (U.S. April 23, 2020):**
Holding: An alien is not eligible for cancellation of removal if he committed a Sec. 1182(a)(2) offense during his first seven years of residence, even if that is not the offense of removal.

*** Nasrallah v. Barr, ___ U.S. ___, 140 S.Ct. 1683 (U.S. June 1, 2020):**
Holding: The Court of Appeals may conduct deferential factual review of whether a noncitizen is entitled to relief from removal under the international Convention Against Torture.

*** Dep't of Homeland Security v. Regents of the Univ. of Calif., 2020 WL 3271746, ___ U.S. ___ (U.S. June 18, 2020):**
Holding: DHS decision to rescind the Deferred Action for Childhood Arrivals (DACA) program, which allows certain noncitizens who came to U.S. as children to have a two-year forbearance of removal, was arbitrary and capricious under Administrative Procedures Act; "The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so."

* **Dep't of Homeland Security v. Thuraissigiam, 2020 WL 3454809, ___ U.S. ___ (U.S. June 25, 2020):**
Holding: The restrictions on habeas corpus review imposed by the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. Sec. 1252, for noncitizens seeking asylum in the U.S. do not violate the Suspension Clause or Fifth Amendment Due Process.

* **Kansas v. Garcia, ___ U.S. ___, 140 S.Ct. 791 (U.S. March 3, 2020):**
Holding: The Immigration Reform and Control Act, 8 U.S.C. 1324(a), does not preempt state criminal laws for identity theft and fraud for conduct related to obtaining

employment; thus, even though defendant-alien could not be prosecuted under state law for providing false information on an I-9 form (because that is preempted by IRCA), defendant-alien can be prosecuted under state law for providing false information on W-4 and state tax forms in connection with obtaining employment.

*** Guerrero-Lasprilla v. Barr, 2020 WL 1325822, ___ U.S. ___ (U.S. March 23, 2020):**
Holding: The Limited Review Provision of the Immigration and Nationality Act, Sec. 1252(a)(2)(D), which limits courts to reviewing only "constitutional claims or questions of law" in removal proceedings, does not preclude courts from applying a "legal standard" to undisputed or established facts; thus, appellate courts can apply the legal standard to determine whether aliens acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling.

*** Nielsen v. Preap, ___ U.S. ___, 2019 WL 1245517 (U.S. March 19, 2019):**
Holding: 8 U.S.C. Sec. 1226 allows certain aliens who are arrested because they are believed to be deportable and who have committed certain crimes to be held without bond, even if they were not taken into custody by immigration officials immediately upon their release from criminal custody.

*** Sessions v. Dimaya, ___ U.S. ___, 138 S.Ct. 1204 (U.S. April 17, 2018):**
Holding: The Immigration and Nationality Act's "aggravated felony" residual clause is unconstitutionally vague; the clause defines "aggravated felony" as including a "crime of violence" defined as a felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

*** Pereira v. Sessions, ___ U.S. ___, 138 S.Ct. 2105 (U.S. June 21, 2018):**
Holding: Under 8 U.S.C. Sec. 1229(a), the "stop time" rule (which stays a 10-year period of continuous presence in the U.S. which a noncitizen must have in order to apply for cancellation of removal) is not triggered unless the notice of removal hearing which the noncitizen received contains the specific "time and place" where the hearing is to be held.

*** Trump v. Hawaii, ___ U.S. ___, 138 S.Ct. 2392 (U.S. June 26, 2018):**
Holding: (1) the Immigration and Nationality Act, 8 U.S.C. Sec. 1182(f), gives the President authority to restrict entry of aliens whenever he finds that their entry "would be detrimental to the interests of the United States;" and (2) even though most people affected by the President's policy come from Muslim-majority countries, the policy does not violate the First Amendment Establishment Clause because the text of the policy says nothing about religion, and the policy is based on the legitimate purpose to prevent entry of persons who cannot be adequately vetted and to induce other nations to improve their practices.

*** Jennings v. Rodriguez, ___ U.S. ___, 138 S.Ct. 830 (U.S. Feb. 27, 2018):**
Holding: The Immigration and Nationality Act's statutory provisions do not require that persons held under the Act be granted bail, but Court does not decide whether detainees have a constitutional right to bail.

*** Esquivel-Quintana v. Sessions, ___ U.S. ___, 137 S.Ct. 1562 (U.S. May 30, 2017):**
Holding: A felony conviction under a state statute criminalizing consensual sex with a minor 16 years old or older will not generally be considered an "aggravated felony" of "sexual abuse of minor" for deportation purposes, though there may be exceptions for perpetrators in a position of trust or other situations.

*** Sessions v. Morales-Santana, ___ U.S. ___, 137 S.Ct. 1678 (U.S. June 12, 2017):**
Holding: 8 U.S.C. Secs. 1401 and 1409, which allow unwed mothers to transmit their U.S. citizenship to their children born outside the U.S. on more favorable terms than unwed fathers, violates equal protection. But the remedy is to apply the more restrictive unwed-father rule to everyone, unless Congress changes the law.

*** Maslenjak v. United States, ___ U.S. ___, 137 S.Ct. 1918 (U.S. June 22, 2017):**
Holding: 18 U.S.C. Sec. 1425(a), which makes it a crime to "knowingly procure[], contrary to law, the naturalization of any person" requires the Government to prove that the illegal act played some role in the defendant's acquisition of their own citizenship; when the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result.

*** Lee v. U.S., ___ U.S. ___, 137 S.Ct. 1958 (U.S. June 23, 2017):**
Holding: Defendants who plead guilty based on bad advice about immigration consequences can show prejudice to set aside their pleas by showing a reasonable likelihood that they would not have pleaded guilty but would have gone to trial, even though they almost certainly would have been convicted at trial; such defendants, to show prejudice, need not show that they likely would have obtained a favorable result at trial.

*** Luna Torres v. Lynch, ___ U.S. ___, 136 S.Ct. 1619 (U.S. May 19, 2016):**
Holding: Under the Immigration and Nationality Act (INA), a state crime counts as an "aggravated felony" when it corresponds to a listed federal offense, even though the state crime lacks the interstate commerce element used in the federal statute; thus, where Defendant-resident alien was convicted of arson under New York law, this was an "aggravated felony" (making Defendant deportable and unable to apply for cancellation of removal) because it corresponded with the federal arson statute, even though the federal arson statute contains an interstate commerce element.

Castaneda v. Souza, 98 Crim. L. Rep. 283 (1st Cir. 12/23/15):
Holding: The detention mandate in the Immigration and Nationality Act that allows ICE to seize criminal aliens "when the alien is released" on parole or probation cannot be exercised years after the alien had already been released; the Act only authorizes ICE to detain aliens immediately upon release.

Doe v. U.S., 2019 WL 623586 (2d Cir. 2019):
Holding: Plea counsel ineffective in failing to inform Defendant of mandatory deportation if he pled guilty.

Etienne v. Lynch, 98 Crim. L. Rep. 286 (4th Cir. 12/30/15):
Holding: Alien who was deported in expedited removal proceeding may raise legal arguments on appeal that were not presented in the administrative proceeding; administrative exhaustion doctrine doesn't apply since an alien subjected to expedited removal isn't given a realistic opportunity to raise legal claims.

Shuti v. Lynch, 99 Crim. L. Rep. 548 (6th Cir. 7/7/16):
Holding: Federal immigration law's definition of "crime of violence" for removal is unconstitutionally vague.

Ortega-Lopez v. Lynch, 99 Crim. L. Rep. 657 (9th Cir. 8/23/16):
Holding: Even though cockfighting is illegal in all states, a misdemeanor conviction for cockfighting is not necessarily a crime of "moral turpitude" (involving base and depraved conduct) for deportation purposes.

U.S. v. Cisneros-Rodriguez, 98 Crim. L. Rep. 287 (9th Cir. 12/23/15):
Holding: Alien's conviction for illegal re-entry vacated because customs agent misled her into waiving her right to counsel at the original removal proceeding by telling her that an attorney would not be able to help her.

Chavez-Solis v. Lynch, 98 Crim. L. Rep. 51 (9th Cir. 10/6/15):
Holding: Board of Immigration appeals, in considering removal of Defendant, could not consider possession of child pornography under Calif. law to be an aggravated felony because the state statute included a broader range of pornographic depictions than the federal child pornography statute.

Dimaya v. Lynch, 98 Crim. L. Rep. 101 (9th Cir. 10/19/15):
Holding: The residual clause of the Immigration and Nationality Act that prohibits relief from removal for any immigrant who commits certain listed offenses or "any other offense that is a felony and that, by its nature, involves substantial risk of physical force" is unconstitutionally vague under *U.S. v. Johnson* (U.S. 2015), which struck down a similar residual clause under ACCA.

U.S. v. Chan, 97 Crim. L. Rep. 532 (9th Cir. 7/9/15):
Holding: Even though *Padilla* is not retroactive, Defendant, whose conviction was final before *Padilla*, can withdraw her plea due to counsel's affirmative misrepresentations

about immigration consequences; the law at time of Defendant's plea was clear that counsel can be ineffective for affirmative misrepresentations of any kind that render plea involuntary; case need not be decided on basis of *Padilla* (failure to warn of immigration consequences) but on law of affirmative misrepresentation.

U.S. v. Gonzalez-Fierro, 2020 WL 549009 (10th Cir. 2020):
Holding: Federal statute stripping jurisdiction for collateral challenge to unreviewed prior expedited removal order by Defendant charged with unlawful reentry violated due process, because before Gov't can use a prior removal to prove a charge of unlawful reentry, there must be some meaningful review of the prior administrative proceeding.

Golicov v. Lynch, 99 Crim. L. Rep. 696 (10th Cir. 9/19/16):
Holding: Immigration and Nationality Act's definition of "crime of violence" is unconstitutionally vague.

Sopo v. Attorney General, 99 Crim. L. Rep. 396 (11th Cir. 6/15/16):
Holding: Aliens facing mandatory detention as aggravated felons pending removal must receive a bond hearing within a reasonable time; here, Defendant had finished a sentence for bank fraud, but had been held 4 years in custody pending removal.

U.S. v. Newman, 98 Crim. L. Rep. 185 (D.C. Cir. 11/17/15):
Holding: Even though counsel did not give "wrong" immigration advice to Defendant until after a guilty plea but before sentencing, Defendant was still prejudiced by counsel's wrong advice because he could have moved to withdraw his guilty plea before sentencing if he had known correct immigration information.

U.S. v. Arizona, 2014 WL 10987432 (D. Ariz. 2014):
Holding: Arizona statute that prohibited human smuggling was preempted by the federal Immigration and Nationality Act that also prohibits transporting aliens.

Bado v. U.S., 97 Crim. L. Rep. 560 (D.C. 7/16/15):
Holding: Even though Defendant accused of misdemeanor would generally have no 6th Amendment right to a jury trial, where Defendant faced deportation if convicted, this was a severe penalty that triggered the right to a jury trial.

Zemene v. Clarke, 2015 WL 798753 (Va. 2015):
Holding: Claim that counsel misadvised Defendant about immigration consequences does not require Defendant to plead that he would have been acquitted if he had gone to trial; test of prejudice is whether he would have rejected pleading guilty or instructed counsel to seek a new plea agreement to avoid immigration consequences.

State v. Valadez, 2016 WL 325524 (Wis. 2016):
Holding: Defendant-Lawful Permanent Resident met her burden to show that her guilty pleas likely would result in her exclusion from re-entry into U.S. such as to allow her to withdraw her pleas for not being given immigration-consequences-warnings as required by statute; this was true even though Defendant had not actually been excluded yet;

Defendant should not be required to leave the U.S. and then be denied re-entry before being able to withdraw her plea.

People v. Asghedom, 2015 WL 9598274 (Cal. App. 2015):
Holding: Trial court abused discretion in finding that Defendant would still have pleaded guilty if he had been advised of immigration consequences of his plea; Defendant was a first time drug offender and likely would still have received probation even if he had gone to trial, and was 20 years old and had been in U.S. since age 12.

People v. Martin-Huerta, 2015 WL 2405401 (Colo. App. 2015):
Holding: Postconviction petitioner's untimely filing of postconviction petition could be excused, where his claim was that his attorney misadvised him of immigration consequences but he did not discover the adverse immigration consequences until the time for filing a timely petition had expired.

People v. Cesar, 2015 WL 4450401 (N.Y. App. 2015):
Holding: Even though Defendant was an illegal alien, trial court's refusal to consider a sentence of probation violated due process and equal protection.

State v. Nkiam, 2015 WL 7003416 (N.C. App. 2015):
Holding: Plea counsel was ineffective in advising Defendant that he faced only a risk of deportation if he pleaded guilty, when deportation was, in fact, presumptively mandatory.

Immunity

State v. Tresler, 2017 WL 3996218 (Mo. App. E.D. Sept. 12, 2017):
Where a Defendant is induced to waive her Fifth Amendment right against self-incrimination by a promise of immunity from a Prosecutor, the doctrine of equitable immunity may immunize the testimony or Defendant from prosecution, even if the provisions of Sec. 491.205 were not followed. (But court finds no promise of immunity was made here.)
Facts: Defendant, who was not yet charged with a crime, was subpoenaed by Prosecutor to testify at a preliminary hearing. Her attorney asked Prosecutor if Defendant was a suspect, and Prosecutor said she "was a witness and nothing more and he had no intention of charging her with any offense." Defendant then testified against various persons. Prosecutor then charged Defendant with also participating in the offense about which she testified. She moved to dismiss on grounds of equitable immunity. The trial court overruled the motion. Defendant was convicted at trial, and appealed.
Holding: The State claims that immunity is recognized in Missouri only where the provisions of Sec. 491.205 are followed, which they were not here. However, the State is wrong. Due process rights are implicated when a governmental promise of immunity, whether authorized by statute or not, induces a defendant to waive her Fifth Amendment rights by testifying or cooperating with the State. The U.S. Supreme Court has held that when evidence of guilt is induced under a promise of immunity, the self-incrimination clause of the Fifth Amendment requires excluding the evidence. And the U.S. Supreme

Court has held that where the State induces a defendant to plead guilty based on a false promise, that promise must be fulfilled. Based on these principles, Defendant seeks specific performance of her promise of immunity. The problem with Defendant's claim here, however, is that the Prosecutor never actually promised her immunity. The Prosecutor's statements to defense counsel were not promises of immunity. Thus, the court did not err in denying her motion to dismiss the charges.

Indictment and Information

State v. Rohra, 2017 WL 5580221 (Mo. App. E.D. Nov. 21, 2017):
Holding: (1) Even though Defendant pleaded guilty to felon-in-possession, he may a pursue a direct appeal on grounds that the information was defective because the predicate felony did not count as a "conviction"; (2) Eastern District would hold that where Defendant received a deferral of judgment in Oklahoma, this was not a felony "conviction" under Sec. 571.070(1), which would render possession of a gun by Defendant unlawful, but Eastern District transfers case to Missouri Supreme Court due to general interest and importance.
Discussion: Defendant had filed a motion to dismiss, but ultimately pleaded guilty. The State claims Defendant waived his claim about his Oklahoma judgment by pleading guilty. But a defect in the information may be raised for the first time on appeal. An information may be deemed insufficient if (1) it does not by any reasonable construction charge the offense of which Defendant was convicted and (2) the defendant demonstrates actual prejudice. The information here meets this test. A person who pleads guilty can challenge an information by direct appeal.

State v. Howard, 2020 WL 283245 (Mo. App. W.D. Jan. 21, 2020):
Holding: Even though Defendant's adopted Daughter/Victim had her adoption vacated, this did not relive Defendant of criminal liability for incest, Sec. 568.020.1, for having had sex with Daughter/Victim before the adoption was vacated, because the vacation is prospective, not retroactive; trial court erred in dismissing information.

Elliott v. State, 2016 WL 6081673 (Mo. App. W.D. Oct. 18, 2016):
Holding: (1) Because a prosecutor has discretion to nolle prosequi a case and then refile charges, trial court did not plainly err in allowing Prosecutor to dismiss charges against Juvenile and then refile them, even though the resulting delay might have caused Juvenile to lose the opportunity for dual jurisdiction sentencing under Sec. 211.073.1 because he would be more than 17 years six months old at time of "conviction;" but (2) appellate court notes that Sec. 211.073.1 appears to indicate that a Juvenile need only be under 17 years six months at the time of **transfer** to court of general jurisdiction to be eligible for dual jurisdiction, not under this age at time of "**conviction**." However, since the parties assume the Juvenile's age is determined at time of "conviction," the appellate court doesn't decide this.
Discussion: Juvenile contends that an offender must be under 17 years six months years old at time of "conviction" in order to be considered for dual jurisdiction in sentencing. But there is no authority holding that age at time of "conviction" is the correct rule. Sec. 211.073.1 states that "the court shall, when the offender is under 17 years and six months

of age, and has been transferred to a court of general jurisdiction … and whose prosecution results in conviction … consider dual jurisdiction." A plain reading of Sec. 211.073.1 would suggest the Juvenile need only be under 17 years six months when transferred to a court of general jurisdiction in order to be eligible for the dual jurisdiction program. This reading would make the delay that occurred here (which caused Juvenile to be over that age at time of "conviction") to be irrelevant, as Juvenile would be eligible for dual jurisdiction. However, as this issue was not raised by the parties, the court does not address it.

State v. Nelson, 2016 WL 7209823 (Mo. App. W.D. Dec. 13, 2016):
Holding: (1) Rule 23.08 allows the State to amend an information if (a) no additional or different offense is charged, and (b) defendant's substantial rights are not prejudiced; the Rule is written in the conjunctive; some cases mistakenly hold that a defendant must disprove both conjunctive components, when in fact, the Rule is violated if either of the Rule's conjunctive components is not satisfied; and (2) even though jury in case recommended a jail sentence and not a fine, the court was authorized to impose both a jail sentence and a fine; Secs. 577.036.1 and 577.036.5 limit the maximum term of imprisonment a court can impose to that recommended by the jury, but do not limit "other disposition[s]" (fines) which a court may impose.

U.S. v. Centeno, 2015 WL 4231582 (3d Cir. 2015):
Holding: Prosecutor's rebuttal argument that Defendant could be convicted merely for driving the getaway car, which was incorrect statement of law and contrary to the jury instructions, was a constructive amendment of the grand jury indictment and required reversal.

U.S. v. Martinez, 2015 WL 5155225 (11th Cir. 2015):
Holding: Failure to allege mens rea for sending a threatening communication rendered incitement fatally deficient in violation of 5th Amendment, because grand jury was not required to find probable cause for each element of offense.

U.S. v. Miller, 2016 WL 1465384 (D. Colo. 2016):
Holding: Where Defendant was indicted for causing a death by unlawful distribution of various listed drugs, but the jury instruction allowed the jury to convict based on a drug that was not charged in the indictment, this was an impermissible constructive amendment of the indictment.

People v. Stapinski, 98 Crim. L. Rep. 50, 2015 WL 5853685 (Ill. 10/8/15):
Holding: Even though Prosecutor had not previously approved a cooperation agreement with Defendant, where (1) police told Defendant that if he cooperated in a drug investigation by helping arrest other people that then police would not indict him on certain charges and (2) Defendant upheld his part of the deal, Defendant's right to substantive due process was violated when Prosecutor then charged him; due process requires the State to honor a cooperation agreement whenever a defendant fulfills his portion of the deal and the cooperation involved surrendering constitutional rights.

People v. Espinoza, 98 Crim. L. Rep. 246 (Ill. 12/3/15):
Holding: An Information which identifies a non-sex crime victim only as a "minor" is insufficient because it does not protect Defendant from double jeopardy in the event of a second prosecution in the future.

State v. King, 97 Crim. L. Rep. 696 (N.M. 9/10/15):
Holding: Where Officer conveyed offer from Prosecutor to Defendant that if Defendant would produce a murder weapon then Prosecutor would "talk dismissal" about an evidence tampering charge, Defendant was entitled to specific performance of dismissal when he produced weapon; although a "finely-parsed" reading of the phrase "talk dismissal" might mean Prosecutor promised only to "talk" about possibility of dismissal, this was not a fair reading of the phrase in the context of the case.

People v. Afilal, 2015 WL 7431371 (N.Y. 2015):
Holding: Complaint charging Defendant with marijuana in "public place" was insufficient because it did no more than track statutory language of "public place" in conclusory fashion; it failed to allege sufficient facts to show the "public place" element.

Allen v. Sanders, 2016 WL 3030136 (Ariz. App. 2016):
Holding: In capital cases, a trial court must independently determine if probable cause exists as to concurrently charged child abuse allegations that are also aggravating factors, and cannot rely on grand jury's determination of probable cause.

People v. Rogers, 2016 WL 1192594 (Cal. App. 2016):
Holding: After Defendant waives preliminary hearing, an information cannot be amended to add a conduct enhancement.

Strickland v. State, 2019 WL 1324336 (Ga. App. 2019):
Holding: Citation charging Defendant with following too closely was defective where it failed to cite all statutory elements of offense or facts in support, even though it said Defendant was "following too closely."

State v. Baxter, 2015 WL 5554645 (Ga. App. 2015):
Holding: Statutory time limit of 180 days for State to obtain an indictment of a juvenile was a mandatory requirement that could not be waived by the juvenile, since statute uses the word "shall."

Ineffective Assistance of Counsel

Hounihan v. State, 2019 WL 5152660 (Mo. banc Oct. 15, 2019):
Holding: Appellate counsel was ineffective in failing to raise sufficiency-of-evidence-claim that State's driver's record exhibit failed to show that Defendant was represented by counsel or waived counsel in his prior driving-while-revoked cases, or that he had served more than 10 days in his prior cases, which was necessary to enhance Defendant's current driving-while-revoked case to a felony under Sec. 302.321.2.
Discussion: The State claims appellate counsel could not be ineffective because the prosecutor, judge and trial counsel also overlooked this issue. But appellate counsel's failure to raise the issue isn't reasonable because it was also overlooked by others. Failure to raise a significantly meritorious claim falls beneath professional standards. The State also argues that reasonable counsel could choose not to raise this issue in favor of other issues. But reasonable counsel would not have chosen to forgo a meritorious sufficiency of evidence claim to focus on other claims. There is a reasonable probability the outcome of direct appeal would have been different.

In the Interest of D.C.M. v. Pemiscot County Juvenile Office, 578 S.W.3d 776 (Mo. banc Aug. 13, 2019):
Holding: (1) Even though Juvenile turned 18 and was released from supervision while appeal of his adjudication (juvenile conviction) was pending, the case is not moot since his juvenile adjudication could be used against him in any later adult proceeding, and there is a stigma that flows from the judgment against him; (2) Juveniles have right to effective assistance of counsel but no statute or case provides a mechanism to raise such a claim, so Court holds that (a) if the claim can be adjudicated from the direct appeal record, court will resolve the claim on direct appeal, but (b) if the claim requires an evidentiary hearing (which will be likely for claims of failure to investigate or prepare, or pursue particular defenses or witnesses), case will be remanded to juvenile court for evidentiary hearing; and (3) if counsel is found ineffective, Juvenile will receive a new adjudication hearing.

In the Matter of the Care and Treatment of Grado, 2018 WL 4572722 (Mo. banc Sept. 25, 2018):
Holding: (1) Sexually Violent Predator Defendants have due process right under 14th Amendment to effective assistance of counsel, because their liberty interest is at stake in SVP proceedings; (2) ineffective counsel issues which are apparent from the record may be raised on direct appeal; but (3) Supreme Court does not decide how issues occurring off the record or on appeal itself may be raised, but will resolve that issue in the future if the legislature does not adopt a statutory procedure for such claims; and (4) Supreme Court does not decide whether the standard for SVP ineffectiveness claims is whether there was a "meaningful hearing based on the record" (which is the standard in termination of parental rights cases), or the *Strickland* standard applicable in criminal cases.

Meiners v. State, 2018 WL 505352 (Mo. banc Jan. 23, 2018):
Holding: Even though under *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014), involuntary manslaughter is a "nested" lesser-included offense of second-degree murder, which means a trial court must give the instruction upon request, where 29.15 Movant's direct appeal was decided before *Jackson*, Movant's appellate counsel was not ineffective in failing to appeal that the trial court erred in failing to give an involuntary manslaughter instruction.
Discussion: Whether direct appeal counsel's performance fell below the standard of competence turns on the state of the law at the time of the direct appeal. Though *Jackson* explains that it was simply making explicit what had long been implicit, the legal principles emphasized in *Jackson* were not so unmistakably obvious, clear or apparent to render appellate counsel's failure to raise the issue objectively unreasonable. Though it might be ineffective assistance if counsel failed to raise the issue today (after *Jackson*), the issue was not so obvious at the time of the appeal. Failure to anticipate a change in the law does not constitute ineffective assistance of counsel.

Watson v. State, 2017 WL 1629372 (Mo. banc May 2, 2017):
(1) Where a judge at sentencing affirmatively misinforms Defendant-Movant about the deadline for filing a pro se postconviction motion under 29.15 (or 24.035), this can excuse the untimely filing; and (2) Movant was entitled to evidentiary hearing on claim that trial counsel was ineffective in not seeking lesser-included offense instruction for nested lesser, where counsel conceded guilt on the lesser.
Facts: Defendant-Movant was convicted at trial of first degree robbery. A contested fact at trial was whether Defendant-Movant displayed a gun during the robbery. At sentencing, trial judge told Defendant-Movant he must file a pro se 29.15 motion within 180 days after his delivery to the DOC. In fact, the time for filing would be 90 days after a mandate on direct appeal. In any event, Defendant was ultimately sent to the Dept. of Mental Health, not DOC. Defendant-Movant's conviction was affirmed on direct appeal and a mandate issued. Defendant filed his pro se 29.15 motion more than 90 days later. He claimed his motion should be considered timely because he relied on the trial judge's advice as to when his motion was due, and he hadn't been delivered to DOC.
Holding: (1) A trial court is not required to tell defendants the deadline for filing an amended motion. There is a difference between failing to inform and *mis*informing Where a court misinforms defendants about critical information upon which the defendants had a right to rely, they are entitled to a remedy. This case presents a new, limited exception to the timeliness requirements. The untimeliness is excused because the trial judge misinformed Defendant-Movant about the deadline. To the extent *Talley v. State*, 399, S.W.3d 872 (Mo. App. E.D. 2013) holds otherwise, it should no longer be followed. (2) The differential element between first and second degree robbery here was whether Defendant displayed or threatened use of a gun. Second degree robbery is a nested lesser offense of first degree robbery because it is impossible to commit the greater without necessarily committing the lesser. The trial court would have been required to give the lesser if counsel had requested it, since determining the facts was for the jury. The State argues counsel was using an "all-or-nothing" defense as a matter of strategy. Counsel can choose that as a matter of strategy, but other cases have granted an evidentiary hearing to determine if that's what counsel, in fact, did. Here, counsel did not

argue Defendant was entirely innocent. Counsel conceded Defendant was guilty of second degree robbery. The record does not refute Defendant-Movant's claim of ineffectiveness for failing to request the lesser. Remanded for evidentiary hearing.

Hoeber v. State, 2016 WL 2343821 (Mo. banc May 3, 2016):
(1) Even though Defendant used a general denial-defense at trial, counsel was ineffective in child sex case in failing to object to verdict directors which did not identify specific acts of sexual misconduct for the jury, where multiple different acts had been testified to at trial; this violated Defendant's right to a unanimous jury verdict; and (2) cases which hold that a defendant cannot be prejudiced by such verdict directors where he used a general-denial offense should no longer be followed.
Facts: Defendant was charged with two counts of statutory sodomy. At trial, various witnesses testified to multiple acts of statutory sodomy. Victim testified acts occurred in the kitchen, but not the bedroom, bathroom or living room. Mother testified Victim said acts occurred in the kitchen and bedroom. Doctor testified Victim said acts occurred in the bedroom, kitchen, bathroom and living room. Defendant had given a statement to police that acts occurred in the bathroom. But at trial, he repudiated this statement and claimed it was coerced. He denied any acts at trial. The verdict directors instructed the jury to find Defendant guilty if he touched the Victim's genitals with his hands.
Holding: Mo. Const. Art. I, Sec. 22, protects the right to a unanimous jury verdict. *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011), decided after the trial in this case, held that non-specific jury instructions in a multiple act case, such as here, violate the right to a unanimous verdict, because they don't ensure that jurors agreed that defendant committed the same act. The verdict director's here allowed jurors to convict of any incident in the kitchen *or* bathroom *or* living room *or* bedroom. There is a real risk jurors did not unanimously agree on the same act. Even though counsel was not required to foresee the Court's decision in *Celis-Garcia*, that case did not create new law. The right to a unanimous jury verdict was previously established, and the Notes on Use to the MAI's emphasized that instructions should be modified in multiple act cases. Since *Celis-Garcia*, some cases have held that where a defendant employs a general denial defense ("unitary defense"), he is not prejudiced by non-specific verdict directors. *Celis-Garcia* did not hold that a defendant who asserts a general denial defense can never be prejudiced; cases that hold otherwise, such as *State v. LeSieur*, 361 S.W.3d 458 (Mo. App. 2012), should no longer be followed. New trial ordered.

Washington v. State, 2020 WL 1522585 (Mo. App. E.D. March 31, 2020):
Holding: (1) Even though Defendant-24.035 Movant said she was "clearheaded" where (a) Defendant-Movant stabbed a police officer while off her medications for schizophrenia; (b) Defendant-Movant had been incompetent and committed to DMH for a period of time prior to her guilty plea; (c) DMH doctors had reported to court that Defendant-Movant would be competent only if she took her medication; (d) after Defendant-Movant was discharged from DMH, she was placed in county jail for more than a year before her guilty plea and later sentencing; and (e) Defendant-Movant said she was not taking her medication and made remarks at her later sentencing reflecting possible delusions about her mother, trial court erred in not, *sua sponte*, ordering a new competency evaluation before sentencing, because a reasonable judge would have had

doubts as to Defendant-Movant's competency at sentencing; and (2) Movant was entitled to evidentiary hearing on her claims that plea counsel was ineffective in advising her to plead guilty when she may have been incompetent, and in failing to investigate and pursue an NGRI defense; Movant's allegations that she had decompenstated since being discharged from DMH and become incompetent, and that doctors would testify she was NGRI at time of crime were not refuted by the record.
Discussion: When counsel is representing an accused diagnosed with a mental disease or defect *and* multiple exams agree medication impacts her competence *and* she is not on medication at the time of the plea *and* she exhibits the same delusions as appear in the exam reports, this indicates a questionable mental condition that makes counsel ineffective without investigating it. To show prejudice, Movant must show a reasonable probability she was not competent. Here, she has alleged that doctors would testify she wouldn't be competent if she wasn't on her medication. Similarly, counsel should have investigated an NGRI defense since counsel knew or should have known Movant wasn't medicated at time of crime. None of the pretrial DMH reports addressed NGRI. Sentence vacated, and remanded for evidentiary hearing on whether plea should be vacated.

Williams v. State, 2020 WL 7214146 (Mo. App. E.D. Dec. 8, 2020):
Holding: Ineffective assistance of counsel at a probation revocation hearing is not cognizable under Rule 24.035; proper remedy is habeas corpus.

Parsons v. State, 2019 WL 2094873 (Mo. App. E.D. May 14, 2019):
Even though Defendant/Movant was allowed to withdraw his guilty plea before sentencing to a DWI charge on grounds that it would violate Double Jeopardy to convict him of DWI and second-degree assault of a law enforcement officer (for hitting the officer with his vehicle), he was prejudiced by defense counsel's failure to correctly advise him that he could be convicted of only one of the offenses if he went to trial, because Defendant/Movant would not have pleaded guilty but would have gone to trial if he knew this.
Facts: Defendant/Movant was charged with DWI and second-degree assault on a law enforcement officer for hitting the Officer with his vehicle. Defendant/Movant rejected an 11 year plea offer, and entered "blind pleas" to both charges. Before sentencing, it was discovered that conviction for both charges would violate Double Jeopardy since DWI was an included element of the assault charge. Defendant/Movant was allowed to withdraw his DWI plea. He was then sentenced to 12 years. He filed a 24.035 motion claiming counsel was ineffective for not advising him that if he went to trial, he could only be convicted of one of the charges, and faced a maximum of 15 years. He claimed he would have gone to trial if counsel had told him this. The motion court ruled that he wasn't prejudiced because he was permitted to withdraw his DWI plea.
Holding: The fact that Defendant/Movant rejected an 11 year offer supports the notion that there is a reasonable probability he would have chosen to go to trial if he had known he faced no more than 15 years at trial, since he would be convicted of either the DWI or assault, but not both at trial. 11 is not that different than 15, but very different than the 30 years he thought he faced at trial if convicted and sentenced to both. Counsel's mistake as to Double Jeopardy skewed the plea bargaining process by squandering any leverage

he had to elicit an acceptable plea offer. Setting aside the DWI plea did not remedy the involuntary nature of the plea to assault under the mistaken advice of counsel about what would happen at trial. Assault conviction vacated.

Stuart v. State, 565 S.W.3d 766 (Mo. App. E.D. Jan. 29, 2019):
Holding: (1) Where 24.035 Movant pleaded guilty to a plea agreement for long-term treatment, but the DOC later determined that Movant was not eligible for the program, Movant's plea was involuntary because the long-term treatment statute, Sec. 217.362, requires that the trial judge verify a defendant's eligibility for the program before sentencing him to it; (2) Movant's plea counsel was ineffective in advising him he would be placed in long-term treatment as part of his plea agreement, when, in fact, he wasn't eligible for the program; and (3) motion court's denial of postconviction relief on grounds that Movant would only be sentenced to long-term treatment "if eligible" is clearly erroneous because he was sentenced to seven-years "with" long-term treatment.

Wilson v. State, 2019 WL 923598 (Mo. App. E.D. Feb. 26, 2019):
Holding: Even though (1) the motion court should have granted an evidentiary hearing to 24.035 Movant on his claim that plea counsel was ineffective in advising him he would receive 3-years' credit for an Illinois sentence (when such credit was not legally available under Missouri law), and (2) the motion court should not have granted relief in the absence of a hearing, where the motion court nevertheless reduced Movant's sentence by three years to account for the Illinois sentence, Movant suffered no prejudice on his claim that his plea was involuntary.

Jeffcott v. State, 2018 WL 2012099 (Mo. App. E.D. May 1, 2018):
Holding: (1) Where for some months between April 2000 and December 2001 hand-to-genital contact did not constitute deviate sexual intercourse (necessary for first-degree sodomy), counsel's advice to Movant to plead guilty to first-degree statutory sodomy was ineffective and Movant was prejudiced, but the motion court did not clearly err in choosing as a remedy to vacate the sodomy convictions and instate convictions and sentences for the lesser-included offense of first-degree child molestation (rather than allow withdrawal of the pleas); (2) where Movant pleaded guilty to incest during a time period when deviate sexual intercourse (necessary for incest) did not include hand-to-genital contact, counsel was ineffective in advising a guilty plea to an offense that was not a crime and Movant was prejudiced; remedy is to vacate that guilty plea because there is no applicable lesser-included offense for incest.
Discussion: Even though Movant contends he would not have pleaded guilty to the sodomy counts if he had known about the hand-to-genital contact issue, the motion court found this testimony not credible, where Movant had entered a blind, non-binding plea, which included many other counts. The choice of remedy was for the motion court. A person can be convicted of a lesser-included offense. Thus, the motion court did not clearly err in imposing as a remedy convictions and sentences for the lesser-included offense of first-degree child molestation.

Williams v. State, 2018 WL 2306687 (Mo. App. E.D. May 22, 2018):
Where Movant's plea agreement called for Movant to be placed in Long Term Drug Program (LTDP) and the court sentenced him to LTDP, but when Movant got to DOC he was determined to be ineligible for LTDP, Movant's plea was involuntary because he pleaded guilty in exchange for LTDP and reasonably relied on his attorney's advice that he would be placed in LTDP.
Discussion: The motion court denied relief on grounds that Movant's testimony that he would not have pleaded guilty if he knew he would not receive LTDP was not credible, since Movant was facing a longer sentence if convicted at trial. But mistaken beliefs about sentencing affect a Movant's ability to knowingly enter a plea if the mistake is reasonable and based on positive representation upon which a Movant is entitled to rely. Here, the record shows the plea agreement was for LTDP. And Movant's counsel told him he would be placed in LTDP. Movant was entitled to rely on these representations. Conviction vacated.

Bearden v. State, 2017 WL 1151063 (Mo. App. E.D. March 28, 2017):
Holding: 24.035 Movant was entitled to evidentiary hearing on claim that plea counsel was ineffective in failing to object to "group guilty plea" procedure.

Cusumano v. State, 2016 WL 40829208 (Mo. App. E.D. Aug. 2, 2016):
Trial counsel was ineffective in pursuing an unreasonable trial strategy which submitted lesser-included offense instructions for unclassified forcible rape and sodomy (even though the statute of limitations had expired on those offenses) in counsel's mistaken belief that this was necessary to preserve a statute of limitations defense to the Class A felonies of forcible rape and sodomy (even though there was no such defense); Movant was prejudiced because he was convicted of the unclassified felonies, and waived the valid statute of limitations defense to those felonies by submitting the lesser-included instructions.
Facts: Movant was charged with forcible rape and sodomy for offenses which occurred in 1988. Under the statutes in effect in 1988, these offenses were "unclassified" felonies unless the defendant inflicted serious physical injury or other aggravating factors were present, in which case the offense was a Class A felony. For "unclassified" offenses, the three-year statute of limitations applied, but for Class A offenses, there was no statute of limitations. Movant was charged with the Class A version of the offenses. Trial counsel filed a motion to dismiss on the basis of statute of limitations, which was denied. At trial, counsel believed that to "preserve" his statute of limitations "defense," he was required to submit the lesser-included "unclassified" offenses. Movant was convicted of the lesser-included offenses, and sentenced to life in prison. On direct appeal, the appellate court held that Movant waived any statute of limitations argument to the unclassified offenses by submitting them to the jury.
Holding: Trial counsel employed an "absurd" and "convoluted" "strategy" that was "not supported by Missouri law." There was no statute of limitations defense to the charged Class A felonies. But by submitting the lesser offenses, counsel waived the valid statute of limitations defense to the time-barred offenses of which Movant was ultimately convicted. It was not reasonable or required for counsel to submit the unclassified lesser-included offenses to preserve a statute of limitations defense to the Class A charges, since

under Missouri law there was no such defense in the first place. Movant was prejudiced because he was convicted of lesser-included offenses that would otherwise have been time-barred. Reversed and remanded for new trial.

Miller v. State, 2016 WL 2339049 (Mo. App. E.D. May 3, 2016):
(1) Movant was entitled to evidentiary hearing on his claim that his plea counsel was ineffective in failing to object to a "group plea" procedure which rendered his plea involuntary; "group pleas" are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea; (2) redacted transcripts on appeal violate Rule 81.15(b), which requires an accurate transcript be provided for appeal; transcripts must provide all parts of the proceeding.
Facts: Movant pleaded guilty in two separate cases, involving two different counties and two different defense counsel, at a "group guilty plea" involving six unrelated defendants. He filed a 24.035 motion, contending that his counsel were ineffective in failing to object to the "group plea" procedure, which rendered his pleas involuntary. The motion court denied the claim without a hearing.
Holding: (1) In at least 10 prior cases, the Eastern District has condemned the practice of "group" guilty pleas, but this has fallen on "deaf ears." "[T]he attorneys practicing in this courtroom either have tuned us out or they fear retribution from the trial judge for raising objections to this procedure." While the Supreme Court has held that group pleas are not automatically impermissible, they are so "abhorrent and antithetical the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness" of a plea. Defense counsel may be ineffective in failing to object to "group pleas." Counsel's failure to object, in and of itself, is sufficient to warrant a hearing. (2) On a separate matter, a redacted transcript of the "group plea" was submitted on appeal. Rule 81.15(b) requires a true and accurate transcript be submitted. "This court should never be provided redacted transcripts."

McNeal v. State, 2016 WL 616297 (Mo. App. E.D. Feb. 16, 2016):
Counsel was ineffective in second-degree burglary case in failing to request lesser-included offense instruction for trespassing, where counsel effectively conceded to jurors that Movant was guilty of trespassing; Movant was prejudiced because there is a reasonable probability that he would have been convicted of misdemeanor trespassing instead of felony burglary.
Facts: Movant was convicted at a jury trial of second degree burglary and misdemeanor stealing for stealing an electric drill from an apartment. The defense was that although Movant stole the drill, he did not enter the apartment with the intent to steal anything, and thus, was not guilty of second degree burglary, but misdemeanor trespassing instead. The defense was that Movant used to know the resident of the apartment at issue, and that he had gone to the apartment to collect money he was owed from the resident. Movant testified that his relationship with the resident was such that he would knock on the door, open it, and call out the resident's name. However, unbeknownst to Movant, the resident had since moved from the apartment. Movant testified he entered the apartment with no intent to steal, but admitted that, once inside, he stole the drill. At trial, defense counsel questioned a police officer as to whether Movant's actions could constitute trespassing.

The officer answered yes. During deliberations, the jury asked whether intent to steal must occur before or after entry into the apartment, but was told only to follow the instructions. In the postconviction case, counsel testified he did not request a lesser-included offense instruction for trespassing as a matter of strategy, because he thought it was inconsistent with the defense, and also because he thought Movant would be upset by it, even though counsel had not discussed the matter with Movant.
Holding: If requested, a trespass instruction would have been required here, since, viewing the evidence in the light most favorable to Movant, there is a basis in the evidence for acquitting Movant of the greater offense, and convicting of the lesser. There is a basis in the evidence to find that although Movant committed trespassing by unlawfully entering the apartment, he did not commit second degree burglary because he did not enter with the intent to steal. Counsel's trial strategy must be reasonable. Because defense counsel effectively conceded Movant's guilt to trespassing, and conviction as to trespassing would have prevented a felony conviction with an extended term of imprisonment, it was not reasonable trial strategy to not request a lesser-included instruction. This was not an "all or nothing" situation where counsel was seeking felony conviction or acquittal (which can be a reasonable strategy), because here, counsel was not contending that Movant committed no crime whatsoever. Movant was prejudiced because there is a reasonable probability the jury would have convicted him of misdemeanor stealing, rather than felony burglary, if the lesser had been submitted.

Hannon v. State, 2016 WL 1085644 (Mo. App. E.D. March 15, 2016):
(1) Trial counsel was ineffective in failing to investigate school records which would have shown that Victim was in school at time of alleged sex crime, not at home where crime allegedly occurred; and (2) even though appellate court on direct appeal had determined that the school records were not newly-discovered evidence which warranted a new trial because they were not likely to have changed the outcome, the Strickland prejudice standard is not outcome-determinative, but considers whether confidence in the verdict is undermined; Movant satisfied the Strickland standard.
Facts: Movant was convicted at trial of a child sex offense alleged to have occurred at Victim's home "on or about October 3." All of the trial witnesses testified that Oct. 3 was the date of the offense because Victim's Mother suffered a drug overdose the next day. At sentencing, Movant complained that his trial counsel had not obtained school records showing Victim was in school on Oct. 3, not at home. On direct appeal, Movant sought a remand on the basis of "newly-discovered" evidence, i.e., the school records, which showed Victim was in school on Oct. 3. The appellate court held that the school records were not likely to have changed the result of the trial. The appellate court also held that the crime was charged as occurring "*on or about*" Oct. 3, and that testimony in child sex cases often contains variations, contradictions and lapses in memory. Movant subsequently filed a 29.15 motion, which alleged counsel was ineffective in failing to investigate the school records. The motion court granted relief. The motion court found trial counsel's explanation as to why he did not obtain the records to be incredible. The State appealed.
Holding: The standard of review requires the appellate court to defer to the motion court's credibility finding regarding trial counsel. The motion court found counsel did nothing to investigate the school records. Strategic decisions can only be made after

thorough investigation of the facts. The State argues that because the appellate court denied a new trial on direct appeal based on the school records claim, Movant cannot "relitigate" this issue as ineffective assistance of counsel. However, the issue raised on direct appeal was different than the issue of counsel's ineffectiveness. The issue now is not counsel's failure to impeach with the records, but counsel's inability to reasonably determine whether or not to impeach with the school records (because counsel did not obtain them). Even though the appellate court on direct appeal held that the school records were "not likely to produce a different result," the *Strickland* standard of prejudice is different. *Strickland* prejudice is not outcome-determinative, but is whether confidence in the fairness of the proceedings is undermined. Here, all of the State's witnesses were certain that the crime took place on Oct. 3. The school records directly refuted this testimony by showing that Victim was in school, not home, that day. New trial ordered.

Rowland v. State, 2020 WL 3248367 (Mo. App. S.D. June 16, 2020):
In rape trial where defense was that sex was consensual, trial counsel was ineffective in failing to timely subpoena and call Witness who would have testified that Movant/Defendant and Victim were laughing together in car after alleged incident, because this would have rebutted element of forcible compulsion; prejudice was also shown by fact that there was a prior hung jury, and jury at instant trial was divided 8-4 before hammer instruction was given.
Facts: Movant/Defendant was charged with rape for allegedly raping Victim, who was a property manager, at an apartment she was showing him. Victim drove Movant to and from the apartment. At trial, Victim testified that on the drive from the apartment she was tearful and trying "to hold it together," but Movant testified she was joking and laughing about their consensual sex at the apartment. A prior trial resulted in a hung jury. The second trial resulted in a jury split 8-4 on guilt before the judge gave a hammer instruction. After Movant was convicted, he filed a Rule 29.15 motion which alleged trial counsel was ineffective in failing to call a Witness (a nurse who was treating Movant for an unrelated matter) who telephoned Movant during the car ride after the apartment-showing and who heard Victim laughing and joking with Movant. Trial counsel had tried to serve Witness with a subpoena one day before trial, but was unsuccessful. Trial counsel testified he thought Witness might be reluctant to testify. Witness testified at 29.15 hearing she would have testified if called. Motion court granted postconviction relief. State appealed.
Holding: The State claims counsel made strategic decision not to call Witness because Witness was reluctant to testify, or Movant didn't prove Witness would have testified. This ignores that Witness testified at 29.15 hearing that she would have testified at trial if she had been subpoenaed to do so. Counsel attempted to serve Witness only one day before trial. This does not show that Witness did not want to testify or that counsel made strategic decision not to call her; it shows that counsel unreasonably delayed in trying to subpoena Witness (as the motion court found). The State claims that Witness' testimony would have been merely impeaching, which the State claims cannot be used as a basis for ineffective counsel claims. But when the testimony of a witness would negate the element of the crime for which Movant was convicted, it provides a viable defense.

Here, Witness' testimony would have rebutted element of forcible compulsion. Judgment granting postconviction relief affirmed.

Hanna v. State, 2019 WL 5558603 (Mo. App. S.D. Oct. 29, 2019):
Holding: Trial counsel was ineffective in failing to investigate and call a witness who would have contradicted State's theory as to the time of a murder; this was true even though the State claimed that the jury could have found its witness "far more credible" on time than the witness who wasn't called; the State's argument misses the point because the jury only heard one side of the story due to counsel's failure to call the defense witness.

Finley v. State, 2019 WL 6711461 (Mo. App. S.D. Dec. 10, 2019):
Holding: Where (1) motion court denied Movant's 29.15 motion on grounds that motion court did not believe Movant's testimony that trial counsel had told him he could not be convicted of a greater offense and, instead, believed counsel's testimony otherwise; (2) the appellate court affirmed; but (3) after the affirmance, Movant found a letter from trial counsel that wasn't available during the postconviction case and which supported Movant's testimony that he had been misadvised, Movant was entitled to recall of the 29.15 appellate mandate to present this newly discovered evidence.
Discussion: After the 29.15 proceedings were over, Movant obtained his Public Defender file and found a letter from his trial counsel telling him that he couldn't be convicted of the greater offense. This letter was not in the file when postconviction counsel was representing him; there was evidence that it was missing during that time. This letter supports Movant's 29.15 testimony and contradicts trial counsel's 29.15 testimony. If postconviction counsel had had this letter, he could have impeached trial counsel with it. Giving incorrect advice about the maximum penalty would be ineffective. Mandate is withdrawn, and case remanded to motion court to allow Movant to present this newly available evidence.

Seals v. State, 2018 WL 3198759 (Mo. App. S.D. June 29, 2018):
Even though appellate counsel successfully claimed on appeal that the trial court plainly erred in not giving a self-defense instruction for the offense of second-degree domestic assault (which resulted in reversal of that count), appellate counsel was ineffective in not also seeking reversal for the related offense of attempted victim tampering; since the attempted victim tampering was the underlying offense for the second-degree domestic assault, it would have been reversed, too, if appellate counsel had raised this issue.
Facts: Defendant/Movant was convicted of second-degree domestic assault, and attempted victim tampering. Appellate counsel, on direct appeal, obtained a reversal of the second-degree assault conviction on grounds that the trial court plainly erred in failing to give a self-defense instruction, but appellate counsel did not claim that the attempted victim tampering also had to be reversed. The appellate court affirmed that conviction. Movant filed a 29.15 motion claiming appellate counsel was ineffective.
Holding: The verdict director for attempted victim tampering was based *solely* on Movant's attempt to prevent Victim from assisting the prosecution with that count (even though there were other unrelated counts). Because the domestic assault count was reversed, the victim could no longer be a "victim" of that offense. The motion court

found that appellate counsel made a "strategic decision" not to raise the victim tampering claim. But the question is not whether counsel's decision was strategic, but whether it was reasonable. Nothing in the record reflects any reasonable basis not to request reversal of the victim tampering count. There is a reasonable probability the outcome of the appeal would have been different if appellate counsel had requested this.

Sanders v. State, 564 S.W.3d 380 (Mo. App. S.D. Nov. 26, 2018):
Holding: Where (1) the issue in Movant's 29.15 case was whether trial counsel was ineffective in not objecting to the jury instructions in a multiple-act child sex case on grounds that the instructions did not sufficiently distinguish each charged act, and (2) trial counsel had expressed some strategic reasons for not objecting, the motion court's Finding that it was "compelled," as a matter of law, to find counsel ineffective under *Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016)(which held that a Movant might be prejudiced when counsel fails to object in a similar situation), was clearly erroneous; *Hoeber* did not bind all fact-finders in all circumstances as a matter of law; case remanded for Findings on whether counsel's choices "objectively reasonable."

Hounihan v. State, 2018 WL 6258890 (Mo. App. S.D. Nov. 27, 2018):
Holding: Where motion court denied Movant's 29.15 claim that appellate counsel was ineffective in not raising that the evidence was insufficient to convict of driving while revoked as a class D felony (as opposed to a misdemeanor), the motion court clearly erred in denying the claim on grounds that postconviction counsel was the "first to notice" the issue; case remanded for Findings as to whether appellate counsel's failure to raise the issue was "objectively reasonable" – appellate counsel's subjective intent aside.

Davis v. State, 2016 WL 4060129 (Mo. App. S.D. July 28, 2016):
Holding: 29.15 Movant's claim that counsel was ineffective for misadvising Movant about a 15-year plea offer, which caused Movant to reject the offer and later receive a longer sentence at trial, was a cognizable postconviction claim under *Missouri v. Frye*, 132 S.Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); pre-*Frye* cases rejecting the cognizability of such claims should no longer be followed; case remanded for evidentiary hearing on claim.

Christian v. State, 2016 WL 4582181 (Mo. App. S.D. Sept. 2, 2016):
Trial counsel was ineffective in failing to object to admission in State's case-in-chief of Movant's related civil deposition in which he repeatedly asserted his 5th Amendment privilege against self-incrimination in response to questions related to the criminal case; the test for prejudice is not whether there is a reasonable probability of a different outcome (which is a direct appeal standard), but whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result (which is the standard ineffectiveness).
Facts: Defendant was charged with forgery relating to a deed of a residence. Defendant and occupant of house had a pending civil case over the same incident. During the State's case-in-chief, the State offered, without objection, excerpts of Defendant's civil deposition, in which he repeatedly asserted his 5th Amendment privilege against self-incrimination in response to questions about the deed. The next day of trial, Movant's

counsel belatedly objected to introduction of the deposition. The objection was overruled. Movant testified at trial as to an exculpatory version of events regarding the deed. Following conviction and direct appeal, Movant filed a 29.15 motion. Trial counsel testified he was surprised by introduction of the deposition.
Holding: Even though there are no Missouri cases holding that counsel is ineffective for failing to object to introduction of a civil deposition in which a Movant asserts his 5th Amendment privilege, basic principles of 5th Amendment law support that a reasonable counsel would object. The State cannot penalize a defendant in a criminal case for exercising their 5th Amendment privilege. The motion court found that Movant had not shown that the result of the proceeding would have been different. Reversal is not warranted on *direct appeal* unless a defendant shows a reasonable probability the result of the proceeding would have been different. But in judging an *ineffectiveness claim*, the standard is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Here, the invocations of 5th Amendment privilege were presented in the State's case-in-chief as affirmative evidence. Jurors would naturally draw an adverse inference from the 5th Amendment invocations. Reversed for new trial.

Sanders v. State, 535 S.W.3d 403 (Mo. App. S.D. Dec. 13, 2017):
Holding: (1) Even though, in multiple count child sex case, Defendant asserted a general denial defense, under *Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016), counsel may be ineffective and Defendant may be prejudiced by the failure of the verdict directors to identify the specific conduct the jury had to find to convict of each act; but (2) whether counsel should have objected to the verdict directors is based on an objective test, and case is remanded for Findings on whether counsel's reason for not objecting was objectively reasonable.

Wadlow v. State, 518 S.W.3d 872 (Mo. App. S.D. May 9, 2017):
(1) Counsel was ineffective in child sex trial in failing to strike juror who said she could not be "fair" because she had a young granddaughter, and (2) even though Defendant knew of biased juror on direct appeal, postconviction claim is cognizable because it deals with ineffective assistance.
Facts: During voir dire in child sex case, juror said she could not be "fair" because she had a granddaughter. Later, juror did not respond to general questions to panel as to whether they would find it difficult to rule in favor of an older person over a child, and whether they would fail to follow the law. Trial counsel testified he could not recall a strategy reason for failing to strike juror, but there "could" have been one.
Holding: Generally, improper jury selection claims are not cognizable in postconviction because the issue can be raised on direct appeal, but here, Movant is raising a claim of ineffective counsel, which is cognizable. Juror showed clear bias. Even though juror was silent as to some rehabilitative questions, this does not cure the clear expression of bias, and her ability to follow the law does not fix her difficulty in resolving *factual* disputes in the case. Counsel's lack of memory or that there "could" have been a strategic reason for not striking juror does not constitute an acceptable explanation for failing to strike clearly biased juror.

Dawson v. State, 2020 WL 3966847 (Mo. App. W.D. July 14, 2020):
Concurring opinion: A notable concurring opinion states that where Movant's claim is that counsel was ineffective in failing to present mitigating evidence and the trial judge and postconviction judge are the same, *Strickland* requires that the claim be decided based on an "objective inquiry" of whether there is a reasonable probability of a different outcome, not on a "subjective inquiry" of whether the particular judge who imposed sentence would have given a different sentence.

Barber v. State, 2020 WL 3966755 (Mo. App. W.D. July 14, 2020):
Counsel was ineffective in advising Defendant/Movant, who was initially charged with felony stealing, Sec. 570.030, to plead guilty to receiving stolen property where Bazell had effectively made the offense a misdemeanor; the statute of limitations had expired for a misdemeanor offense before Movant was initially charged; and the statute of limitations for receiving stolen property was not tolled and had expired before that offense was filed as part of the plea bargain.
Facts: In 2012, the alleged offense occurred. In 2015, Defendant/Movant was charged with felony stealing. In August 2016, *Bazell* was decided, which effectively made the offense a misdemeanor. In November 2016, the State and Movant entered into a plea agreement whereby Movant would plead guilty to receiving stolen property, and receive three years. Later, Movant filed a Rule 24.035 motion.
Holding: Under *Bazell*, which was decided before Movant's plea, Movant could only be charged with misdemeanor stealing. A misdemeanor has a one-year statute of limitations. Because Movant wasn't initially charged until three years after the alleged offense, the statute of limitations had expired. The statute of limitation wasn't tolled for a receiving stolen property offense. Stealing and receiving have differences in the elements that must be proven to convict, and they are different levels of offense.

Sprofera v. State, 2020 WL 6277237 (Mo. App. W.D. Oct. 27, 2020):
Holding: Even though 29.15 Movant's counsel forfeited Movant's right to jury sentencing at trial by failing to object to improperly charging him as a prior offender, in order to demonstrate prejudice on his later ineffective assistance of counsel claim, Movant must show that but for counsel's sentencing error, he would have received a lower sentence (which here, the motion court found that Movant failed to show, so he receives no relief).

In the Matter of Care and Treatment of White v. State, 2019 WL 2256863 (Mo. App. W.D. May 28, 2019):
Holding: Claim of ineffective assistance of SVP counsel is judged under the *Strickland* standard.

Sanders v. State, 2017 WL 770967 (Mo. App. W.D. Feb. 28, 2017):
Where 24.035 Movant had previously been convicted of endangering welfare of a child, Sec. 568.045, which may have been non-sexual in nature, and later pleaded guilty to failure to register as a sex offender because of this offense, Movant was entitled to evidentiary hearing on claim that his plea counsel was ineffective in failing to inform him

that he didn't have to register and had a complete defense to the registration charge, and that the charge lacked a factual basis.
Discussion: The judge, in denying Movant's claims, relied on Sec. 589.400.1(7) for the proposition that Movant was required to register; that section requires anyone who has been or is required to register under federal law to register in Missouri. However, the State charged Movant with violating Sec. 589.400.1(1), which requires registration for offenses committed under Chapter 566 RSMo. Nothing within the charging documents or at the plea hearing indicates that the child endangerment charge was sexual in nature. Although the judge may have had some information outside the record to show it was sexual, given that child endangerment alone does not require registration, and that was the basis for the registration charge, Movant is entitled to a hearing to determine if counsel was ineffective and if there was a factual basis for his plea.

*** Andrus v. Texas, 2020 WL 3146872, ___ U.S. ___ (U.S. June 15, 2020):**
Holding: Capital counsel ineffective in penalty phase for not investigation mitigation and rebutting aggravation; mitigating evidence would have included defendant's childhood was marked by neglect, privation, violence, abuse and mental illness; counsel could have rebutted State's aggravating evidence that defendant had committed a prior robbery by showing that the sole witness to the robbery later recanted.

* **Garza v. Idaho, ___ U.S. ___, 139 S.Ct. 738 (U.S. Feb. 27, 2019):**
Holding: Even though Defendant had executed an appeal waiver as part of a plea agreement, where Defendant requested that counsel file a notice of appeal, defense counsel was ineffective in failing to file the notice, and prejudice is presumed.

* **McCoy v. Louisiana, ___ U.S. ___, 138 S.Ct. 1500 (U.S. May 14, 2018):**
Holding: The Sixth Amendment right to the assistance of counsel precludes defense attorneys from conceding their clients' guilt against the clients' wishes.

*** Lee v. U.S., ___ U.S. ___, 137 S.Ct. 1958 (U.S. June 23, 2017):**
Holding: Defendants who plead guilty based on bad advice about immigration consequences can show prejudice to set aside their pleas by showing a reasonable likelihood that they would not have pleaded guilty but would have gone to trial, even though they almost certainly would have been convicted at trial; such defendants, to show prejudice, need not show that they likely would have obtained a favorable result at trial.

* **Shinn v. Kayer, ___ U.S. ___, 141 S.Ct. 517 (U.S. Dec. 14, 2020):**
Holding: Under AEDPA, 9th Circuit impermissibly substituted its own judgment for State court's and was not deferential to State court judgment (which denied claim that death penalty counsel was ineffective in failing to investigate mitigation), where fair-minded jurists could disagree as to whether *Strickland* standard was met; AEDPA precludes granting relief on any claim adjudicated in State court on the merits unless the adjudication resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law as decided by U.S. Supreme Court.

*** Weaver v. Mass., ___ U.S. ___, 137 S.Ct. 1899 (U.S. June 22, 2017):**
Holding: In the context of an ineffective assistance of counsel claim for failing to object to closure of a courtroom during voir dire, a defendant must demonstrate prejudice to receive a new trial, even though the courtroom closure was "structural error." Prejudice in this context means either a reasonable probability of a different outcome, or that the particular violation was so serious as to render the trial fundamentally unfair. Here, the courtroom was closed due to lack of enough seating for the public, but there was no showing of specific harm from the closure, such as misconduct by the judge or prosecutor during the closure. (Court notes that if courtroom closure is objected to and raised on direct appeal, automatic reversal is still generally required regardless of any actual effect on the trial's outcome.)

*** Buck v. Davis, 2017 WL 685534, ___ U.S. ____ (U.S. Feb. 22, 2017):**
Holding: (1) Death penalty counsel was ineffective in calling an expert who testified that the defendant's race made him statistically more likely to be dangerous in the future, even though the expert's principal testimony was that the particular defendant probably would not be dangerous; race cannot be a factor in assessing a death sentence; (2) appellate court erred in essentially deciding merits of case in denying a certificate of appealability because that imposes too high a standard for COA's; the statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then – if it is – an appeal in the normal course.

* **Elmore v. Holbrook, 100 Crim. L. Rep. 79, 137 S.Ct. 3 (U.S. 10/17/16)(Sotomayor, J., dissenting from denial of cert.):**
Justice Sotomayor writes opinion dissenting from denial of cert. in ineffective assistance of counsel case in which she reviews SCOTUS law on ineffective assistance. Case involved death penalty counsel failing to present any mental health expert in penalty phase. Opinion is useful summary of major SCOTUS holdings, and Sotomayor cites numerous cases to support the following principles: (1) Effective counsel must thoroughly investigate the defense he chooses to present; (2) Strategic choices made after less than complete investigation are only reasonable to the extent that reasonable professional judgment supports the limitation on investigation; (3) while fear of prosecutor rebuttal may justify a decision not to present certain mitigating evidence, it can rarely justify failing to investigate the evidence in the first instance; (4) even though death penalty defendant may not want matters investigated and may actively obstruct investigation, counsel has an obligation to investigate anyway; (5) key inquiry in prejudice is to compare what was presented at trial and what competent counsel could have presented; (6) inquiry into prejudice should not presume that a defense expert's opinion would be rendered meaningless by the State's presentation of a contrary expert; it was not reasonable to discount entirely the testimony of Movant's three postconviciton mental health experts, particularly where jury might have been convinced that the crime was the direct result of Movant's cognitive impairments; and (7) even a petitioner who commits a heinous crime can be prejudiced by failing to investigate mitigation.

*** Maryland v. Kulbicki, ___ U.S. ___, 136 S.Ct. 2 (U.S. 10/5/15):**
Holding: Counsel was not ineffective in failing to challenge "comparative bullet lead analysis" at Defendant's trial where trial occurred in 1995, when "comparative bullet lead analysis" was widely accepted; this is true even though "comparative bullet lead analysis" was later discredited and in 1995 there existed one published report discrediting the analysis; the reasonableness of counsel's actions must be judged from the perspective of the time of counsel's actions; in the pre-Internet era, counsel was not required to comb through numerous libraries and documents to find a little-known report.

U.S. v. Laureys, 101 Crim. L. Rep. 516 (D.C. Cir. 8/8/17):
Holding: Counsel ineffective in child enticement case in failing to call mental health expert who would testify that Defendant's online chats were merely fantasy.

U.S. v. Mohammed, 101 Crim. L. Rep. 479 (D.C. Cir. 7/21/17):
Holding: Counsel ineffective in drug trafficking case in not investigating Witness in foreign country who would have shown Gov't's main witness against Defendant was biased.

U.S. v. Abney, 98 Crim. L. Rep. 434, 2016 WL 746790 (D.C. Cir. 2/5/16):
Holding: Where Defendant was sentenced five days after Congress passed the Fair Sentencing Act, which lowered drug sentences such as Defendant's, counsel was ineffective in failing to seek a continuance, so that Defendant could be sentenced to a lower sentence after the Act's effective date.

U.S. v. Newman, 98 Crim. L. Rep. 185 (D.C. Cir. 11/17/15):
Holding: Even though counsel did not give "wrong" immigration advice to Defendant until after a guilty plea but before sentencing, Defendant was still prejudiced by counsel's wrong advice because he could have moved to withdraw his guilty plea before sentencing if he had known correct immigration information.

Rivera v. Thompson, 102 Crim. L. Rep. 359 (1st Cir. 1/9/18):
Holding: Counsel was ineffective in failing to move to suppress statements Defendant made after Officer pointed gun at Defendant (who was jogging away from a crime scene), ordered him down on the ground, and questioned him without giving *Miranda* warnings.

Casiano-Jimenez v. U.S., 2016 WL 1211859 (1st Cir. 2016):
Holding: Counsel was ineffective in failing to personally advise Defendant about right to testify; Defendant was one of several non-English speaking co-defendants, and another attorney was designated to address the co-defendants as a group about testifying and that attorney told the group it was not advisable to testify; Defendant was prejudiced because he had no prior convictions, so would have made a good witness for himself, and could have explained his lack of knowledge about the drugs at issue.

Doe v. U.S., 2019 WL 623586 (2d Cir. 2019):
Holding: Plea counsel ineffective in failing to inform Defendant of mandatory deportation if he pled guilty.

Lynch v. Dolce, 2015 WL 3771891 (2d Cir. 2015):
Holding: Appellate counsel ineffective by not appealing trial court's failure to give a mandatory jury instruction; even though counsel raised a sufficiency claim and the instructional claim would not have resulted in discharge, the sufficiency claim was legally weaker.

Abdul-Salaam v. Penn. Dept. of Corr., 103 Crim. L. Rep. 377 (3d Cir. 7/12/18):
Holding: Death penalty counsel ineffective in failing to investigate childhood abuse and behavioral problems, and educational and juvenile records.

U.S. v. Carthorne, 102 Crim. L. Rep. 310 (4th Cir. 12/21/17):
Holding: Even though erroneous application of sentence enhancement wasn't "plain error," sentencing counsel was ineffective in failing to object to the erroneous enhancement, since standards for plain error and ineffective assistance aren't the same; counsel cannot have had a strategic reason not to object to the erroneous enhancement since it increased Defendant's sentence by seven years.

U.S. v. Ragin, 98 Crim. L. Rep. 572 (4th Cir. 3/11/16):
Holding: Where defense counsel fell asleep during trial multiple times, this was tantamount to no legal representation and was structural error, so Defendant need not show prejudice to prevail on ineffective assistance claim.

Grueninger v. Director, Virginia Dept. of Corrections, 2016 WL 502939 (4th Cir. 2016):
Holding: State court unreasonably applied federal law in holding that counsel was not ineffective in failing to move to suppress Defendant's statement made to police during a re-interview three days after Defendant had invoked his right to counsel by saying, "I need an attorney."

U.S. v. Shepherd, 102 Crim. L. Rep. 425 (5th Cir. 1/26/18):
Holding: Pleas counsel was ineffective in advising Defendant to plead to failure to register as sex offender when Defendant, in fact, was not required to register.

U.S. v. Freeman, 2016 WL 117170 (5th Cir. 2016):
Holding: Counsel ineffective in failing to file motion to dismiss based on statute of limitations.

Baer v. Neal, 102 Crim. L. Rep. 359 (7th Cir. 1/11/18):
Holding: Counsel was ineffective in death penalty case in failing to object to Prosecutor telling jury that victim's family wanted Defendant to get death, and in failing to object to jury instructions which prevented proper consideration of mitigating evidence.

U.S. v. Read, 2019 WL 1196654 (9th Cir. 2019):
Holding: Where counsel presented NGRI defense without Defendant's consent, this violated Defendant's right to choose his defense.

Browning v. Baker, 101 Crim. L. Rep. 660 (9th Cir. 9/20/17):
Holding: (1) Gov't violated Brady in failing to disclose that Witness was given leniency on unrelated charges in exchange for testimony; impeachment evidence that a Witness had once hired someone to assault his wife; police reports showing discrepencies over eyewitness identification; and bloody footprints at scene; and (2) counsel was ineffective in failing to interview Officers who would have given information about these facts.

Weeden v. Johnson, 101 Crim. L. Rep. 65 (9th Cir. 4/21/17):
Holding: Counsel ineffective in failing to investigate mental health defense for teenage Defendant charged with murder.

Bemore v. Chapell, 2015 WL 3559153 (9th Cir. 2015):
Holding: Counsel was ineffective in failing to investigate mitigating mental health evidence, and Defendant was prejudiced since judge had sentenced Defendant to death but not sentenced a co-Defendant to death because co-Defendant had suffered head trauma.

U.S. v. Chan, 97 Crim. L. Rep. 532 (9th Cir. 7/9/15):
Holding: Even though *Padilla* is not retroactive, Defendant, whose conviction was final before *Padilla*, can withdraw her plea due to counsel's affirmative misrepresentations about immigration consequences; the law at time of Defendant's plea was clear that counsel can be ineffective for affirmative misrepresentations of any kind that render plea involuntary; case need not be decided on basis of *Padilla* (failure to warn of immigration consequences) but on law of affirmative misrepresentation.

Ellis v. Harrison, 947 F.3d 555 (9th Cir. 2020):
Holding: Where counsel had deep seated racist believes, this was, in effect, a denial of counsel under *Cronic*, because it is impossible to know precisely how counsel's beliefs may have affected his decisions in Petitioner's case; *Cronic* standard should apply instead of *Strickland*-prejudice standard.

Hardwick v. Sec'y, Fla. Dept. of Corrections, 2015 WL 5474275 (11th Cir. 2015):
Holding: Capital counsel ineffective in failing to investigate turbulent family history, mental/physical abuse, alcohol/drug addiction, and seek evidence to support statutory mitigator that at time of crime, Defendant's capacity to confirm his conduct to requirements of law was substantially impaired.

Arvelo v. Sec'y Florida Dept. of Corrections, 2015 WL 3609351 (11th Cir. 2015):
Holding: State court's holding that Defendant waived any ineffective assistance of counsel claim merely by pleading guilty was contrary to clearly established federal law.

Fenn v. U.S., 2016 WL 1161441 (E.D. Va. 2016):
Holding: Counsel was ineffective in child pornography case in failing to call Defendant's Father to testify (to apparently deny that he downloaded the porn or deny saying this), and in then failing to call Mother to testify that Father told her that Father downloaded the porn; Father's statement to Mother would have been admissible under statement-against-interest exception to hearsay rule.

Speight v. Warner, 2016 WL 397908 (W.D. Wash. 2016):
Holding: Counsel ineffective in failing to raise on direct appeal that Defendant's right to public trial was violated in rape case, where judge questioned potential jurors in chambers without following the test for closure.

Ariz. State Bar Comm. on Rules of Prof. Conduct, Op. 15-01 (June 2015), 97 Crim. L. Rep. 414: Arizona adopts rule that forbids defense counsel from advising Defendants from entering into plea agreements that waive claims of ineffective counsel, and forbids prosecutors from proposing such deals.

Editor's Note: Missouri Formal Opinion 126 is similar.

Helmedach v. Comm'r of Corr, 189 A.3d 1173 (Conn. 8/14/18):
Holding: Counsel has duty to promptly convey plea offer, and was ineffective in delaying relaying offer until after Defendant testified (after which offer was withdrawn).

Davis v. Commission of Corrections, 98 Crim. L. Rep. 167, 2015 WL 6909406 (Conn. 11/17/15):
Holding: Counsel's agreement to the maximum sentence provided for in a plea agreement, where the agreement allowed counsel to argue for a lower sentence, was a complete breakdown in adversarial process and violated *Cronic*, 466 U.S. 648 (1984).

Urquhart v. State, 2019 WL 311040 (Del. 2019):
Holding: Where counsel did not engage in plea discussions and didn't meet with Defendant until morning of trial, counsel was ineffective.

Starling v. State, 98 Crim. L. Rep. 269 (Del. 12/14/15):
Holding: (1) counsel ineffective in failing to cross-examine a key prosecution Witness about inconsistent statements he made before trial that would have exculpated Defendant; (2) counsel ineffective in failing to show that police threatened to charge Witness with a crime unless he inculpated Defendant, because this would show Witness' statement was involuntary and possibly inadmissible; and (3) prosecutor violated *Brady* by telling defense that probation violation proceedings against another Witness were "pending" when they had, in fact, been dismissed, because this could have been used to impeach Witness.

Ibar v. State, 2016 WL 454038 (Fla. 2016):
Holding: Counsel was ineffective in failing to obtain an expert to challenge the identification of Defendant as the perpetrator shown in a surveillance video; an expert

could have testified to differences in facial proportions which would indicate Defendant was not the perpetrator.

People v. Cotto, 2016 WL 2926359 (Ill. 2016):
Holding: Postconviction Movants are entitled to counsel who provide reasonable level of assistance, regardless of whether counsel is appointed or retained.

State v. Schlitter, 2016 WL 3201667 (Iowa 2016):
Holding: Counsel was ineffective in failing to challenge sufficiency of evidence in child endangerment case, where a reasonable juror could not have found that Defendant inflicted child's injuries, since several other people also cared for the child at the same time.

State v. Curley, 103 Crim. L. Rep. 358 (La. 6/27/18):
Holding: Counsel ineffective in failing to investigate self-defense claim based on battered wife syndrome as possible defense for Defendant-Wife who murdered abusive husband.

Com. v. Diaz Perez, 2020 WL 524702 (Mass. 2020):
Holding: Counsel ineffective in failing to investigate and call alibi witness, where state's evidence relied on nighttime eyewitnesses who had been drinking, and where jury hung at Defendant's first trial where alibi evidence was presented.

Com. v. Celester, 2015 WL 10015096 (Mass. 2016):
Holding: Defendant was entitled under Mass. Constitution to effective assistance of counsel at a police interrogation; if counsel at such an interrogation fails to provide competent advice, counsel is not meeting the purpose of having counsel during an interrogation.

Com. v. Alcide, 2015 WL 4165129 (Mass. 2015):
Holding: Counsel ineffective in failing to investigate and present evidence that another party committed the shooting, and failing to challenge the eyewitness identification.

State v. Armstrong, 2015 WL 3429316 (Neb. 2015):
Holding: Attorney was ineffective in allowing defense Witnesses to watch a child forensic interview video in violation of state law, and then agreeing during trial that defense Witnesses should not be allowed to testify because of that, even though attorney had told jury that Witnesses would testify.

People v. Harris, 98 Crim. L. Rep. 226, 2015 WL 7356114 (N.Y. 11/23/15):
Holding: Counsel was ineffective in failing to assert valid statute of limitations defense for Defendant.

People v. Wright, 97 Crim. L. Rep. 510, 2015 WL 3965732 (N.Y. 7/1/15):
Holding: Where State DNA expert had testified that the crime scene DNA was did not match a particular person but did not exclude Defendant, counsel was ineffective in failing to object to Prosecutor's misleading closing argument that Defendant "left his DNA all over the crime" scene; jurors are powerfully swayed by DNA evidence and counsel should have objected to the Prosecutor's misleading statement of the DNA results.

People v. Negron, 2015 WL 7355828 (N.Y. 2015):
Holding: Counsel ineffective in failing to investigate that third-party committed crime.

State v. Pierre, 2015 WL 9107530 (N.J. 2015):
Holding: Counsel was ineffective in failing to investigate Defendant's alibi that he was in another State at time of crime.

Com. v. Solano, 2015 WL 9283031 (Pa. 2015):
Holding: Death penalty counsel ineffective in failing to present mitigation regarding abusive childhood and neuropsychological impact on Defendant.

Com. v. Steckley, 2015 WL 8124153 (Pa. 2015):
Holding: Where trial counsel failed to inform Defendant of mandatory minimum 25-year sentence if he was convicted at trial, which caused him to reject a 6-year plea offer, counsel was ineffective and Defendant was prejudiced because he would have accepted the 6-year offer.

Director of Dept. of Corrections v. Kozich, 2015 WL 8467614 (Va. 2015):
Holding: Where judge "invited" defense counsel to file a motion to reconsider sentence prior to the judge's entry of a written judgment, counsel was ineffective in failing to do so, because judge was indicating that he would reconsider his sentence.

Zemene v. Clarke, 2015 WL 798753 (Va. 2015):
Holding: Claim that counsel misadvised Defendant about immigration consequences does not require Defendant to plead that he would have been acquitted if he had gone to trial; test of prejudice is whether he would have rejected pleading guilty or instructed counsel to seek a new plea agreement to avoid immigration consequences.

Mellot v. State, 2019 WL 96920 (Wyo. 2019):
Holding: Plea counsel ineffective in advising Defendant to plead guilty to felony Medicaid fraud, because there was no factual basis given that the individual Medicaid claims were less than $500 statutory threshold; counsel mistakenly believed the claims could be aggregated to reach felony amount.

People v. Eddy, 244 Cal. Rptr. 3d 872 (Cal. App. 2019):
Holding: Counsel's concession at murder trial that Defendant committed manslaughter violated 6th Amendment right to maintain innocence, even if Defendant temporarily acquiesced in it; Defendant had wanted defense that another person did murder.

People v. Asghedom, 2015 WL 9598274 (Cal. App. 2015):
Holding: Trial court abused discretion in finding that Defendant would still have pleaded guilty if he had been advised of immigration consequences of his plea; Defendant was a first time drug offender and likely would still have received probation even if he had gone to trial, and was 20 years old and had been in U.S. since age 12.

Edward M. v. Commissioner of Corrections, 2018 WL 6716552 (Conn. App. 2018):
Holding: Even though Defendant and his girlfriend testified that Defendant was circumcised (in child sex case where child said he wasn't), counsel was ineffective in failing to introduce medical evidence of this, especially where jury sent note during deliberations asking why there were no medical records showing circumcision.

Helmedach v. Comm. of Corrections, 100 Crim. L. Rep. 9 (Conn. App. 9/27/16):
Holding: Even though the State agreed to keep a plea offer open (which was made during trial) until after Defendant testified, counsel was ineffective in failing to "promptly" convey the offer to Defendant until after her testimony; by the time counsel conveyed the offer, the State had withdrawn it.

Jones v. State, 2015 WL 2259311 (Fla. App. 2015):
Holding: Appellate counsel was ineffective in failing to raise a jury instruction issue, where there had been two favorable appellate opinions on the issue before movant's appeal, and a third favorable opinion prior to the initial appellate brief.

Oatney v. Premo, 2015 WL 8316856 (Or. App. 2015):
Holding: Counsel was ineffective in failing to move to suppress a co-Defendant's statements, which were derived from an immunity agreement Defendant had made; the immunity agreement provided that Defendant would give information to the Prosecutor in exchange for information discovered as a result of Defendant's information not being used against Defendant.

State v. Hildreth, 2019 WL 1033626 (N.M. App. 2019):
Holding: Trial counsel ineffective in refusing to participate in trial proceedings.

State v. Nkiam, 2015 WL 7003416 (N.C. App. 2015):
Holding: Plea counsel was ineffective in advising Defendant that he faced only a risk of deportation if he pleaded guilty, when deportation was, in fact, presumptively mandatory.

Ex parte Saenz, 2016 WL 1359214 (Tex. App. 2016):
Holding: Counsel was ineffective in failing to impeach Witness, who identified Defendant in court as the shooter, with a prior inconsistent statement to police in which Witness said he could not make out the shooter's face.

N.Y. State Bar Ass'n Comm. on Prof. Ethics Op. 1098 (6/10/16):

Holding: New York ethics committee holds that it is unethical for prosecutors to structure plea bargains that require defendants to give up right to pursue ineffective assistance of counsel claims.

Interrogation – Miranda – Self-Incrimination – Suppress Statements

State v. Rice, 2019 WL 1446931 (Mo. banc April 2, 2019):
(1) Trial court erred in first-degree murder case in not giving voluntary manslaughter instruction because there was evidence from which jury could find Defendant acted from sudden passion, in that Victims had told Defendant he would not see his son again and had assaulted Defendant; (2) Defendant's right to silence was violated where, after Miranda, Officer continued to interrogate Defendant after he said "I don't wanna talk no more" and "I got nothing to say," and "I don't wanna talk"; (3) Prosecutor improperly commented on Defendant's post-Miranda silence when he asked Officer if Defendant had answered questions and Officer said he did not, and introduced Defendant's statements that he did not want to talk; and (4) Prosecutor's closing penalty phase argument that Defendant was "the 13th juror and if I'd been allowed to ask him those questions last week, he would have told us…" and that Defendant had not apologized for the crime were improper direct references to Defendant's right not to testify.
Facts: Defendant killed two Victims – his former Girlfriend and her boyfriend, after Girlfriend told Defendant he would not see his son again. Defendant went to Victims' house. Victims attacked Defendant. Defendant shot them. Defendant fled and was chased by police. Defendant had a shootout with police, and was himself shot. He was taken to hospital and questioned by police. Defendant, after *Miranda*, said "I don't wanna talk no more," and "I don't wanna talk," but police continued to question him. The trial court refused Defendant's requested voluntary manslaughter and accompanying second-degree murder instruction.
Discussion: (1) The refused voluntary manslaughter instruction and second-degree murder instruction properly tracked MAI-CR3d 314.08 and 314.04. A voluntary manslaughter instruction must be given when a party timely requests it; there is a basis for acquitting of the charged offense; and there is a basis for convicting of the lesser. Here, Defendant requested the instruction, and there is always a basis for acquitting of the greater since a jury never has to believe the State's evidence. The issue is whether there was a basis for convicting of the lesser. Here, there was because Victims told Defendant he would never see his son again, and Victims assaulted Defendant; this was sufficient evidence for a jury to find sudden passion arising from adequate cause. (2) Defendant's statements that he did not want to talk were unequivocal invocations of his right to silence. Even though Officer did stop interrogation for 20-30 minutes, this was not passage of a significant period of time to be able to resume interrogation. Defendant's statements should have been suppressed. (3) The trial court violated *Doyle v. Ohio* by admitting evidence of Defendant's silence and that he didn't want to talk. Silence does not only mean muteness; it includes a statement that Defendant wants to remain silent. (4) The Prosecutor's closing argument that Defendant was a "13th juror and if I'd been allowed to ask him those questions last week, he would have told us…" and that Defendant had not apologized for the crime were direct references to Defendant's failure

to testify. The State's claim that the comments referred to voir dire are far-fetched because a Defendant never testifies on voir dire.

Roesing v. Dir. of Revenue, 2019 WL 1912818 (Mo. banc April 30, 2019):
Holding: As matter of first impression, Sec. 577.041.1, which gives Drivers 20-mintues to contact an attorney, includes the right to have the attorney conversation be private; thus, where Officer stood by, listened to, and recorded Driver's telephone conversation with his attorney, Driver's subsequent refusal to take breath test was not voluntary; Director has burden to show Driver wasn't prejudiced, which Director failed to do.
Discussion: A driver who contacts an attorney can make an informed decision about whether to take a BAC test only if the driver is able to candidly disclose all information necessary to receive appropriate advice from an attorney. A driver is not free to speak candidly about incriminating evidence if police are listening to or recording the conversation because a prosecutor could use the information to decide whether to bring charges. Privacy is inherent in a driver's statutory right to counsel. Judgment revoking license for refusal to take BAC test reversed.

State ex rel. Healea v. Tucker, 545 S.W.3d 348 (Mo. banc May 1, 2018):
Holding: Where the Police Dept. secretly recorded a conversation between Defendant and his attorney at the police station, this violated Defendant's attorney-client privilege and Sixth Amendment rights, but the remedy need not be dismissal; instead, the portions of a master's report which detail questions Defendant asked his attorney should be sealed from public view; the remainder of the master's report can be unsealed since it contains no confidential statements by Defendant.

State v. Holman, 2016 WL 7100554 (Mo. banc Dec. 6, 2016):
Holding: Where, after Defendant had been taken into custody and read his *Miranda* rights, Officer asked Defendant if he would sign a consent to search form and he said, "I ain't signing shit without my attorney," this was not a clear, unequivocal invocation of the Fifth Amendment right to counsel.
Discussion: The issue in this case is whether Defendant invoked his Fifth Amendment right to counsel. This Court must determine whether, after being Mirandized, a suspect can graft a refusal to sign a consent to search onto his Fifth Amendment right to have an attorney present during questioning. To successfully invoke the right to counsel, a defendant's desire to have an attorney present must be sufficiently clear so that a reasonable officer would understand that defendant is invoking his right to an attorney. Here, Defendant did not clearly state he wanted an attorney. A reasonable officer would not have understood Defendant's statement refusing to sign the consent to search form as an invocation of the Fifth Amendment right to counsel.

State v. Little, 2020 WL 1522589 (Mo. App. E.D. March 31. 2020):
Holding: (1) Where Defendant told Officer during interrogation "I need a lawyer, I'm steady talking," and he "don't do no talking without a lawyer….I would like to adhere to that this time" (when he hadn't during prior arrests), this was a clear, unequivocal invocation of right to counsel, and interrogation should have ceased; a reasonable Officer would have understood Defendant to be invoking right to counsel; (2) Defendant did not

voluntarily "reinitiate" discussion with Officer during any interim because interrogation never ceased, so there was no "interim," but (3) trial court's error in not suppressing Defendant's statements was harmless in bench trial where court said it didn't regard Defendant's later statements as a "confession."

State v. Jinkerson, 2018 WL 3977677 (Mo. App. E.D. Aug. 21, 2018):
Holding: Even though Defendant had been arraigned and had retained counsel, where Officer subsequently approached Defendant in jail, read him *Miranda* rights, and Defendant made incriminating statements, trial court erred in suppressing statements on grounds that this violated 6th Amendment right to counsel, because the statements were voluntarily given after *Miranda* rights.
Discussion: *Michigan v. Jackson*, 475 U.S. 625 (1986), held that a defendant's waiver of the 6th Amendment right to counsel is presumptively invalid if made after previously asserting that right at arraignment. *Jackson* presumed that a defendant who had previously asserted a right to counsel would not later voluntarily waive that right in later interactions with police. But *Jackson* was overruled by *Montejo v. Louisiana*, 566 U.S. 778 (2009). After *Montejo*, a defendant is free to waive their 6th Amendment right to counsel so long as the waiver is voluntary, knowing and intelligent. Here, Officer read Defendant his *Miranda* rights before questioning him, and Defendant voluntarily waived counsel and made statements.

State v. Stricklin, 2018 WL 3117544 (Mo. App. E.D. June 26, 2018):
Holding: Where, after a child Defendant was staying with had a vaginal injury, police (1) asked Defendant to come to the police station for an interview, (2) multiple officers interviewed Defendant in an accusatorial way and told him he was going to jail, and (3) Defendant repeatedly asked to talk to a lawyer, Defendant was "in custody" for *Miranda* purposes, and his oral and written statements given without *Miranda* warnings must be suppressed.
Discussion: The State argues Defendant was not "in custody" for *Miranda* purposes. Two inquiries determine if Defendant was "in custody." First, what were the circumstances surrounding the interrogation, and second, given those circumstances, would a reasonable person have felt free to terminate the interview and leave. Here, Officers told Defendant they didn't believe his innocence story, and that if he didn't "straighten it out," "you're going in cuffs." Defendant said, "I want a lawyer. Right now." Defendant was told that was his choice, but police continued the interview. A reasonable person would not believe he was free to terminate the interview or leave. The totality of circumstances shows that the interview became custodial. Although Officers initially told Defendant he was not under arrest, he was never informed he could terminate the interview, walk away, or refuse to answer questions. The atmosphere was police dominated. It was conducted in an interview room with multiple Officers or interviewers. The Officers told Defendant he would be charged and was going to jail. Finally, the fact that he was arrested after the interview supports that he was "in custody."

State v. Tresler, 2017 WL 3996218 (Mo. App. E.D. Sept. 12, 2017):
Where a Defendant is induced to waive her Fifth Amendment right against self-incrimination by a promise of immunity from a Prosecutor, the doctrine of equitable immunity may immunize the testimony or Defendant from prosecution, even if the provisions of Sec. 491.205 were not followed. (But court finds no promise of immunity was made here.)
Facts: Defendant, who was not yet charged with a crime, was subpoenaed by Prosecutor to testify at a preliminary hearing. Her attorney asked Prosecutor if Defendant was a suspect, and Prosecutor said she "was a witness and nothing more and he had no intention of charging her with any offense." Defendant then testified against various persons. Prosecutor then charged Defendant with also participating in the offense about which she testified. She moved to dismiss on grounds of equitable immunity. The trial court overruled the motion. Defendant was convicted at trial, and appealed.
Holding: The State claims that immunity is recognized in Missouri only where the provisions of Sec. 491.205 are followed, which they were not here. However, the State is wrong. Due process rights are implicated when a governmental promise of immunity, whether authorized by statute or not, induces a defendant to waive her Fifth Amendment rights by testifying or cooperating with the State. The U.S. Supreme Court has held that when evidence of guilt is induced under a promise of immunity, the self-incrimination clause of the Fifth Amendment requires excluding the evidence. And the U.S. Supreme Court has held that where the State induces a defendant to plead guilty based on a false promise, that promise must be fulfilled. Based on these principles, Defendant seeks specific performance of her promise of immunity. The problem with Defendant's claim here, however, is that the Prosecutor never actually promised her immunity. The Prosecutor's statements to defense counsel were not promises of immunity. Thus, the court did not err in denying her motion to dismiss the charges.

State ex rel. Healea v. Tucker, 2017 WL 2451869 (Mo. App. E.D. June 6, 2017):
Holding: (1) Where Police Dept. secretly recorded an attorney-client visit between defense counsel and defendant, this violated the 6th Amendment right to counsel, attorney-client privilege, due process, and 600.048.3, which requires police to provide a private attorney-client visiting place; appellate court grants writ limiting public access to report which contains substance of the attorney-client conversation; (2) Where Attorney General's Office had copy of secretly taped attorney-client conversation for two years before disclosing it, never logged the evidence as is customary, and never explained the non-customary handling of the evidence, there is an appearance of impropriety for Attorney General's Office to continue to prosecute case, and Office is disqualified and Special Prosecutor appointed; Defendant need not show actual prejudice to disqualify the Attorney General's Office; appearance of impropriety is standard; but (3) Defendant's request to exclude all evidence obtained *after* the secret recording is not subject to writ of prohibition; Defendant's remedy is to object to this evidence at trial and pursue issue on direct appeal.

State v. Williams, 2017 WL 2778052 (Mo. App. E.D. June 27, 2017):
Even though School had a policy whereby students who were 30 minutes late for school would be searched to protect school from violence and drugs, School lacked reasonable

individualized suspicion to search Defendant-student, merely because he was tardy; drugs found are suppressed; (2) School's policy to search all tardy students for drugs was unreasonable in absence of specific evidence justifying policy; and (3) Defendant's statements made to security officer and police following the finding of drugs are suppressed as fruit of poisonous tree.

Facts: School had a policy that students who were 30 minutes late would be hand-searched. School claimed policy was to protect School from drugs and violence in "neighborhood." Defendant arrived at school 30 minutes late. He passed through School's metal detector without incident, but drugs were found in the hand-search. Defendant claimed search violated 4th Amendment.

Holding: The U.S. Supreme Court has promulgated two tests for determining reasonableness of school searches. The search here failed both. First, although constitutionality of school searches is more "relaxed," search here lacked any reasonable, individualized suspicion. Tardiness may be a factor in reasonable suspicion but it does not *per se* create reasonable suspicion. The State presented no evidence that tardy students are more likely to bring contraband to school, or anything about this particular Defendant-student other than he was tardy. Second, although the State seeks to uphold the search under its neutral school policy, this requires balancing Defendant-student's privacy interest with School's interest for safety and order. Here, School immediately turned student over to law enforcement when drugs were found. This shows the policy had a law-enforcement purpose, more than promoting welfare and safety of students. There was no evidence that tardy students contributed to the drug problem in School, that drugs were an immediate problem in School, or that the policy was effective in combatting drugs. Thus, search was unreasonable under School's policy. Drugs suppressed and statements suppressed as fruit of poisonous tree.

State v. Bell, 2016 WL 2341906 (Mo. App. E.D. May 3, 2016):

(1) Where during initial interrogation, Defendant requested an attorney, but before one was provided, police had subsequent interviews with Defendant in which they (a) read the probable cause statement to him and said he was a "calm dude to sit there after hearing that," (b) said they had talked to his wife and girlfriend, and (c) said that he may want to explain his side of the story especially because the probable cause statement was being released to the press, police engaged in the functional equivalent of interrogation without providing counsel and Defendant's confession should have been suppressed; but (2) admission of the confession was harmless as to second degree murder, though prejudicial as to Defendant's conviction for first degree murder; remedy is to remand case to require State to choose to retry Defendant for first degree murder, or accept entry of conviction for second degree murder; (3) even though Defendant was arrested with cocaine in his pocket, this was evidence of uncharged bad acts that was not legally or logically relevant to the charge of first degree murder.

Facts: Defendant and Victim bumped into each other on a street. An argument ensured, and Defendant eventually shot Victim and Victim's girlfriend. Defendant was charged and convicted of first degree murder. During initial interrogation, Defendant said he wanted a lawyer and wrote "No" on a *Miranda*-waiver form. Interrogation ceased, but no counsel was provided. Twelve hours later, police read Defendant the probable cause statement in his case, and said he was "a calm dude to sit there after hearing that."

Subsequently, they also told him that they had talked to his wife and girlfriend. Police also said Defendant should take the "opportunity to put your side" of the story out, especially because the probable cause statement was being released to the press. Defendant eventually said he would talk. At that point, police re-read his *Miranda* rights and he waived them.
Holding: (1) Defendant clearly invoked his right to counsel during initial interrogation. However, counsel was not provided. After invoking the right to counsel, police may not subject a defendant to further interrogation unless either counsel is present, or the *defendant himself initiates* further communication with police. Here, the record is clear that Defendant himself did not re-initiate communication. Moreover, interrogation refers not just to express questioning, but also to its "functional equivalent," meaning any words or actions on the part of police that police know or should know are reasonably likely to elicit an incriminating response. The focus of this analysis is on the perceptions of the defendant, not the police. Here, the police's further interactions with Defendant were the "functional equivalent" of interrogation. The rules against continued police interrogation after a defendant has invoked counsel were designed to prevent police badgering of a defendant. Here, Defendant was badgered after he invoked counsel. His confession should have been suppressed. (2) The appellate court must determine whether admission of the confession was harmless error. Here, the confession was critical to prove deliberation for first degree murder, but there was other evidence of guilt to prove the lesser-included offense of second degree murder. Even though the traditional remedy would be to remand for a new trial, an appellate remedy should extend no further than the scope of the wrong. Thus, appellate court remands case to require State to elect either to retry Defendant for first degree murder *or* accept entry of conviction for second degree murder. (3) The trial court erred in admitting evidence that Defendant had cocaine in his pocket when arrested. This was a prior bad act that had no logical or legal relevance to whether Defendant committed the murder. This was true even though defense counsel had argued that Victim was angry because *Victim* had been involved in a bad drug deal earlier that day. Even if true, no evidence suggested *Defendant* was involved in the drug deal, and the State argued Defendant and Victim were strangers to each other.

State v. Billings, 2016 WL 6945937 (Mo. App. S.D. Nov. 28, 2016):
Holding: Prosecutor committed *Doyle* violation in closing argument in urging jury to use as evidence of guilt the fact that Defendant invoked his right to remain silent after *Miranda* warnings (but not plain error); Prosecutor said Defendant had not answered questions, and "Why not? … I think that's one of the most important questions you guys can ask yourselves when you're going back there to deliberate. Why not? Why not cooperate? Why not answer any of these questions."

State v. Ellmaker, 2020 WL 6139847 (Mo. App. W.D. Oct. 20, 2020):
Even though DWI-Defendant, after having been arrested and given Miranda warnings, answered some questions by police, trial court violated Defendant's right to post-Miranda silence by admitting police testimony that Defendant said he didn't want to answer whether he had been intoxicated.
Facts: Police stopped Defendant for possible DWI. Defendant failed various field sobriety tests, was arrested and given *Miranda* warnings. Police interrogated Defendant.

He gave answers to some questions about drinking, but when asked if he was under the influence when stopped, he said he did not want to answer that question. At trial, the State was allowed to introduce police testimony that Defendant did not want to answer that question. The State also referred to Defendant's refusal to answer in opening statement, and argued it in closing argument.
Holding: *Doyle v. Ohio*, 426 U.S. 610 (1976), held that it violates a defendant's due process rights to allow post-arrest, post-*Miranda* silence to be used against a defendant at trial, because the *Miranda* warning implicitly assures a suspect that his silence won't be used against him. A defendant can waive his right to silence by making statements to police. But a defendant can also reclaim his right to silence (revoke his waiver), at which time silence is again protected. Here, Defendant initially waived his right to silence by answering some police questions. But later, Defendant indicated that he wished to remain silent. If a defendant indicates *in any matter*, at any time before or *during* questioning that he wishes to remain silent, the interrogation must cease. Here, Defendant reclaimed his right to silence by expressly refusing to answer the police question about whether he was intoxicated. A *Doyle* violation occurred when the State was permitted to use this as evidence of guilt. The violation was not harmless because the State repeatedly used this as evidence of guilt. Reversed and remanded for new trial.

State v. Goucher, 2019 WL 3417152 (Mo. App. W.D. July 30, 2019):
Holding: Where (a) Officer stopped car for a broken light; (b) car was owned by Defendant-Passenger's mother but driven by another Driver; (c) Officer told Driver he would write him a ticket; (d) Officer then went and asked Defendant-Passenger about expired insurance, but when Defendant said she'd call her mother about current insurance, Officer said not to worry about it; (e) Officer then asked Defendant to search car and purse; (f) Defendant allowed search of car but not purse; (g) Officer then ordered Defendant to put purse on car's trunk; (h) Officer then asked if contraband was in purse and Defendant said it had drugs; (i) Officer then searched purse and found drugs, this violated 4th Amendment because the purpose of the traffic stop was completed when Officer said he would write a ticket and not to worry about calling mother for insurance, so traffic stop was unnecessarily prolonged, and Defendant's statements and drugs found in search are suppressed. The fact that Defendant-Passenger was "nervous," had a "sunken" face that looked different than driver's license, and refused consent to search purse did not create reasonable suspicion of criminal activity to prolong traffic stop or justify warrantless search.

State v. Marchbanks, 2018 WL 2407605 (Mo. App. W.D. May 29, 2018):
Holding: (1) Even though Defendant was represented by counsel in a drug case and tampering case, and counsel had filed an Assertion of Rights form saying that Defendant was asserting his right to silence, where Officers then questioned Defendant about a murder case while he was in jail, the trial court erred in suppressing those statements because *Miranda* rights cannot be anticipatorily invoked in anticipation of potential future questioning; and (2) even though the Officers' questioning of Defendant may have violated Rule 4-4.2 (which prohibits lawyers from communicating with represented persons and the Prosecutor was ultimately responsible for the Officers' conduct),

Defendant makes no argument that Rule 4-4.2 provides a basis to exclude the statements independent of *Miranda*, so court does not decide that issue.
Discussion: Even though Defendant's *Miranda* claims fails because *Miranda* rights cannot be anticipatorily invoked, "[t]his Court is nonetheless sympathetic to [Defendant's] situation." Officers should have known that Defendant was represented by counsel in both the drug and tampering cases. The Assertion of Rights form was filed with both the jail and on Case.net in the drug and tampering cases. When a party is known to be presented by counsel, that party should only be contacted through their counsel, per Rule 4-4.2. The Prosecutor is responsible for the actions of Officers, even if the Prosecutor didn't actually know that the Officers were going to question Defendant about the murder. There was a responsibility upon the Prosecutor not to sanction or take advantage of statements taken by Officers from a person represented by counsel in the absence of his counsel. However, the case law on this is not based on constitutional protections, and Defendant makes no argument that Rule 4-4.2 may provide a basis to exclude the statements, so we do not reach that issue.

State v. Craig, 2018 WL 2921859 (Mo. App. W.D. June 12, 2018):
Holding: Officer's reading of a search warrant to Defendant at her home to be searched was not the functional equivalent of interrogation (thus requiring *Miranda* warnings) in this case, but circumstances accompanying an otherwise lawful recitation could lead a reasonable person to believe they are being interrogated; determining whether particular statements or practices amount to interrogation depends on the circumstances, particularly whether the statements are objectively and reasonably likely to result in incriminating responses by the suspect, as well as the nature of the police statements and the context in which they are given.

In the Interest of J.L.H, Juvenile Officer v. J.L.H., 2016 WL 880561 (Mo. App. W.D. March 8, 2016):
(1) Where Officer questioned Juvenile about the location of a gun without giving the right-to-silence or other warnings required by Sec. 211.059, Juvenile's statements must be suppressed; and (2) there is no "public safety" exception to Sec. 211.059.
Facts: Officers received a tip that Juvenile may be carrying a gun. Officers chased Juvenile, caught him and handcuffed him. Without providing any right-to-silence warnings, Officer asked Juvenile where he threw the gun. Juvenile made an incriminating statement about the gun. He was charged with a gun offense. He filed a motion to suppress statements under Sec. 211.059. The trial court overruled the motion. The only evidence at trial connecting Juvenile to the gun was his incriminating statement.
Holding: Sec. 211.059 provides that when a Juvenile is taken into custody, the Juvenile "shall" be advised before questioning that he has the right to remain silent; that any statement he makes may be used against him; that he has a right to have a parent, guardian or custodian be present; and that he has a right to counsel. The State argues these warnings were not required here, because there is a "public safety" exception to Sec. 211.059; this is an issue of first impression. There is a "public safety" exception to *Miranda* warnings which was recognized in *New York v. Quarles*, 467 U.S. 649 (1984); there, the Supreme Court allowed questioning about a gun in the absence of *Miranda* warnings. However, Sec. 211.059 is independent of federal constitutional decisions. The

Legislature has provided greater protection under Sec. 211.059 than the federal constitution requires. Sec. 211.059 gives Juveniles broader rights than *Miranda* does. E.g., it gives the right to have a parent present at questioning. Sec. 211.059 was enacted after *Quarles*; the Legislature could have included a public-safety exception in the statute, but did not. Missouri courts have not previously addressed what remedy should occur for violation of Sec. 211.059. However, the Missouri Supreme Court has concluded that violation of similar Juvenile Code provisions constitutes reversible error. Juvenile's statements should have been suppressed. Reversed and remanded for new trial.

U.S. v. Lopez, 2015 WL 10692810 (3d Cir. 2015):
Holding: Gov't violated due process by repeatedly asking Defendant at trial if he told anyone about "what happened" before his trial testimony; such impeachment violated his right to post-*Miranda* silence.

U.S. v. Giddins, 101 Crim. L. Rep. 272 (4th Cir. 6/6/17):
Holding: Defendant's didn't voluntarily waive *Miranda* rights where police made it seem that Defendant would not get his car back if he didn't sign a *Miranda* waiver.

Hendrix v. Palmer, 103 Crim. L. Rep. 355 (6th Cir. 6/26/18):
Holding: Where Defendant asked for counsel during a first interrogation, and then two days later, Officers re-interrogated Defendant without counsel, the statements in the second interrogation must be suppressed because the assertion of right to counsel carried over to that interrogation.

U.S. v. West, 2015 WL 9487929 (7th Cir. 2015):
Holding: Trial court erred in excluding evidence of Defendant's mental disabilities because they were relevant to the voluntariness of his confession.

Petrocelli v. Baker, 101 Crim. L. Rep. 453 (9th Cir. 7/5/17):
Holding: Where State doctor saw Defendant without the consent of his lawyer and without Miranda warnings and then testified in penalty phase that Defendant was "psychopathic," this violated Defendant's Fifth and Sixth Amendment rights against self-incrimination and to counsel.

U.S. v. Fomichev, 103 Crim. L. Rep. 494 (9th Cir. 8/8/18):
Holding: Marital privilege prevents Gov't from using recording of Defendant-Husband and Wife in immigration marriage fraud case, even though Wife secretly recorded the conversation as part of agreement with Gov't.

Reyes v. Lewis, 99 Crim. L. Rep. 639 (9th Cir. 8/17/16):
Holding: Where police deliberately withhold *Miranda* warnings until after a suspect confesses and then give warnings and have suspect confess again, this violates *Seibert*, 542 U.S. 600 (2004); the second confession must be suppressed unless police took "curative measures" to ensure the suspect understood the importance of the failure to warn and waiver.

U.S. v. Williams, 100 Crim. L. Rep. 246 (9th Cir. 12/5/16):
Holding: Where Defendant had invoked his *Miranda* rights, his answer to a routine booking inquiry whether he was a member of a gang was not admissible because his admission that he was in a gang was incriminating, even though the question may have been asked only to determine his security classification level in the jail; the "booking exception" to *Miranda* did not apply in these circumstances.

Jones v. Harrington, 99 Crim. L. Rep. 568 (9th Cir. 7/22/16):
Holding: Defendant invoked right to silence when he said, "I don't want to talk no more, man."

Garcia v. Long, 2015 WL 9267557 (9th Cir. 2015):
Holding: Erroneous admission of Defendant's statements after he had invoked counsel under *Miranda* had substantial and injurious effect on jury in rape trial; even though Victim's testimony was detailed and powerful, it was not corroborated by physical evidence.

Mays v. Clark, 98 Crim. L. Rep. 245 (9th Cir. 12/18/15):
Holding: (1) Police violated *Miranda* by not stopping interrogation when Defendant said he wanted to call his father "to get his lawyer to come down here;" this was an unambiguous assertion of right to counsel; (2) police also engaged in "troubling" tactics when they hooked Defendant up to a fake polygraph machine and falsely told him he had failed the polygraph. But both errors "harmless" under deferential standard of federal habeas review.

Sharp v. Rohling, 97 Crim. L. Rep. 530 (10th Cir. 7/15/15):
Holding: State court unreasonably determined the facts in finding that Defendant's confession was voluntary even though she was told she would not go to jail if she confessed; when she asked whether she would go to jail, police said "no, no, no" in an effort to keep her talking.

U.S. v. Iyamu, 2018 WL 6696297 (D. Minn. 2018):
Holding: Defendant made broad assertion of his right to counsel – not a limited assertion – where he said he wanted to speak to his attorney about fraud charges against him, even though he also said "if there's any other questions, I will give you my answers;" police should have ceased all questioning when he asked to speak to an attorney.

U.S. v. Ledbetter, 2016 WL 2956250 (S.D. Ohio 2016):
Holding: Requiring Defendant to display gang-related tattoo violated 5th Amendment privilege against self-incrimination.

SEC v. Huang, 97 Crim. L. Rep. 741 (E.D. Pa. 9/23/15):
Holding: 5th Amendment right against self-incrimination prevents Gov't from forcing Defendant to reveal password to his smartphone.

People v. Garcia, 100 Crim. L. Rep. 564 (Cal. 3/20/17):
Holding: Requiring sex offenders on probation to disclose incriminating information as part of their treatment doesn't violate 5th Amendment rights where law enforcement cannot use the information to charge them with more crimes.

People v. Elizalde, 2015 WL 3893445 (Cal. 2015):
Holding: Defendant's answers about gang affiliation during booking were "custodial interrogation" under *Miranda,* even though the questions were not asked for investigatory purposes.

People v. Roberson, 2016 WL 2860520 (Colo. 2016):
Holding: Polygraph question to sex-crime probationer whether he had viewed child pornography while on probation violated 5th Amendment privilege against self-incrimination.

In re S.W., 2015 WL 5474170 (D.C. 2015):
Holding: Where Officer told Juvenile that Officer was protecting him from "the lions," that "everybody" was saying that Juvenile "did a whole bunch of stuff," that "they're gonna try to say that you did it all," and that he should take the opportunity to "give his version of what happened," Juvenile's confession was not voluntary.

State v. Horwitz, 2016 WL 2586307 (Fla. 2016):
Holding: Under Fla. Const.'s right against self-incrimination, where a Defendant does not testify, State cannot use his his pre-*Miranda,* pre-arrest silence as evidence of guilt.

State v. McAdams, 99 Crim. L. Rep. 105, 2016 WL 1592710 (Fla. 4/21/16):
Holding: Under the Fla. Const., Defendant had a due process right to be told that his lawyer had arrived at the police station while he was being interrogated, even though Defendant was not technically "in custody."

State v. Philpot, 99 Crim. L. Rep. 305 (Ga. 6/6/16):
Holding: Defendant invoked right to counsel during interrogation when he told police to call his girlfriend to get contact information for his lawyer.

In re D.L.H. Jr., 2015 WL 2411927 (Ill. 2015):
Holding: Even though 9-year-old Juvenile's father was present during police interrogation and police adopted a conversational tone, Juvenile's statements were not voluntary where police used child's fear that his family would go to jail and be taken away to elicit the statements.

State v. Fisher, 99 Crim. L. Rep. 109 (Kan. 4/22/16):
Holding: Even though Defendant never invoked his right to silence during police questioning, Prosecutor could not question Defendant at trial about why he didn't volunteer the information he gave in his trial testimony.

Tigue v. Com., 2018 WL 7814537 (Ky. 2018):
Holding: Expert testimony on false confessions was admissible in hearing on motion to suppress Defendant's confession.

State v. Alexander, 285 So.3d 1091 (La. 2019):
Holding: Defendant's statement made after Officer told Defendant he should "apologize to his mother for what he did" made in the same interrogation room where Officer had promised Defendant that his statements would remain confidential subverted Miranda warnings and required suppression; even though Mother was not a state actor, Defendant made statements as direct result of Officer's direction.

Com. v. Adonsoto, 99 Crim. L. Rep. 722 (Mass. 9/16/16):
Holding: Police must record all police station interrogations of non-English speaking Defendants conducted through an interpreter; recordings are necessary to gauge reliability and also provide an independent basis to evaluate the truth of the police testimony for confrontation clause purposes.

Com. v. Smith, 46 N.E.3d 984 (Mass. 2016):
Holding: Even though Defendant previously waived his *Miranda* rights, questioning should have ceased when he said "I'm done" and "I don't want to talk no more," and police should not have kept questioning him in the guise of clarifying his answers.

Com. v. Libby, 2015 WL 3904617 (Mass. 2015):
Holding: Defendant's confession was involuntary where during interrogation after *Miranda* warnings he said he had no money for an attorney, but police told him that a lawyer would only be appointed at arraignment and lawyers "don't just come running out and sit in on an interview" and Defendant would have to "call" a lawyer.

State v. DeAngelo, 98 Crim. L. Rep. 72 (N.M. 10/15/15):
Holding: Under state statute, juveniles under 15 cannot validly Miranda rights unless they can explain to police on the record in their own words what waiver of those rights means; responding "yes" to police questions or signing a waiver form is not sufficient.

State v. Vincenty, 2019 WL 1104543 (N.J. 2019):
Holding: Where (1) Defendant was already incarcerated on another charge; (2) Officers did not inform him at the outset of interrogation that new charges had been filed; (3) Defendant was not informed of the new charges until after he'd waived *Miranda* rights; and (4) Defendant was shocked and surprised when told of the new charges, his *Miranda* waiver was not knowing and voluntary.

Keaundra D. v. Clark Cty. Dep't of Family Serv., 102 Crim. L. Rep. 94 (Nev. 10/5/17):
Holding: Mother's 5th Amendment privilege against self-incrimination was violated when her parental rights were terminated due to her failure to admit that she intentionally

injured her child; Mother cannot be forced to choose between Fifth Amendment right and other important interests.

State v. Baker, 2016 WL 1697911 (Ohio 2016):
Holding: (1) Even though a statute created a presumption that a recorded confession is voluntary, the presumption does not apply to whether the waiver of *Miranda* rights before making the confession was voluntary; (2) applying the statutory presumption to juveniles violates due process.

Com. v. Cooley, 2015 WL 4068720 (Pa. 2015):
Holding: Where Parole Officer handcuffed Defendant-parolee and told him he was under investigation for new crimes, he was in custody for *Miranda* purposes because he would not have felt free to leave.

Squire v. State, 2016 WL 717128 (Fla. App. 2016):
Holding: Where Officer told Defendant he was trying to help him and implied he would not be charged if the shooting was an accident, these were promises of leniency that rendered confession involuntary.

People v. Bridgeford, 2015 WL 6500857 (Cal. App. 2015):
Holding: Even though police released Defendant after he had invoked his right to counsel under *Miranda*, they could not re-arrest him a few hours later and resume interrogation.

People v. Perez, 98 Crim. L. Rep. 337 (Cal. App. 1/8/16):
Holding: Where police told Defendant that he wouldn't be charged as long as he was "honest" and told the truth, this was a promise of leniency that rendered his confession involuntary, even though he was well-educated and not mistreated.

People v. Wright, 2016 WL 197822 (Ill. App. 2016):
Holding: Where Officer handcuffed Defendant, put him in back of police car, engaged him in conversation, at least some of which was about the evidence against him, and had him watch the mother of his children also be put in back of a police car, Defendant was in custody for *Miranda* purposes.

State v. Moore, 2014 WL 7366225 (Ind. App. 2014):
Holding: Where Defendant invoked her right to silence during police interrogation, the "community caretaking" function did not justify police in continuing to interrogate her about children she was babysitting at the time she was arrested; there was no indication the children were in immediate danger, and it was unclear what the police would do with any information about the children anyway.

Friend v. State, 2015 WL 50260878 (Tex. App. 2015):
Holding: In DWI case, even though Defendant had executed a *Miranda* waiver and answered some questions on a police form, he unequivocally invoked his right to silence when he wrote on the form that he was "not saying" in response to questions about

alcohol consumption; Officer's trial testimony that Defendant wrote "not saying" on the form violated Defendant's right to silence.

State v. Powell, 2016 WL 1212574 (Wash. App. 2016):
Holding: Compelling a sex offender to disclose his sexual history in the course of sex treatment violates 5th Amendment privilege against self-incrimination; the State had refused to grant immunity to Defendant for disclosure.

"Jail Time" Credit – DOC Time Credit
(Note: such cases are indexed under "Sentencing Issues" before 2016)

Gray v. Mo. Dept. of Corrections, 2019 WL 2655876 (Mo. App. W.D. June 28, 2019):
Holding: Even though Sec. 506.384.1 provides that no civil action may be brought by a prisoner "until all administrative remedies are exhausted," this did not deprive the court of "subject matter jurisdiction" if Petitioner (who was seeking jail time credit) did not exhaust; instead, the statute is an affirmative defense which Defendant-DOC must timely plead or it is waived.

Lynch v. Hurley, 2019 WL 580431 (Mo. App. W.D. Feb. 13, 2019):
Holding: Even though (1) a habeas court had previously denied Petitioner's jail-time credit claim on grounds that it was not cognizable in habeas and would not lead to his immediate release, but (2) the habeas court then proceeded to address and deny the claim on the merits, Petitioner was not collaterally estopped from re-litigating the jail-time credit claim in a declaratory judgment action because the habeas court's merits ruling was not necessary to dispose of the habeas claim and, thus, was gratuitous surplusage.

Dunn v. Precythe, 2018 WL 2622028 (Mo. App. W.D. July 31, 2018):
Holding: (1) Even though Petitioner/Defendant had been on electronic monitoring/house arrest prior to his conviction and sentence to DOC, he was not entitled to jail time credit for the electronic monitoring/house arrest time under Sec. 558.031.1 because that statute applies only to people who were in jail or custody pre-trial; but (2) Sec. 221.025.2 gives a sentencing judge *discretion* to grant time spent on electronic monitoring toward a DOC sentence, but Petitioner/Defendant did not request this credit at sentencing.

Yowell v. Missouri Department of Corrections, 2016 WL 2338213 (Mo. App. W.D. May 3, 2016):
(1) Even though Defendant's probation was revoked because of consumption of alcohol, where the consumption was in connection with a DWI arrest which could not have occurred without consumption of alcohol, he was entitled to jail time credit because his probation revocation was "related to" the DWI case, but (2) where Defendant received three consecutive sentences, which were later vacated and converted to concurrent sentences, Defendant could receive credit toward only one of the three sentences, because the other two sentences were not running at the time of the credit at issue.

Facts: In 2002, Defendant was placed on probation for DWI in Crawford County. In 2007, Defendant was charged with DWI in Phelps County. After various other events, Defendant was charged with two additional DWI's in Phelps County in 2011. On January 4, 2012, Defendant's probation was revoked for the Crawford County offense. On February 6, 2012, Defendant pleaded guilty to three DWI's in Phelps County and received three consecutive sentences of 7 years each. On September 6, 2013, the Phelps County sentences were vacated. In 2014, Defendant was sentenced to three concurrent sentences in Phelps County. The issue in the case was what credit Defendant should receive toward the *Phelps* County cases.

Holding: (1) DOC contends that Defendant should not receive jail-time credit from January 4, 2012, until February 5, 2012, because his probation revocation in Crawford County was not caused by his Phelps County cases, meaning his time in custody was not "related to" the 2007 and 2011 Phelps cases. For time in custody to be "related to" an offense, there must be some right to be free from custody absent the subsequent offense. However, "related to" is established where the subsequent offense is *one of the causes* of the time in custody, as opposed to the *only* cause; the person has to prove that the subsequent offense would have prevented his release from custody on the prior offense. DOC argues that Defendant's Crawford County revocation was not caused by the 2007 and 2011 Phelps DWI cases, but instead by consumption of alcohol in violation of a special condition of probation. As to the 2007 and first 2011 cases, the DOC is correct. The conduct underlying the 2007 and first 2011 Phelps cases was not one of the grounds of the Crawford revocation on January 4, 2012; separate violation reports about alcohol consumption were filed regarding these cases, and Defendant had remained on probation after those violations. However, in the second 2011 Phelps case, the charge of DWI would not exist without the consumption of alcohol. The incident that led to the new charge is the exact behavior that led to the probation violation and revocation, meaning that, without the consumption of alcohol, Defendant would remain free from custody. Thus, Defendant is entitled to credit on the second Phelps case from January 4, 2012, to February 5, 2012. (2) Regarding the time period from February 6, 2012, to September 6, 2013, Defendant is entitled to credit toward the 2007 Phelps case only, not toward the 2011 Phelps cases. This is because the vacated sentences for the 2011 Phelps cases were originally ordered to be consecutive to the vacated 2007 Phelps case, so Defendant was only serving the vacated sentence for the 2007 Phelps case during this time period and should receive credit only for this time on the newly imposed (2014) sentence for the 2007 Phelps case. In a prior case involving resentencing issues, the court held that the start date of various sentences must "drop down" and begin in order to avoid having a period of incarceration that applies to *none* of the offender's sentences. But that issue does not appear here because Defendant is getting credit toward the 2007 Phelps case. There is no period in which DOC is refusing to give credit to *any* sentence; all periods of time are "accounted for" in some way.

<u>In re Kory v. Gray</u>, 2016 WL 66504 (Mo. App. W.D. Jan. 5, 2016):

(1) Even though State dismissed prior felony charges and filed a new information charging Incident Crime as a misdemeanor, where Defendant had been held in jail for 532 days on prior felony informations or complaints regarding the same Incident Crime, Defendant was entitled to 532 days jail time credit under 558.031.1, since all the service

of jail time was related to the misdemeanor; (2) it would be futile for habeas petitioner (Defendant) to file his habeas petition in lower court where judge had already denied him jail time credit, so Defendant has good cause to file directly in appellate court.
Facts: In 2014, Defendant was charged with a felony and incarcerated in jail for a Criminal Incident. In Summer 2015, the State dismissed the information but filed a new felony complaint the same day about Incident. In December 2015, the State dismissed the complaint and filed an amended information charging Incident as a misdemeanor. Defendant pleaded guilty and was sentenced to one year in county jail. The trial court refused to grant him jail time credit. He filed a writ of habeas corpus.
Holding: (1) Sec. 558.031.1 does not apply only to felony convictions or confinement in DOC; it applies to any confinement following conviction. 558.031.1 provides that a person shall receive jail time credit when the prior time in custody is "related to" the offense. Time is custody is "related to" a sentence if the inmate could have been free from custody absent the charge. Here, Defendant would have been free from custody absent the earlier 2014 information and 2015 complaint about same Incident. The successive charges filed by a single prosecuting entity on the same nuclear of facts resulted in time in custody that was "related to" the ultimate offense of conviction. **(2)** Rule 91.02(a) provides that a habeas petition shall be filed in the circuit court unless good cause is shown to file first in higher court. Here, Defendant would have had to file his petition in circuit court in front of same judge who denied him jail time credit. This would be futile. Thus, Defendant has good cause to file directly in appellate court. Habeas granted.

<u>State ex rel. Koster v. Oxenhandler</u>, 2016 WL 1039446 (Mo. App. W.D. March 15, 2016):
(1) Even though Defendant (Petitioner) had previously been denied habeas relief in another county, Rule 91 does not prohibit a successive habeas petition in a different county where Defendant had been moved; (2) even though the issue on which Defendant obtained habeas relief may not have been pleaded in his petition, Rule 96.01(a) authorizes a court to grant habeas relief "although no petition be presented;" (3) where the trial court ordered an NGRI evaluation before Defendant had filed a notice of intent to rely on NGRI, the trial court erroneously injected the issue of NGRI itself (without having been raised by Defendant) and had no authority to accept the NGRI plea and commit Defendant to DMH; (4) while there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident; (5) although an on-the-record NGRI plea hearing may not be required in every case, it is a "best practice" that is "strongly encouraged" to ensure the plea is knowing and voluntary, to ensure that there is no other defense, and to ensure the defendant understands the consequences of the plea; (6) the "escape rule" does not apply to Rule 91 proceedings, or does not apply here as a matter of discretion; and (7) the trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination.
Facts: In 2004, Defendant was charged with assault. Subsequently, various DMH reports found him incompetent to proceed. In 2006, DMH found him competent. In

April 2007, apparently at the request of the court, DMH also prepared a criminal responsibility report which found that Defendant was NGRI at the time of his offense; the report also stated Defendant's version that the offense was an accident. On July 9, 2007, various bench notes indicate that Defendant filed notice of intent to rely on NGRI that day, and notice that he had no other defense. Also on July 9, 2007, bench notes indicate that the court accepted Defendant's NGRI plea, and committed him to DMH. In 2011, Defendant escaped from DMH in St. Louis; he was soon recaptured. While in St. Louis, Defendant sought habeas relief from his NGRI plea in St. Louis, which was denied. Defendant was transferred to Fulton (Callaway County). He then sought habeas relief from his NGRI plea in Callaway County. The habeas court granted relief on multiple grounds. The habeas court refused to apply the "escape rule." The habeas court also awarded "jail time credit" for all time Defendant spent in DMH. The State appealed. **Holding:** (1) As an initial matter, the State argues that Defendant's Callaway petition is precluded because of the decision on the merits in the St. Louis habeas case. However, Rule 91 does not expressly prohibit the filing of successive habeas petitions in lower courts. (2) The State argues that Defendant's claim was not presented in his petition, but Rule 91.06(a) allows granting of habeas relief even without a petition. (3) Although Sec. 552.030 does not require that a NGRI plea be taken in open court on-the-record, and does not require that a Defendant personally sign the notice that he has no other defense, the plea court here violated due process by not following the required order of the statute. The statute requires that *before* a court can accept an NGRI plea, (i) the Defendant must first inject the issue by timely filing a notice of intent to rely on NGRI; (ii) thereafter, the trial court must order a criminal responsibility evaluation; (iii) the defendant must have no other defense *and* must file a written notice to that effect; and (iv) the criminal responsibility evaluation must support the NGRI defense. Here, the responsibility report was not an authorized pretrial evaluation because it was ordered off-the-record *before* Defendant had asserted his NGRI defense. Also, the report did not support the NGRI defense since it contained Defendant's assertion that the crime was an accident, which was in conflict with Defendant's written notice that he had no other defense, thus raising an issue whether Defendant had a defense he was not willing to waive. By requiring Defendant to submit to a criminal responsibility evaluation before he had asserted the NGRI defense, the trial court erroneously injected the defense itself. The court then accepted the NGRI plea on the very day it was asserted – a procedural impossibility if Secs. 552.020.4 and 552.030.3 are followed, since both sections mandate (and only authorize) the preparation of a responsibility report *after* the NGRI defense is timely asserted *by the accused*. Unless the affirmative defense of NGRI is injected by the accused, the trial court has no authority to acquit of NGRI. (4) A defendant can waive the procedural irregularity of a premature responsibility report; however, to preclude later habeas relief, the court and State should make certain that the defendant's knowing, intelligent and voluntary waiver of the procedural irregularity is demonstrated in the record. While there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve the doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident. (5) Though the appellate court does not decide whether an on-the-record NGRI plea is needed in *every* case, "we *strongly* encourage the practice." An on-the-record inquiry would ensure that

the accused's plea is knowing and voluntary, that he has no other defense, and the he understands the consequences of a plea, including that he may be committed to DMH for longer than a prison term. (6) The "escape rule" does not apply to Rule 91 proceedings, but even if it does, it need not be applied here as a matter of discretion; there is no indication that Defendant's escape adversely affected the criminal justice system. (7) The trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination. Judgment setting aside NGRI plea and remanding case for trial affirmed.

Hinojosa v. Davey, 98 Crim. L. Rep. 7 (9th Cir. 9/25/15):
Holding: Statutory change that eliminated "good time" credits for gang members was unconstitutionally ex post facto as applied to prisoners who committed their offenses before the statutory change; the change had the effect of increasing those prisoners' sentences.

Alcantara v. Hollingsworth, 2016 WL 2593696 (D.N.J. 2016):
Holding: Where Defendant had been convicted in Florida and later New York, and there was no showing that he was awaiting transportation to his officially-designated prison until the date he was sentenced in New York, Defendant was entitled to jail-time credit toward his New York sentence for the period between the two convictions.

In re Stevens, 2015 WL 6688705 (Wash. App. 2015):
Holding: Washington DOC's refusal to credit a prisoner for good time served on a concurrent sentence in Idaho, which did not have a good time credit program, violated Equal Protection; prisoner was being treated differently for serving his sentence under the Interstate Agreement on Detainers than prisoners who receive credit under the Interstate Corrections Compact.

Joinder/Severance

*** Kansas v. Carr, 2016 WL 228342, ___ U.S. ___ (U.S. Jan. 20, 2016):**
Holding: (1) The Eighth Amendment does not require that jurors in death penalty cases be instructed that mitigating circumstances need not be proven beyond a reasonable doubt; (2) capital codefendants' penalty phases need not be severed.

State v. Gialloreto, 2019 WL 7183309 (Or. App. 2019):
Holding: Rape charges during a robbery and burglary should have been severed from public indecency charges where (1) the indecency charges arose over several dates but the rape charge on a single date, and (2) the charges didn't involve the same or similar evidence, victims, locations, intent or modus operandi.

Judges – Recusal – Improper Conduct – Effect on Counsel – Powers

State ex rel. Richardson v. May, 565 S.W.3d 191 (Mo. banc Jan. 15, 2019):
Holding: Even though the State in 2018 filed a superseding indictment against Defendant which added new charges and Defendant filed his application for automatic change of judge within 10 days of his initial plea to the new charges, where Defendant had originally been charged in 2016 and entered his (original) initial plea of not guilty at that time, his application for automatic change of judge filed in 2018 was untimely because Rule 32.07(b) requires the application for change of judge be filed in "cases" – not charges -- within 10 days of the initial plea.
Discussion: Rule 32.07(b) provides that "in felony and misdemeanor *cases* the application must be filed not later than 10 days after *the initial plea* is entered." Defendant argues his application was timely because it was filed within 10 days of his initial plea on the new charges in the superseding indictment. Rule 32.07(b) expressly refers to "cases," not "charges." The Rule refers singularly to "the application" and requires it to be filed within 10 days of the single "initial plea" in the case. Defendant's plea of not guilty to the new *charges* was not the "initial plea" in the criminal *case*. His application filed in 2018 was untimely.

Fed. Home Loan Mortgage Corp. v. Pennington-Thurman, 2020 WL 1860678 (Mo. App. E.D. April 14, 2020):
Holding: Where (1) Defendant was served with process on August 22, 2018, for suit in state court; (2) on August 23, 2018, the suit was removed to federal court; (3) the case was remanded back to state court on February 14, 2019; and (4) Defendant filed her application for automatic change of judge on April 1, 2019, the application was timely because Rule 55.34 states that the date of the remand order is deemed to be the date of "service" for determining when a pleading shall be filed or an action taken, and Rule 51.05(b) grants 60 days from "service" to file for automatic change of judge. Because of Rule 55.34, the April 1 application was filed within 60 days of "service." Trial court erred in ruling that application for change of judge was untimely.

State ex rel. Evers v. Hogan, 2019 WL 3917507 (Mo. App. E.D. Aug. 20, 2019):
Holding: The automatic right to change of judge under Rule 32.07 applies to a judge who will conduct a bond hearing, and not just to trial judges; motion must be granted if filed not later than 10 days after initial plea is entered, or if the designation of the judge occurs more than 10 days after initial plea, within 10 days of designation of the trial judge or prior to commencement of any proceedings on the record, whichever is earlier. But Eastern District transfers case to Missouri Supreme Court due to general interest and importance.

State ex rel. Acuity v. Thornhill, 516 S.W.3d 400 (Mo. App. E.D. April 11, 2017):
Holding: Where Plaintiff timely filed for a change of judge under Sec. 517.061 in Associate Circuit Court, the court was required to grant it, even though the time limits under Sec. 517.061 are different than under Rule 51.05(b).
Discussion: Judge argues that Rule 51.05(b)'s time limits applied, and where there is a conflict between a Supreme Court rule and a statute, the rule prevails. However, under

Rule 41.01(d), courts defer to legislative enactment establishing specialized procedures for actions before association circuit divisions. In Sec. 517.061, the legislature enacted a different time limit than Rule 51.05(b). The Judge was required to follow 517.061 and recuse himself. Writ of prohibition granted even though trial has already occurred.

State ex rel. Waack v. Thornhill, 515 S.W.3d 839 (Mo. App. E.D. April 11, 2017):
Holding: Where Defendant timely filed for a change of judge under Sec. 517.061 in Associate Circuit Court, the court was required to grant it, even though the time limits under Sec. 517.061 are different than under Rule 51.05(b).
Discussion: Judge argues that Rule 51.05(b)'s time limits applied, and where there is a conflict between a Supreme Court rule and a statute, the rule prevails. However, under Rule 41.01(d), courts defer to legislative enactment establishing specialized procedures for actions before association circuit divisions. In Sec. 517.061, the legislature enacted a different time limit than Rule 51.05(b). The Judge was required to follow 517.061 and recuse himself. Writ of prohibition granted.

State ex rel. Patterson v. Holden, 2019 WL 4439486 (Mo. App. S.D. September 17, 2019):
Holding: Where circuit judge unilaterally established a "Domestic Abuse" "treatment court" and ordered Defendants to participate in it as part of their sentence, this was unauthorized under Secs. 478.001 to 478.009 (governing creation of treatment courts) and local court rules, which generally require that such courts be created by a majority of judges in the circuit and certain judges be designated by that majority to preside over the courts.

In the Matter of Care and Treatment of Jones, 565 S.W.3d 704 (Mo. App. S.D. Dec. 5, 2018):
Holding: Rule 51.05, allowing automatic change of judge without cause, applies to sexually violent predator proceedings under Sec. 632.480.

In re Marriage of Speir, 2018 WL 718534 (Mo. App. S.D. Feb. 6, 2018):
Even though Defendant had appeared before Judge for a motion hearing, Defendant was still entitled to change of Judge under Rule 51.05(b), because his application for change of judge was filed within 60 days from service of process, which was the applicable time period, where no trial had yet been set.
Facts: Defendant was served with a legal action on Oct. 5. Defendant's attorney appeared for a motion hearing in the case on Oct. 24. Also on Oct. 24, Defendant filed an application for change of judge under Rule 51.05(b). Judge denied the motion on grounds that Defendant had appeared at the motion hearing. Defendant appealed.
Holding: Rule 51.05(b) states the application "must be filed within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer. If the designation of the trial judge occurs less than 30 days before trial, the application must be filed prior to any appearance before the trial judge." Here, Defendant was entitled to the longer 60-day period from service of process. The trial court based its decision on the second clause of the second sentence, completely omitting the conditional clause. There was no trial set at the time the motion for change of judge was filed. The

condition precedent of the second sentence – that the trial judge be designated less than 30 days before trial – was not met; therefore, the subsequent clause regarding appearance before the judge was not applicable. Change of judge should have been granted.

State ex rel. Bollinger v. Bernstein, 2016 WL 6750712 (Mo. App. S.D. Nov. 15, 2016):

Holding: (1) Where Defendant pleaded guilty to an offense charged by traffic ticket, was sentenced to a fine, and a written judgment and sentence was entered, the judgment in the criminal case was "final" and the trial court could not, *sua sponte*, set it aside later the same day without stating any grounds for doing so; (2) even though Rule 29.13(a) allows a trial court to set aside a criminal judgment within 30 days of entry if either the facts stated in the indictment or information did not constitute an offense *or* the court lacked jurisdiction, where the trial court waited 16 months to claim that it had lacked jurisdiction because the State had not filed an information (and also claimed Defendant had not paid the fine) but then abandoned that argument on appeal, the Rule did not authorize setting aside the final judgment. Writ of prohibition prohibiting setting aside the plea made permanent.

In re: Marriage of Farris v. Farris, 2016 WL 1573186 (Mo. App. S.D. April 18, 2016):

Holding: Trial court should have granted Husband's motion to recuse judge because a reasonable person would find an appearance of impropriety and doubt the impartiality of the court. Court made numerous statements during trial which showed prejudgment of the case, such as that Husband was "just wasting everyone's time;" that none of Husband's evidence would "make a difference" in how the court was going to rule; that court had "all the evidence I need;" and that Husband was "beating a dead horse" in putting on his evidence. Court also made statements showing bias against Husband, such as that Husband was "egocentrical, self-centered," arrogant; that court was "going to admit [the exhibit] into evidence because it shows just how foolish you are;" that Husband was asking "stupid, stupid, stupid questions;" and that Husband was a "narcissistic [person] who can't be dealt with," a "drama queen," and someone who "whines all day."

Roberts v. Shaw, 2016 WL 1158239 (Mo. App. S.D. March 23, 2016):

Holding: (1) A successor judge is without power to render a judgment based on testimony and evidence heard by his predecessor absent a stipulation by the parties allowing the successor judge to decide the case; where there is no stipulation by the parties to allow a successor judge to decide the case, the judge must grant a new trial; and (2) although Rule 79.01 allows a successor judge to perform the duties of a predecessor judge, this applies only "after a verdict is returned or findings of fact are filed" by the predecessor; where there was no verdict or findings by the predecessor, the successor must grant a new trial.

State v. Alqabbaa, 2016 WL 1253847 (Mo. App. S.D. March 30, 2016):
Even though after Prosecutor filed a nolle prosequi, the trial court purported to dismiss the case with prejudice, the trial court had no authority to take any action after the nolle prosequi; thus, trial court erred in dismissing the re-filed case on grounds that it had dismissed the prior case with prejudice.
Facts: Defendant was charged with various offenses. On the morning of trial, the State entered an oral nolle prosequi. The trial court then dismissed the case "with prejudice" on grounds that allowing the State to refile would violate Defendant's constitutional rights, although the court did not specify which rights. Later, the State refiled the case. The trial court granted a motion to dismiss on grounds that the first case was dismissed with prejudice. The State appealed.
Holding: Sec. 56.087 allows a prosecutor to dismiss a case without prejudice before double jeopardy has attached. Once the State dismisses, there is no case before the trial court, and any purported actions by the trial court are nullities. Here, the trial court was without authority to dismiss with first case "with prejudice," because the State had already dismissed it. Thus, it could not rely on that dismissal to dismiss the re-filed case.

Gall v. Steele, 2016 WL 7094037 (Mo. App. W.D. Dec. 6, 2016):
Holding: Even though declaratory judgment action involving the power of 2nd Circuit Judge to appoint clerks was heard by 13th Circuit Judge, the case was not one in which one circuit court was improperly exercising powers over another circuit court. "[T]his case involves a declaratory judgment action as provided by Sec. 527.010 and Rule 87. As such the Thirteenth Judicial Circuit did not assert superintending control over the Second Judicial Circuit, but, instead, this case was tried as a contested declaratory judgment action as provided by law."

State v. Larsen, 2016 WL 4374255 (Mo. App. W.D. Aug. 16, 2016):
Even though (1) Sec. 479.170.1 states that where it "shall appear" to a municipal judge that an offense is not cognizable in municipal court, the judge shall refer it to state court; and (2) Sec. 479.170.2 states that DWI offenses in which a defendant has two or more prior DWI convictions are not cognizable in municipal court, where the municipal judge accepted Defendant's guilty plea to DWI and sentenced him, double jeopardy precluded the State from later charging Defendant with the same DWI in state court. This is because the municipal court had subject matter jurisdiction to hear the DWI case. Even assuming that Sec. 479.170 was a restriction upon the municipal court's authority, the statute did not prohibit the judge's actions here because it only requires a judge to refer a case to state court where it "appear[s]" to the judge that such referral is required, and there was no evidence before the judge indicating that Defendant had two or more prior convictions.
Facts: Defendant pleaded guilty and was sentenced in municipal court for DWI. Later, the State charged Defendant, as a persistent DWI offender, with the same incident in State court. The trial court granted Defendant's motion to dismiss on double jeopardy grounds. The State appealed.
Discussion: The State claims that Sec. 479.170 prohibited the municipal judge from hearing the municipal DWI case, and that its judgment is a nullity. But the State's jurisdictional argument is not valid after *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d

349 (Mo. banc 2009), which rejected the notion of "jurisdictional competence." Art. V, Sec. 23, Mo.Const., gives municipal judges the power to hear municipal ordinance violations. Thus, the municipal court had subject matter jurisdiction. The State's argument that Sec. 479.170 imposes a restriction on the municipal court's authority is nothing more than a "jurisdictional competence" argument, not a subject matter jurisdiction argument. Moreover, the statute's plain language requires a municipal judge to refer a case to state court only when it "appear[s]" to the judge that referral is required. Here, there was no evidence before the municipal judge of Defendant's prior convictions. Dismissal on double jeopardy grounds affirmed.

* **Ortiz v. United States, ___ U.S. ___, 138 S.Ct. 2165 (U.S. June 22, 2018):**
Holding: (1) Even though the Court of Appeals for the Armed Forces (CAAF) was established under Article I and is in the Executive Branch, the Supreme Court has appellate jurisdiction over its decisions because the Court's appellate jurisdiction includes more than just Article III courts, e.g., state courts, and courts of U.S. territories and the District of Columbia; (2) a military officer's simultaneous service as a judge on both the Air Force appeals court and the Court of Military Commission Review (CMCR) did not violate either 10 U.S.C. Sec. 973(b)(which prohibits an active-duty military officer from holding certain civil offices) or the constitution's Appointments Clause; the Appointments Clause does not impose rules about service in dual offices or prohibit service in dual offices, but only establishes procedures for how office holders are appointed.

*** Rippo v. Baker, 137 S.Ct. 905 (U.S. March 6, 2017):**
Holding: A defendant who seeks to disqualify a judge for bias need only show that, as an objective matter, the average judge in the situation would not likely be neutral and the risk of bias is high; proof of actual, subjective bias is not required.

* **Williams v. Pennsylvania, ___ U.S. ___, 136 S.Ct. 1899 (U.S. June 9, 2016):**
Holding: Due process requires that a state supreme court justice be disqualified from judging a postconviction case where the judge had previously been the prosecutor who authorized seeking the death penalty in the underlying criminal case; the test for disqualification is objective, "which avoids having to determine whether actual bias is present;" the test is "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."

U.S. v. Lefsih, 101 Crim. L. Rep. 536 (4th Cir. 8/14/17):
Holding: Defendant entitled to new trial in visa fraud case where Judge showed bias by saying Congress created the visa program for the "bottom hundred" immigrants who have no "skill or education" and will "drag along … ten kids and four wives."

Schmidt v. Foster, 103 Crim. L. Rep. 245 (7th Cir. 5/29/18):
Holding: Defendant's right to counsel was violated when Judge questioned Defendant about mitigating circumstances in his case outside the presence of his counsel; the conversation in the Judge's chambers was a critical stage at which the right to counsel attached.

U.S. v. Nickle, 98 Crim. L. Rep. 619 (9th Cir. 3/21/16):
Holding: Judge has no authority to reject a guilty plea because he wants Defendant to state and admit extra details beyond the statutory elements of the crime; a judge can reject a plea only if Defendant is disputing guilt or doesn't understand the charges.

U.S. v. Krueger, 2015 WL 6904338 (10th Cir. 2015):
Holding: Defendant was prejudiced by seizure of evidence in Oklahoma pursuant to a warrant issued by a Kansas magistrate, since the Kansas magistrate lacked authority to issue the warrant.

Sales v. State, 2015 WL 662300 (Ga. 2015):
Holding: Where trial court stated in voir dire that "this happened in Taylor County," this impermissibly expressed a judicial opinion on a disputed factual issue at trial (venue).

State v. Rice, 2016 WL 2941118 (Md. 2016):
Holding: Trial court lacked authority to deny State's motion to compel a witness to give immunized testimony.

People v. Stevens, 97 Crim. L. Rep. 450 (Mich. 7/23/15):
Holding: Where trial judge questioned defense witnesses in a manner that took on the prosecutor's role, Defendant was denied a fair and impartial judge, and was granted new trial before a different judge; judicial bias is structural error.

North Carolina v. Bartlett, 98 Crim. L. Rep. 9 (N.C. 9/25/15):
Holding: If a judge before leaving office fails to sign a written order that required deciding a material fact from a suppression hearing, the new judge must rehear the evidence and issue a fresh ruling; this is because a trial judge is in no better position to decide facts from a cold record than appellate court would be.

State v. Thomas, 2016 WL 3402040 (N.M. June 20, 2016):
Holding: Although there is no bright-line ban prohibiting judicial use of social media, friending, online postings, and other activity can easily be misconstrued and create an appearance of impropriety.

State v. MacFarlane, 99 Crim. L. Rep. 49 (N.J. 4/7/16):
Holding: Even though 13 months after sentencing, Judge s
aid in a different case that he "always gives 60 years" for murder, Defendant, who had previously received 60 years, was entitled to resentencing on grounds that the judge "arbitrarily imposed a predetermined sentence;" this was true even though Judge in Defendant's case had specifically cited aggravating and mitigating factors in sentencing Defendant.

People v. Novak, 102 Crim. L. Rep. 118 (N.Y. 10/24/17):
Holding: Due process precluded an appellate judge from ruling in a case which they presided over as a trial judge.

State v. Brown, 2015 WL 687503 (Ohio 2015):
Holding: Probate judge does not have authority to issue criminal search warrants.

F.C.L. v. Agustin, 2015 WL 2248175 (Or. 2015):
Holding: Trial court violated due process and gave overly coercive warnings to Defendant about the risks of testifying falsely, where before Defendant took the stand, trial court warned Defendant that it had already found the State's witnesses to be credible; a reasonable person in Defendant's position would believe that the court had abandoned its role as a neutral factfinder and already decided that Defendant was lying if he testified.

State v. Williams, 2015 WL 5061254 (Alaska App. 2015):
Holding: Even though state statute may give Executive branch the power to initiate criminal contempt proceedings for failing to comply with a court order, the ultimate authority over whether such a charge can proceed lies with the court whose order has been violated; the Executive branch cannot force a court to adjudicate a criminal contempt that the court does not believe is warranted.

People v. Pace, 2015 WL 5316768 (Ill. App. 2015):
Holding: Where trial judge said at sentencing that he would consider defendant's "allocution, which he did not avail himself of," this showed that Defendant was being improperly punished for exercising his right to silence and privilege against self-incrimination at allocution, and warranted resentencing.

People v. McClendon, 2015 WL 5016612 (Ill. App. 2015):
Holding: Denial of Defendant's timely and unopposed motion to withdraw guilty plea was not warranted; judicial discretion should not be used to override prosecutorial discretion in the absence of compelling reasons.

Jury Instructions

State v. Knox, 2020 WL 4592034 (Mo. banc Aug. 11, 2020):
Holding: (1) Where the jury instructions in stealing case failed to specify any value for a watch and Bluetooth speaker that were stolen, the offense is a Class D misdemeanor under Sec. 570.030.7 (which specifies value less than $150), not a Class A misdemeanor under Section 570.030.8 (which applies when "no other penalty is specified"); and (2) where Defendant was convicted of stealing $1200 in cash, this was a Class D felony under Sec. 570.030.5(1), not a Class C felony (as it was under the pre-2017 criminal code); but since Defendant's actual sentence was within the range for a Class D felony, re-sentencing is not required and the sentence can be corrected by *nunc pro tunc* order.
Discussion: The "new" Criminal Code makes stealing more than $750 but less than $25,000 a Class D felony, Sec. 570.030.5(1). The Code makes stealing less than $150 a Class D misdemeanor, Sec. 570.030.7. The Code does not specify what happens for property valued between $150 and $750, but the Code states that if "no other penalty is specified in this section," the offense is a Class A misdemeanor, Sec. 570.030.8. Regarding the stolen watch and Bluetooth, the jury wasn't instructed to find any value. The State argues that this makes the offense a Class A misdemeanor, because that was the default position under the old criminal code. But this ignores that the State bears the burden of proof on every element of the crime, and that when the legislature amends a statute, it is intended to accomplish a result. When the legislature enacted the new criminal code, it added 570.030.7 that makes stealing less than $150 a Class D misdemeanor. The State's argument would render .7 a nullity. Under the new Code, a stealing between $150 and $750 is a Class A misdemeanor because "no other penalty is specified." But here, there is a penalty specified for less than $150, and that's a Class D misdemeanor. Since the State failed to prove the element of value, the offenses here were Class D misdemeanors. Trial court erred in entering judgments for Class A misdemeanors for stealing the watch and Bluetooth.

State v. Brandolese, 2020 WL 3529369 (Mo. banc June 30, 2020):
Holding: (1) Even though the sister of an assistant prosecutor who had worked on the case before trial served on the jury, it was not plain error for the court to fail to strike the juror; even assuming that Sister-Juror's service on jury violated Sec. 494.470.1 regarding disqualifying family relationships of jurors, Defendant has not shown how Sister-Juror was biased or unfair (she made no statements on voir dire evidencing bias), and has not shown Sister-Juror was even aware that her brother had previously worked on the case; even assuming this is "structural error," all errors alleging plain error under Rule 30.20 -- whether statutory, constitutional or structural – must be evaluated under the same manifest injustice framework; and (2) even though Defendant did not agree to the State's self-defense instruction (which was submitted), where Defendant also submitted proposed self-defense instructions that were improper and did not comply with MAI, Defendant "invited" error and cannot show plain error in submitting the State's instructions at trial.

State v. Michaud, 2019 WL 6710282 (Mo. banc Dec. 10, 2019):
Holding: In attempted enticement of child case, Sec. 566.151, RSMo. Supp. 2006, trial court did not err in refusing Defendant's non-MAI instruction that required jury to find that Defendant knew Victim was younger than 15 years old, because the jury was instructed in the approved MAI instruction that it had to find that Defendant purposefully attempted to commit enticement of a child, which includes the finding that Victim was younger than 15; the jury was not required to make the same finding twice.

State v. Barnett, 577 S.W.3d 124 (Mo. banc July 16, 2019):
Even though Defendant testified he did not stab Victim (which was contrary to the State's evidence and third-party witness testimony), Defendant was entitled to a self-defense instruction because the evidence viewed favorably to Defendant supported it; the test for a self-defense instruction remains the same regardless of which party introduced the testimony supporting the instruction and regardless of whether Defendant testified to the contrary.
Facts: Victim approached Defendant after they both left and bar, and threatened to kill him. Defendant testified he saw a metal object in Victim's hand. Defendant testified he then shoved Victim to ground and left. The Victim was later found with stab wounds. Defendant denied stabbing Victim but claimed he acted in self-defense. Defendant's request for a self-defense instruction was refused.
Holding: The State claims Defendant is entitled to a self-defense instruction only if the evidence supporting the theory of self-defense was offered by the State or testimony of a third-party Witness. But while there are old cases supporting the State's argument, those cases are based on a wrong reading of applicable law and should no longer be followed. A court is required to submit an instruction if there is substantial evidence to support it, and that rule does not change when Defendant's testimony contradicts the requested instruction. This would usurp the jury's fact-finder role. When the evidence supports two conflicting versions, even when both versions have been provided by Defendant, the court must refrain from determining which version is correct. The question whether a Defendant is entitled to an instruction cannot turn on which party introduced the evidence supporting the instruction. Going forward, it will be simplest if, when determining whether a defendant is entitled to an instruction, the court evaluates each requested instruction individually. When the instruction is supported by the evidence, it should be given regardless of any other instruction also being given.

State v. Rice, 2019 WL 1446931 (Mo. banc April 2, 2019):
(1) Trial court erred in first-degree murder case in not giving voluntary manslaughter instruction because there was evidence from which jury could find Defendant acted from sudden passion, in that Victims had told Defendant he would not see his son again and had assaulted Defendant; (2) Defendant's right to silence was violated where, after Miranda, Officer continued to interrogate Defendant after he said "I don't wanna talk no more" and "I got nothing to say," and "I don't wanna talk"; (3) Prosecutor improperly commented on Defendant's post-Miranda silence when he asked Officer if Defendant had answered questions and Officer said he did not, and introduced Defendant's statements that he did not want to talk; and (4) Prosecutor's closing penalty phase argument that Defendant was "the 13th juror and if I'd been allowed to ask him those questions last

week, he would have told us…" and that Defendant had not apologized for the crime were improper direct references to Defendant's right not to testify.
Facts: Defendant killed two Victims – his former Girlfriend and her boyfriend, after Girlfriend told Defendant he would not see his son again. Defendant went to Victims' house. Victims attacked Defendant. Defendant shot them. Defendant fled and was chased by police. Defendant had a shootout with police, and was himself shot. He was taken to hospital and questioned by police. Defendant, after *Miranda*, said "I don't wanna talk no more," and "I don't wanna talk," but police continued to question him. The trial court refused Defendant's requested voluntary manslaughter and accompanying second-degree murder instruction.
Discussion: (1) The refused voluntary manslaughter instruction and second-degree murder instruction properly tracked MAI-CR3d 314.08 and 314.04. A voluntary manslaughter instruction must be given when a party timely requests it; there is a basis for acquitting of the charged offense; and there is a basis for convicting of the lesser. Here, Defendant requested the instruction, and there is always a basis for acquitting of the greater since a jury never has to believe the State's evidence. The issue is whether there was a basis for convicting of the lesser. Here, there was because Victims told Defendant he would never see his son again, and Victims assaulted Defendant; this was sufficient evidence for a jury to find sudden passion arising from adequate cause. (2) Defendant's statements that he did not want to talk were unequivocal invocations of his right to silence. Even though Officer did stop interrogation for 20-30 minutes, this was not passage of a significant period of time to be able to resume interrogation. Defendant's statements should have been suppressed. (3) The trial court violated *Doyle v. Ohio* by admitting evidence of Defendant's silence and that he didn't want to talk. Silence does not only mean muteness; it includes a statement that Defendant wants to remain silent. (4) The Prosecutor's closing argument that Defendant was a "13th juror and if I'd been allowed to ask him those questions last week, he would have told us…" and that Defendant had not apologized for the crime were direct references to Defendant's failure to testify. The State's claim that the comments referred to voir dire are far-fetched because a Defendant never testifies on voir dire.

State v. Holmsley, 2018 WL 4326408 (Mo. banc Sept. 11, 2018):
Where Defendant was charged with sodomy and attempted sodomy for committing certain acts with the purpose of "terrorizing" the victims and the instructions submitted the case on this theory, the State in closing argument argued that jurors could convict Defendant if they found that he committed the acts for "sexual gratification" was improper because it misstated the law and was misleading to jurors, and trial court abused discretion in overruling Defendant's request for a curative instruction on this disputed element in the case.
Facts: Defendant, a high school football player, was charged with first degree sodomy and attempted first degree sodomy after he and other senior players entered the dorm room of junior classman at a football camp, and tried to insert objects in the juniors' anuses through their clothing. The State charged Defendant with sodomy and attempted sodomy for "terrorizing" the victims. The State never claimed before trial that the acts were done for "sexual gratification." The defense claimed the acts were pranks, not sexual acts intended to "terrorize" the victims, and thus, Defendant lacked the mental

state for the crimes. During closing, the State argued the jury could convict if it found that Defendant committed the acts either for "terrorizing" the victims, or for "sexual gratification." The trial court sustained Defendant's objection to the argument, but refused to give a curative instruction to disregard.
Holding: At the time of the charged crimes, Sec. 566.060.1 defined "deviate sexual intercourse" as committing certain acts for the purpose of "gratifying the sexual desire of any person *or* for the purpose of terrorizing the victim." The instructions submitted the case only on a terrorizing theory. However, the State told the jury it could convict "for either sexual gratification," or "to terrorize." In doing so, the State misrepresented the law before the jury, and injected misleading and contradictory statements about the law. Defendant was prejudiced because the State's improper argument went to the disputed issue in the case. Defendant never denied committing the charged acts; rather his defense was that the acts were pranks, not a sexual act intended to terrorize. Reversed for new trial.

State v. Bruner, 2018 WL 414948 (Mo. banc Jan. 16, 2018):
Whether a self-defense instruction is required is based on the elements in Sec. 563.031; the common law elements of self-defense and cases citing the common law elements are no longer to be followed.
Facts: When Defendant learned that his estranged wife was out with another man, he went looking for them. When he found them, Defendant began to verbally confront his wife. The man then assumed a "fighting stance," and said he would "have your throat slit in two hours." The man did not move toward Defendant or attempt to hit him. Defendant shot and killed the man. Defendant testified at trial, but did not testify that he acted in self-defense. Instead, he testified he shot the man when Defendant was in a dissociative state. Nevertheless, the defense sought a self-defense instruction, which was denied. Defendant was convicted of first-degree murder.
Holding: In order to receive a self-defense instruction, self-defense must be shown by substantial evidence. The elements of self-defense that must be shown are set out in Sec. 563.031. As relevant here, before use of force can be justified, Defendant must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful force by another, Sec. 563.031.1. Defendant may use deadly force only if he reasonably believes that such deadly force is necessary to protect himself against death, serious physical injury, or any forcible felony, Sec. 563.031.2(1). Sec. 563.031.1(1) also provides that force may not be used if the Defendant was the "initial aggressor." The State and Defendant quote from cases setting out a common law test for self-defense, which includes the absence of aggression or provocation; real or apparent necessity to use deadly force; reasonable cause for belief that deadly force is necessary; and attempt to avoid the danger. While these elements largely, but not completely, parallel the elements of self-defense under the statute, it is the statute that necessarily must govern what is required to inject self-defense. Reliance on cases addressing what is required under a different test is not helpful and such cases should no longer be followed. Here, Defendant did not testify he acted in self-defense. A victim's words alone are insufficient to support a claim of self-defense. Neither is deadly force justified in response to fear of being grabbed or punched. At most, Defendant showed a fear of simple assault or battery, but deadly force cannot be used to

repel simple assault and battery. Deadly force is only justified when Defendant reasonably believes such force is necessary to protect from death, serious physical injury, or a forcible felony. That's not the case here, so self-defense instruction need not be given.

State v. Oates, 2018 WL 830311 (Mo. banc Feb. 13, 2018):
Self-defense is not available as a defense to felony murder unless the underlying felony involves the use of force; Defendant was not entitled to self-defense instruction where the underlying felony was attempting to distribute a controlled substance.
Facts: Defendant shot and killed two people while trying to sell them marijuana. He was charged with conventional second degree murder, and an alternative count of felony murder for the killing during the drug deal. The trial court instructed the jury on conventional murder, and lesser offenses of voluntary and involuntary manslaughter – all with self-defense instructions. The trial court also instructed on felony murder, but refused a self-defense instruction on felony murder. The jury convicted of felony murder.
Holding: Pre-2007 cases hold that self-defense is not an available defense to felony murder. Defendant argues that amendments to Secs. 563.031.1 and 563.074.1 in 2007 changed this. However, the 2007 changes did not alter the principle that self-defense justifies only the use of force and is, therefore, a defense only to prosecution for the use of force. Where, as here, the prosecution for felony murder is not based on Defendant's use of force, but rather the underlying felony of attempting to distribute drugs, self-defense is not an available defense. In other words, unless the underlying felony involves the defendant's use of force, felony murder is not prosecuting the Defendant's use of force. Felony murder is prosecuting a different act – the commission of a felony that results in the death of person.

State v. Jensen, 524 S.W.3d 33 (Mo. banc July 11, 2017):
Even though (1) jury in first degree murder trial was instructed on second degree murder and voluntary manslaughter, and (2) jury found Defendant guilty of second degree murder, trial court prejudicially erred in failing to give nested lesser of involuntary manslaughter because this would have tested whether Defendant acted "recklessly" instead of "knowingly;" the failure to instruct on a nested lesser is prejudicial when the lesser offense that was actually submitted at trial did not "test" the same element of the greater offense the omitted lesser would have challenged.
Facts: Defendant was charged with first degree murder. The trial court instructed on second degree murder and voluntary manslaughter, but refused an instruction for involuntary manslaughter. The jury convicted of second degree murder.
Holding: Defendant contends the court erred in not instructing on the nested lesser offense of involuntary manslaughter. The differential element distinguishing second degree murder and involuntary manslaughter is whether Defendant acted "knowingly" instead of "recklessly." Prejudice is presumed when a trial court refused to give a properly requested nested lesser. But here the State argues that the presumption of prejudice is rebutted because the jury had the option of convicting Defendant of the lesser offense of voluntary manslaughter, but instead, convicted him of the greater offense of second degree murder. However, the failure to instruct on a nested lesser is prejudicial

when the lesser offense that was actually submitted at trial did not "test" the same element of the greater offense the omitted lesser would have challenged. By convicting of second degree murder, not voluntary manslaughter, the jury determined Defendant did not cause Victim's death under the influence of sudden passion arising from adequate cause. The voluntary manslaughter instruction did not test directly whether Defendant acted "recklessly" instead of "knowingly." Thus, the State has not rebutted the presumption of prejudice.

State v. Brown, 2017 WL 2952448 (Mo. banc July 11, 2017):
(1) Third degree assault for recklessly creating a "grave risk" of death or serious physical injury, Sec. 565.070.1(4), is not a "nested" lesser included offense of first degree assault, Sec. 565.050, because it is possible to commit first degree assault by purposefully attempting to kill or cause seriously physical injury without also creating a "grave risk" of death or serious physical injury, but (2) third degree assault is a designated lesser under Sec. 556.046.1(2); as a designated lesser, there must be evidence to support giving it, which there was here; and (3) even though the jury rejected a lesser for second degree assault, Defendant was prejudiced by the failure to give the third degree assault instruction because it would have tested whether Defendant acted "recklessly" as opposed to "purposely."
Facts: Defendant pointed a gun at Victim and shot him. Defendant was convicted of first degree assault, Sec. 565.050. The trial court instructed on the lesser offense of second degree assault, Sec. 565.060, but refused Defendant's requested instruction for third degree assault, Sec. 565.070.1(4), that Defendant recklessly created a grave risk of death or serious physical injury.
Holding: A defendant is entitled to a lesser instruction if he timely requests it; there is a basis in the evidence for acquitting of the charged offense; and there is a basis for convicting of the lesser offense. In every case, there is a basis to acquit of the charged offense because the jury is free to disbelieve the State's evidence. Here, the parties agree there is a basis for convicting of the lesser, but disagree on the analysis. Defendant contends that third degree assault is a "nested" lesser because it is impossible to commit the greater without committing the lesser. The State contends third degree assault is not a "nested" lesser but, instead, is a designated lesser under Sec. 556.046.1(2). The State is correct. Third degree assault is not a "nested" lesser because it requires proof of a "grave risk" of death or serious physical injury, while first degree assault requires proof of an attempt to kill or cause serious physical injury. It is possible to commit first degree assault by purposefully attempting to kill or cause serious physical injury without also creating the "grave risk" of death or serious physical injury. Thus, third degree assault does not consist of a subset of the elements of first degree assault. Even though third degree assault is not a "nested" lesser, it is specifically denominated a lesser by Sec. 565.046.1(2), but since is it not "nested," there is not always a basis in the evidence to convict of the lesser. The lesser must be based on the evidence in the case. Here, viewing the evidence in the light most favorable to Defendant, there was a basis to convict of the lesser. But the State argues there is no prejudice because the jury was instructed on second degree assault but found the greater offense. However, the second degree instruction did not test whether Defendant acted "recklessly" (instead of "purposely") which is what the third degree assault instruction would have done.

State v. Sanders, 522 S.W.3d 212 (Mo. banc July 11, 2017):
Even though involuntary manslaughter is a nested lesser included offense of second degree murder, trial court properly rejected involuntary manslaughter instruction which did not track the manner in which the greater offense was charged; i.e., where Defendant was charged with second degree murder for "kicking and strangling" Victim, but requested lesser stated only that Defendant "kicked" Victim, this was properly rejected because it deviated from the charged greater offense.
Facts: Defendant was charged with second degree murder for "kicking and strangling" Victim. At trial, Defendant testified he kicked Victim but didn't strangle her. The trial court instructed on second degree murder and voluntary manslaughter, but refused Defendant's involuntary manslaughter instruction which required the jury to find Defendant recklessly caused Victim's death only by kicking her.
Holding: Defendant contends the trial court erred in refusing to submit the nested lesser included offense of involuntary manslaughter. Prejudice is presumed when a court fails to give a requested instruction on a nested lesser offense. But a court does not commit error in rejecting an improper instruction for the lesser. Sec. 566.046.1 provides that a person may be convicted of an offenses included in "an offense charged in the indictment or information." Sec. 556.046.2 provides that the court shall not be required to instruct on a lesser unless there is a basis for a verdict acquitting of "the offense charged" and convicting of the lesser. This means the lesser crime must be included in the higher crime *with which the accused is specially charged,* and the averments of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the lesser. Here, involuntary manslaughter is a nested lesser of second degree murder, but the court did not err in rejecting the instruction because Defendant's instruction deviated from the manner in which the greater crime is charged in the pleading, i.e., it omitted the criminal conduct of "strangling."
Dissenting opinion: Defendant's instruction was based on the same, but less, facts than those charged. It comported with his theory at trial that he kicked but did not strangle Victim. To hold that instructions may only mirror the language of the state's information precludes a defendant from ever alleging he committed a subset of the conduct charged and allows the state to frame all the instructions based only its factual theory of the crime.

State v. Smith, 522 S.W.3d 221 (Mo. banc July 11, 2017):
Holding: (1) In first-degree burglary case, Defendant was entitled to nested lesser-included instruction for first-degree trespass, and failure to give it was not harmless even though jury was instructed on (but did not find) second-degree burglary; a trespassing instruction would have tested a different element than the second-degree burglary instruction; and (2) *Bazell* applies to all provisions of Sec. 570.030.3, including stealing over $500.
Discussion: (1) Defendant, charged with first-degree burglary, requested lesser-included offense instruction for nested offense of first-degree trespassing. Because it is impossible to commit first-degree burglary without also necessarily committing first-degree trespass, there is always a basis in the evidence to acquit of the charged offense because the jury is free to disbelieve any or all of the State's evidence. The court erred in failing to give the

trespass instruction. The State argues the error is harmless, however, because the jury was instructed on second-degree burglary, but failed to find it. But the jury's rejection of one lesser instruction in favor of the charged offense does not automatically mean the refusal to give additional nested lesser can be regarded as harmless. This case shows why. The jury was instructed on first-degree burglary which has three elements: (a) unlawful entry; (b) with intent to commit a crime therein; (c) while armed with a deadly weapon. Second-degree burglary omits the third element, meaning second-degree burglary tests jurors' belief whether there is a deadly weapon. But that is not the element Defendant disputed at trial. He disputed whether he entered with intent to commit a crime. First-degree trespass would have required only a finding of unlawful entry. The element of intent to commit a crime in the premises was not tested. Reversed for new trial. (2) Defendant was also convicted of felony stealing over $500, Sec. 570.030.3(3)(d). *Bazell*'s analysis of the applicability of Sec. 570.030.3 does not depend on which particular enhancement provision of 570.030.3 is at issue. *Bazell* looked at the definition of the offense of stealing in 570.030.1 and held that, because the definition does not contain as an element "the value of property or services," Sec. 570.030.3 does not apply. *Bazell* draws no distinction among the numerous subcategories of 570.030.3. Stealing convictions reversed and remanded for resentencing as misdemeanors.

Hoeber v. State, 2016 WL 2343821 (Mo. banc May 3, 2016):
(1) Even though Defendant used a general denial-defense at trial, counsel was ineffective in child sex case in failing to object to verdict directors which did not identify specific acts of sexual misconduct for the jury, where multiple different acts had been testified to at trial; this violated Defendant's right to a unanimous jury verdict; and (2) cases which hold that a defendant cannot be prejudiced by such verdict directors where he used a general-denial offense should no longer be followed.
Facts: Defendant was charged with two counts of statutory sodomy. At trial, various witnesses testified to multiple acts of statutory sodomy. Victim testified acts occurred in the kitchen, but not the bedroom, bathroom or living room. Mother testified Victim said acts occurred in the kitchen and bedroom. Doctor testified Victim said acts occurred in the bedroom, kitchen, bathroom and living room. Defendant had given a statement to police that acts occurred in the bathroom. But at trial, he repudiated this statement and claimed it was coerced. He denied any acts at trial. The verdict directors instructed the jury to find Defendant guilty if he touched the Victim's genitals with his hands.
Holding: Mo. Const. Art. I, Sec. 22, protects the right to a unanimous jury verdict. *State v. Celis-Garcia,* 344 S.W.3d 150 (Mo. banc 2011), decided after the trial in this case, held that non-specific jury instructions in a multiple act case, such as here, violate the right to a unanimous verdict, because they don't ensure that jurors agreed that defendant committed the same act. The verdict director's here allowed jurors to convict of any incident in the kitchen *or* bathroom *or* living room *or* bedroom. There is a real risk jurors did not unanimously agree on the same act. Even though counsel was not required to foresee the Court's decision in *Celis-Garcia*, that case did not create new law. The right to a unanimous jury verdict was previously established, and the Notes on Use to the MAI's emphasized that instructions should be modified in multiple act cases. Since *Celis-Garcia*, some cases have held that where a defendant employs a general denial defense ("unitary defense"), he is not prejudiced by non-specific verdict directors. *Celis-*

Garcia did not hold that a defendant who asserts a general denial defense can never be prejudiced; cases that hold otherwise, such as *State v. LeSieur*, 361 S.W.3d 458 (Mo. App. 2012), should no longer be followed. New trial ordered.

State v. Zetina-Torres, 2016 WL 792508 (Mo. banc March 1, 2016):

(1) Even though jury was instructed to find Defendant guilty based on an accomplice liability theory, and (2) even though the evidence against Co-Defendant had previously been found insufficient to convict in Co-Defendant's prior direct appeal, the appellate court reviewing sufficiency of the evidence considers only the legal question whether the statutory elements of the crime were proven, which does not rest on how the jury was instructed; further, Sec. 562.046(1) provides that it is no defense to criminal responsibility of a defendant based upon conduct of another that such other person has been acquitted.

Facts: Defendant and Co-Defendant were charged with trafficking drugs found in a truck. Defendant was the driver and Co-Defendant was the passenger. Co-Defendant was tried and convicted, but on direct appeal, the appellate court found the evidence insufficient to prove that Co-Defendant knew about the drugs. When Defendant went to trial, the jury was instructed to find Defendant guilty if he acted with Co-Defendant in the crime.

Holding: Defendant contends that because the jury was instructed on an accomplice liability theory, and because Co-Defendant's conviction was ultimately vacated, the evidence is insufficient. The U.S. Supreme Court recently held in *Musacchio v. U.S.*, 2016 WL 280757 (U.S. 2016), that when examining sufficiency, the appellate court considers only the legal question whether the elements of a statute were satisfied; sufficiency review does not rest on how the jury was instructed. Here, Defendant was charged with acting alone or in concert with Co-Defendant. There was ample evidence that Defendant knew about the drugs in the truck. Defendant's argument that his conviction must be vacated because the Co-Defendant was ultimately discharged is also refuted by Sec. 562.046(1) which provides that it is no defense to criminal responsibility based on conduct of a co-defendant that such co-defendant has been acquitted.

State v. Blurton, 2016 WL 1019299 (Mo. banc March 15, 2016):

Holding: There is no plain error in a trial court failing to give a non-mandatory requested instruction that incorrectly states the law, and a trial court is not obligated to correct a non-mandatory instruction (overruling *State v. Derenzy*, 89 S.W.3d 472 (Mo. banc 2002)).

Discussion: *Derenzy* held that, although a trial court's rejection of an incorrectly worded lesser instruction proffered by defendant was "not error," the trial court's failure to correct and submit a properly worded instruction was plain error. *Derenzy* relied on Rule 28.02(a), which requires a trial court to "instruct the jury in writing upon all questions of law arising in the case that are necessary for their information in giving the verdict." Rule 28.08(a) applies to *mandatory* instructions, even if not requested by defendant. The lesser at issue in *Derenzy*, however, was not an instruction that was necessary, i.e., was *not* a mandatory instruction. The rationale applied by the Court in *Derenzy* to find plain error should apply only when an instruction is mandatory, even when not requested. A trial court is not obligated to correct and submit non-mandatory instructions.

State v. Brown, 2020 WL 5002830 (Mo. App. E.D. Aug. 25, 2020):
Holding: (1) Even though the prosecutor in a multiple sex act case argued only to convict of a particular act, where the jury instructions did not differentiate among the acts, there was a danger that the jury was not unanimous in its verdict, but (2) this wasn't "manifest injustice" to rise to the level of plain error because the potential for prejudice is reduced where Defendant relies on a general denial offense (as here), rather than a defense where he tried to pick apart each individual act; in the latter case, the jury is more likely to believe different acts occurred. And the fact that the prosecutor focused on a particular act in closing argument diminishes the risk of prejudice, too.

State v. Welch, 2020 WL 642300 (Mo. App. E.D. Feb. 11, 2020):
Holding: Where the evidence would support that Defendant became angry because his Girlfriend had sex and showered with another man, trial court erred in first-degree assault trial in not giving a lesser instruction on second-degree assault based on sudden passion arising from adequate cause.
Discussion: Second-degree assault is not a "nested" lesser-included offense because it is not impossible to commit the higher offense without necessarily committing the lower. This is because second-degree assault contains an additional element not present in the greater, i.e., sudden passion. Defendant has the burden of injecting the issue of sudden passion arising from adequate cause, and this must be supported by the evidence. Sudden passion is an unexpected force motivated by *another person's provocation*. Although Defendant's voluntary intoxication is not to be considered, here, there was evidence that Girlfriend had sex with and showered with another man. This would be sufficient evidence to stir up sudden passion motivated by another's provocation.

State v. Endicott, 2020 WL 891005 (Mo. App. E.D. Feb. 25, 2020):
Even though in second-degree murder case (1) trial court instructed jury on self-defense and self-defense in vehicle, and (2) defense did not request a defense of another instruction, trial court plainly erred in not instructing on use of force in defense of another where evidence (viewed in light most favorable to giving instruction) supported that Defendant shot Victim to defend another person.
Facts: Victim, who was intoxicated, approached Defendant and various other people after they left a bar and were getting into their cars. Victim asked to go with them to another bar, but the group told Victim no. Surveillance footage showed Victim swing at Defendant, and Defendant shot Victim. Victim had gun in his pocket.
Holding: A defense of another instruction must be given if a justification defense is injected into the case by any evidence, and even if Defendant doesn't request or desire such an instruction. The instruction must be given even if the evidence is inconsistent with Defendant's testimony or theory of the case. Here, the evidence supported that Defendant was protecting the group from a menacing Victim, and may have reasonably believed a member of the group was in imminent danger when Victim tried to enter their car. Even though there was evidence to the contrary, we review Defendant's claim of plain error by viewing the evidence in the light most favorable to Defendant. Even though the video showed Victim didn't have a gun in his hand, the relevant inquiry is whether it was reasonable for Defendant to believe he did, or believe that Victim was

readily capable of using his gun against the group. Even though a self-defense instructions was given, appellate court will not "conjecture" on whether jury would have convicted if it had been properly instructed on defense of another.

State v. Henry, 2019 WL 347170 (Mo. App. E.D. Jan. 29, 2019):
Holding: Where Child-Witness in child sex case testified that charged sodomy occurred in three different places, but jury instruction did not differentiate between the places, trial court plainly erred in giving the instruction because it deprived Defendant of right to unanimous jury verdict under *Celis-Garcia*.

State v. Oates, 2017 WL 2854195 (Mo. App. E.D. July 5. 2017):
Even though Defendant was charged with felony-murder with the predicate felony being distribution of a controlled substance, Defendant was not precluded from raising a self-defense claim "as a matter of law," and the trial court erred in refusing a self-defense instruction. Self-defense is not precluded "as a matter of law" from being raised by a defendant charged with felony murder when the predicate felony can be classified as "non-forcible."
Facts: Defendant killed two people in a car in connection with a drug deal. Defendant claimed that the Victims had threatened to kill him and he shot Victims in self-defense. The jury was instructed on self-defense as to conventional second degree murder, voluntary manslaughter and involuntary manslaughter, but the court refused a self-defense instruction on felony-murder.
Holding: The State contends that Defendant was not entitled to an instruction on self-defense because it is not a defense to felony-murder where it was not a defense to the underlying felony. Although "any" felony may be used to establish a basis for felony murder, when a death results from the use of reasonable force as permitted in Sec. 563.031.1(3) – which only precludes use during the commission of a felony that is *forcible* – self-defense is a potential defense to negate criminal liability. Self-defense is not precluded "as a matter of law" from being raised by a defendant charged with felony murder when the predicate felony can be classified as "non-forcible." A trial court must give a self-defense instruction when substantial evidence is adduced to support it. Defendant's testimony showed that Victims were the aggressors; he had reasonable grounds for believing he faced immediate danger when Victims pulled a gun on him; the force he used was reasonably necessary given the circumstances; and he did everything in his power to avoid danger, given the close confines of the car. Hence, the court erred in not giving a self-defense instruction to felony murder.

State v. Carlton, 527 S.W.3d 865 (Mo. App. E.D. Sept. 5, 2017):
Even though Child-Victim testified to a series of sexual acts that were largely undifferentiated, trial court plainly erred in giving identical verdict directors for first-degree child molestation, because this violated Art. I, Sec. 22(a)'s right to a unanimous jury verdict under Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011).
Facts: Child-Victim testified that Defendant touched her "many, many times" in a similar way over a period of time. The trial court submitted two identical verdict directors instructing on first-degree child molestation.

Discussion: The State claims this is not a multiple-acts case because it involves an undifferentiated series of acts which would not allow the State to distinguish between the acts. However, the determining factor in deciding whether there is a different and distinct criminal act is not the quality of the testimony or evidence in the record, but the nature of the criminal conduct itself. Each allegation, although similar, is unconnected to the last and is not like a course of conduct in which multiple acts cannot be distinguished. The record contains evidence that would allow the acts to be differentiated. E.g., Victim said some acts occurred while waiting for a school bus. Other acts occurred when Victim was playing with another child. Without any modification to the verdict directors, Defendant's right to a unanimous verdict was violated. The error was prejudicial because in closing argument the State did not distinguish between acts but told the jury it "happened a bunch of times." The verdict directors allowed each juror to select any, all, or only one act from a larger pool of acts presented by the State.

State v. McPike, 2017 WL 1058615 (Mo. App. E.D. March 21, 2017):
Where (1) Defendant took furniture by a dumpster behind a furniture store, and (2) store Owner testified that abandoned furniture was sometimes placed there for disposal (though not the furniture at issue), Defendant was entitled to jury instruction on claim of right in stealing case.
Discussion: A claim of right defense is a special negative defense for stealing. The Defendant has the burden of injecting the issue. The evidence must be more than Defendant's subjective belief. The burden for injecting the issue is lower than the burden for proving it. Merely because the evidence adduced by Defendant does not prove conclusively an honest belief in a right to take property, such evidence is still sufficient to warrant a claim of right instruction. Here, Defendant's evidence was sufficient to warrant an instruction. Defendant testified the furniture was next to a dumpster and he had seen people take furniture from the area before without issue. Store Owner testified that abandoned furniture is sometimes placed by the dumpster for disposal and other people take it away, though this particular furniture was not intended to be trash. A person with Defendant also testified that they believed the furniture to be trash. Reversed for new trial.

State v. Whipple, 2016 WL 6080418 (Mo. App. E.D. Oct. 18, 2016):
Holding: (1) As a matter of first-impression, even though the owner of property does not have a duty to retreat under the "castle doctrine" and "stand your ground" law, Sec. 563.031, in order for the owner to use deadly force, he must have a reasonable belief that such force is necessary to defendant himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force; and (2) although Defendant-owner was not entitled to a self-defense instruction solely because he had no duty to retreat, trial court erred in failing to give self-defense instruction where a man came onto Defendant's property; argued with Defendant; and appeared to seek to run over Defendant with the man's vehicle, which caused Defendant to shoot at the man's car; this is true even though Defendant had gone to another location and argued with the man shortly before the shooting incident on Defendant's property.

State v. Rycraw, 2016 WL 5390198 (Mo. App. E.D. Sept. 27, 2016):
Defendant's right to unanimous verdict was violated where he was charged with two acts of exposing his genitals but Victim testified to three acts and instructions identified the charged acts only as an exposing incident and another exposing incident a "second time;" further, the prejudice was not cured by the prosecutor's closing argument in which prosecutor explained which charged act referred to which instruction because it is presumed that jurors follow a court's instructions, not closing arguments.
Discussion: Defendant was charged with exposing his genitals to child Victim on two separate occasions. However, Victim testified to three different incidents of exposure. The verdict directors were identical, except that the second count stated that defendant exposed his genitals "a second time." The verdict directors failed to ensure that jurors would unanimously agree on which of the three acts formed the basis for the convictions on the two counts. Defendant was prejudiced as a result. During closing argument, the State assigned a specific act to each count. However, this did not cure the prejudice because courts presume that jurors follow *instructions* given by trial courts, not closing arguments.

State v. Wooten, 2016 WL 145591 (Mo. App. E.D. Jan. 12, 2016):
Jury instruction which allowed conviction for resisting Defendant's own arrest by "physical interference" was plain error, because Sec. 575.150 does not allow resisting one's own arrest by "physical interference;" "physical interference" only applies to resisting arrest of a third party.
Facts: Defendant struggled with officers as they sought to arrest him for a drug offense. He was convicted at a jury trial of resisting arrest by "physical interference."
Holding: Sec. 575.150.1(1) allows conviction for resisting one's own arrest by "the use of violence or physical force or by fleeing." Sec. 575.150.1(2) allows for conviction for resisting arrest of a third person by "the use of violence, physical force or *physical interference*." Under the plain reading of the statute, a defendant may not commit the crime of resisting one's own arrest through "physical interference." This only applies to resisting arrest of third parties. The instruction here misdirected the jury and relieved the State from its burden of proof. Reversed and remanded for new trial.

State v. Payne, 2016 WL 796753 (Mo. App. E.D. March 1, 2016):
(1) Although voluntary manslaughter is a lesser included offense of first and second degree murder, Sec. 565.025, it is not a "nested" lesser, i.e., not separated from the greater offense by only one differential element for which the State bears the burden of proof; thus, State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014), which requires a trial court to instruct on "nested" lessers, does not apply; (2) voluntary manslaughter requires Defendant to inject the issue of sudden passion for voluntary manslaughter.
Facts: Defendant was convicted of first degree murder. At trial, the court instructed on second degree murder, but refused an instruction on voluntary manslaughter. Defendant appealed.
Holding: Voluntary manslaughter is a lesser offense of first and second degree murder under Sec. 565.025, but it is not a "nested" lesser. A nested lesser consists of a subset of the greater; for a nested lesser, it is impossible to commit the greater offense without also committing the lesser. Voluntary manslaughter includes an element not present in first or

second degree murder, i.e., the presence of sudden passion from adequate cause. Also, under Sec. 565.023.2, Defendant bears the burden of injecting sudden passion into a case. Further, there is no reversible error where instructions for the greater offense and one lesser include offense are given, and Defendant is convicted of the greater; the one exception is where the lesser that was given did not "test" the same element of the greater offense that the refused lesser would have challenged. Here, the second degree instruction "tested" for the same element of first degree murder, deliberation, that that the voluntary manslaughter would have challenged. This is because the second degree murder instruction gave the jury an opportunity to find Defendant guilty of a lesser if it refused to find a particular element (deliberation), but the jury nevertheless found the element. Refusal to give voluntary manslaughter instruction affirmed.

State v. Robinson, 2016 WL 1110487 (Mo. App. E.D. March 22, 2016):
Trial court plainly erred before trial in failing to give the mandatory preliminary instructions -- MAI-CR3d 300.06, 302.01 and 302.02 -- which explain the order of trial, note taking and what constitutes evidence; this was a fundamental failure to instruct the jury, particularly as to what constitutes evidence; (2) even though the trial court attempted to correct its error by giving a "retroactive" version of the instructions later in the trial, this did not cure the error because the instructions were designed to prevent premature bias, and once bias is formed, a juror can no longer be impartial.
Facts: Before trial, the trial court failed to give the mandatory preliminary instructions explaining the order of trial, note taking, and what constitutes evidence. When this was discovered later in trial, the trial court attempted to correct the error by modifying the instructions, giving them in the "past tense," and questioning jurors whether they followed them.
Holding: The failure to give the instructions was error. The appellate court does not use an "outcome determinative" test to determine if manifest injustice resulted, however, because manifest injustice is not so narrowly defined. An "outcome determinative" test precludes consideration of whether the trial court so misdirected or failed to instruct the jury that the verdict was tainted. The instructions were designed to help jurors based their opinions on evidence; once a juror forms an opinion, they are no longer impartial. Here, the trial court's attempt to "retroactively" instruct the jury left many instructions unheard altogether, or instructions so late as to be useless. Most critical was the failure to instruct before trial as to the definition of evidence. Neither the judge's comments and rulings, nor the attorneys arguments and objections, constitute evidence. New trial ordered.

State v. Farr, 2020 WL 5792954 (Mo. App. S.D. Sept. 29, 2020):
(1) Even though (a) Child-Victim testified in first-degree statutory sodomy trial that he was less than 14 years old (necessary for first-degree sodomy), and (b) trial court instructed jury on lesser offense of first-degree child molestation that he was less than 14 years old, trial court erred in rejecting nested, lesser instruction for second-degree child molestation that Victim was less than 17 years old, since jury may disbelieve State's evidence as to age and believe Victim was older; Defendant was prejudiced since age of Victim wasn't tested by a jury instruction. But (2) there was no prejudice regarding a separate Victim where jury was instructed on "enhanced" first-degree sodomy for child

less than 12 and first-degree child molestation for child less than 14, but jury didn't find first-degree child molestation; the differential element of age was tested by the one lesser instruction for this child.

Facts: Defendant was charged with first-degree statutory sodomy against two different children, Victim 1 and Victim 2. The crimes against Victim 1 occurred before their 12th birthday.The crimes against Victim 2 might have occurred after Victim 2's 12th birthday. "Enhanced" first-degree statutory sodomy, Sec. 566.062, requires that the victim be "less than 12 years old." "Regular" first-degree statutory sodomy, Sec. 566.062, requires the victim be "less than 14 years old." First-degree child molestation requires the victim be "less than 14 years old." Second-degree child molestation requires the victim be "less than 17 years old." For both victims, the trial court instructed on the nested, lesser offense of first-degree child molestation, but refused to instruct on the nested, lesser offense of second-degree child molestation because there was no evidence that Victims were more than 14 but less than 17 years old. Jury found Defendant guilty of first-degree sodomy (the highest offense) for both victims.

Holding: Sec. 546.046 provides that to be entitled to a lesser instruction, (1) a party must request the instruction, (2) there is a basis for acquitting of the higher offense, and (3) there is a basis for convicting of the lesser offense. Defendant asked for the lesser instruction, and there is a basis for convicting of the lesser since Victims are "less than 17," so the issue here is whether there was a basis for acquitting of higher offense. The jury is allowed to disbelieve all or part of the State's evidence, so the jury could disbelieve Victims' testimony about their ages, and find that they were older than they claimed. Thus, there was a basis to acquit of the higher offense, and it was error not to give the second-degree child molestation instructions. But the prejudice differs by Victim and charge. For Victim 1 (where the charge was "enhanced" first-degree sodomy), the issue of the Victim's age was tested by submission of the first-degree child molestation instruction because the jury was given one instruction with "less than 12" and another with "less than 14." Since the jury rejected the lesser for Victim 1, the jury wouldn't have found second-degree child molestation. For Victim 2 (where the charge was "regular" first-degree sodomy), jury was given the same "less than 14" instruction with regard to first-degree sodomy and first-degree child molestation. This did not test the element of age. Therefore, Defendant was prejudiced regarding Victim 2. New trial ordered regarding Victim 2.

<u>State v. Austin</u>, 2020 WL 7224203 (Mo. App. S.D. Dec. 8, 2020):

Holding: Resisting a lawful stop, Sec. 575.150, does not require State to prove that Defendant knew *why* Officer was trying to pull Defendant over.

Concurring Opinion: Concurring Judge writes to "caution judges and attorneys not to use MAI-CR 4th 429.61 without first modifying it accurately to follow Sec. 575.150" and applicable case law. The fifth paragraph of MAI-CR 4th 429.61 requires the jury to find that defendant knew or reasonably should have known of the basis for the stop. But this finding is not required by Sec. 575.150 or the case law applying the statute.

State v. Vanlue, 2019 WL 2609165 (Mo. App. S.D. June 10, 2019):
Holding: Where Defendant was charged with first degree assault on a law enforcement office, trial court erred in overruling Defendant's request for an instruction on second degree assault of law enforcement officer, because this was a "nested" lesser-included offense on which a requested instruction is mandatory, and Defendant was prejudiced because his attorney argued the disputed element in closing about whether Officer sustained serious physical injury.
Discussion: Failure to give a mandatory instruction is presumed to prejudice Defendant unless the State clearly establishes otherwise. Here, Defendant contested the element of whether the officer sustained serious physical injury, which is the difference between first and second degree assault. Even though this defense may have been implausible under the facts, Defendant had a right to put forth this defense and may have done so more effectively if a second degree instruction had been given. Although this case would not qualify for plain error relief, this is a case of preserved error, and the State has not refuted that Defendant was prejudiced.

State v. Michaud, 2018 WL 6599177 (Mo. App. S.D. Dec. 17, 2018):
The jury instruction for attempted enticement of a child, MAI-CR4th 420.62, does not comply with substantive law because it does not include the mens rea that Defendant knew the child was less than 15 years old, and trial court erred in giving it.
Facts: Defendant was charged with attempted enticement of a child, Sec. 566.151, for rubbing a child's stomach as a substantial step toward enticing a child to engage in sexual conduct. Over defense objection, the trial court gave MAI-CR4th 420.62 (attempted enticement of a child), which did not require the jury to find that Defendant knew the child was less than 15. The defense submitted a version of MAI-CR4th 420.60 (enticement of a child), which did require the jury to find that "defendant knew that Victim was less than 15," which the trial court refused.
Holding: The trial court erred in not submitting an instruction that required the jury to find that Defendant knew the Victim was less than 15. Sec. 566.151 on enticement requires the State to prove a defendant's knowledge, awareness or belief that the Victim was less than 15. An attempt to commit an underlying offense necessarily presumes a corresponding *mens rea*. The State's instruction complied with MAI-CR4th 420.62 (attempted enticement). But that instruction conflicts with substantive law because it does not include the *mens rea* element that a defendant knew or believed the child was less than 15. The rejected instruction reflected substantive law. Defendant was prejudiced because the jury was not required to find a necessary element, i.e., that Defendant knew or believed the Victim was under 15.
Dissenting opinion: This case points up an unexpected and unexplained MAI split regarding the *mens rea* required to convict for child enticement, but not for an attempt to commit the same crime. If one MAI is wrong, it should be fixed. If, somehow, both are correct, an explanation in Notes on Use would be helpful. But, on the merits, dissenting judge is not convinced that 566.151 demands underage scienter, notwithstanding the child-enticement MAI, its Notes on Use, or the majority's citation to distinguishable "police sting" cases.

State v. Comstock, 2016 WL 3213492 (Mo. App. S.D. June 9, 2016):
Even though trial court gave a self-defense instruction that Defendant was allowed to use deadly force to protect himself from "death or serious physical injury," trial court erred in refusing Defendant's self-defense instruction that he could also use deadly force to protect himself from the "forcible felony" of second degree domestic assault, which involves only "physical injury," where Defendant and Victim were housemates who got into fight.
Facts: Defendant had been married to Victim's mother, and although divorced, Defendant lived with Victim and mother. Victim was not happy that Defendant lived with them. Victim told Defendant he "wasn't wanted" in the house. Victim "came at" Defendant and began shoving him. Victim was larger than Defendant. Defendant was scared, grabbed a knife and stabbed Victim. A fight ensued, during which Defendant again stabbed Victim.
Holding: Regarding refusal of Defendant's self-defense instruction, the evidence is viewed in light most favorable to Defendant. Defendant's proposed instruction stated that he could use deadly force "to protect himself against the commission of a forcible felony." The instruction identified the forcible felony as second degree domestic assault, which occurred if Victim was attempting to cause "physical injury" to Defendant. Instead of this instruction, the trial court submitted the State's self-defense instruction. It said Defendant could use deadly force only to "protect himself from death or serious physical injury." Sec. 563.031 allows a self-defense instruction allowing deadly force to defend against three situations: death, serious physical injury or "any forcible felony." On appeal, the State claims second degree domestic assault does not qualify as a "forcible felony" here because it must be committed by a deadly weapon, dangerous instrument, choking or strangulation; however, the second degree domestic assault statute, 565.073.1(1), states the offense is committed "by any means, including but not limited to" those methods. Thus, second degree domestic assault includes Victim's conduct here. Defendant was prejudiced by the failure to give Defendant's self-defense instruction because the jury could have found that Defendant used deadly force to protect against only "physical injury" upon him, not "serious injury or death." Reversed for new trial.

State v. Seals, 2016 WL 640518 (Mo. App. S.D. Feb. 17, 2016):
Trial court plainly erred in failing to, sua sponte, instruct jury regarding self-defense in second-degree domestic assault case, where Victim at trial recanted her statements to police and testified she began the fight with Defendant.
Facts: Defendant and Victim had a fight in a hotel room. When police arrived, Victim said Defendant had become angry and choked her. At trial, however, Victim's testimony contradicted what she told police. At trial, she testified that she had attacked Defendant.
Holding: A trial court is required to give a self-defense instruction, *sua sponte*, if substantial evidence is presented to support the instruction; the evidence is viewed in the light most favorable to Defendant. Here, there was affirmative testimony from Victim at trial that she had initiated the attack on Defendant. The self-defense instruction would not have been based simply on a jury's decision not to believe some of her testimony, but instead on Victim's affirmative assertion that she attacked Defendant.

State v. Johnson, 2020 WL 420746 (Mo. App. W.D. Jan. 28, 2020):
Holding: (1) Where Prosecutor, in first-degree murder trial, argued that "you are only going to get to these [lesser-included offenses] if you find he is not guilty of murder first degree," this was an improper "acquittal-first" argument which misstated the law, because lesser-included instructions do not require jurors to acquit of the greater offense before considering the lesser, but this wasn't plain error here; and (2) a claim of "prosecutorial misconduct" can only be raised on direct appeal, but it is not a "freestanding claim;" instead, it must be framed in terms of trial court error.
Discussion: (1) Lesser-included offenses do not require a defendant first be acquitted of the greater offense before the jury can consider the lesser. MAI-CR3d 313.04 provides juries can consider the lesser if they "do not find the defendant guilty" of the greater. The State contends telling a jury they must find a defendant "not guilty" of the greater is the same as telling them they can only consider the lesser if they "do not find the defendant guilty." We disagree. MAI-CR4th 402.05 provides the jury's "verdict, whether guilty or not guilty, must be agreed to by each juror." A finding of "not guilty" thus requires a jury to unanimously acquit a defendant. As a result, the State's argument the jury had to find Defendant "not guilty" of first-degree murder before going to the lessers was an improper "acquittal first" argument, but not plain error under the facts here. (2) Defendant also raises the prosecutor's argument as a "freestanding claim" of prosecutorial misconduct, which he claims requires reversal. We agree that prosecutorial misconduct which is apparent at trial (such as in closing argument) must be raised, if at all, only on direct appeal. We do not agree, however, that it is a "freestanding" claim independent of trial court error. The claim must raise that the trial court erred in some way, such as overruling preserved error or failing to *sua sponte* intervene.

State v. Weyant, 2020 WL 1522630 (Mo. App. W.D. March 31, 2020):
Holding: (1) Trial court did not plainly err in a "single act" child sex case in submitting a disjunctive instruction allowing jury to convict of first-degree sodomy if it found that Defendant penetrated Victim's vagina either for the purpose of sexual gratification "or" for the purpose of terrorizing her, since the jury was still required to find unanimously "the act" of digital penetration, which satisfied the element of deviate sexual intercourse; a disagreement about the means of the offense would not matter as long as the State proved the necessary elements of the offense, especially where defense counsel didn't claim there wasn't evidence to support both means, didn't request a pretrial bill of particulars to specify the means, and didn't object to the instruction; and (2) court cautions counsel that *Celis-Garcia* (allowing plain error review of jury instructions for unanimity in multiple act child sex cases) is not "an opportunity to engage in instructional-error sandbagging."

State v. Gates, 2020 WL 6277241 (Mo. App. W.D. Oct. 27, 2020):
Holding: Secs. 563.074.1 and 536.031.1(3) combine to codify pre-2007 decisional law declaring self-defense to be unavailable as a matter of law as a defense to felony murder predicated on the commission of a *forcible* felony; thus, where Defendant was accused of committing or attempting to commit a forcible felony (first-degree robbery) as the predicate offense for second-degree murder, Defendant was not permitted to use self-

defense as a defense, and trial court did not err in excluding Defendant's testimony about his version of the crime (indicating he acted in self-defense) or not instructing jury on it.
Discussion: Sec. 563.074.1 creates the defense of justification. It states that "a person who uses force as described in section[] 563.031 … is justified in using such force and such fact shall be an absolute defense to criminal prosecution." Sec. 563.031 allows a person to use force to defend himself *unless* three exceptions apply. As relevant here, Sec. 563.031.1(3) applies. It excludes justification as a defense if the "actor was attempting to commit, committing, or escaping after commission of a *forcible* felony."

State v. Green, 2019 WL 6481423 (Mo. App. W.D. Dec. 3, 2019):
Holding: (1) Where Defendant was charged with kidnapping, Sec. 565.110, trial court plainly erred in submitting instruction for felonious restraint, because this is not a lesser-included offense of kidnapping, in that it requires proof of an element -- exposure to a substantial risk of harm -- which not included in kidnapping; manifest injustice resulted because Defendant was convicted of a crime for which he was not charged; (2) on remand, Double Jeopardy precludes retrial on kidnapping because the felonious restraint conviction (though not a lesser-included offense) served as an implicit acquittal of the charge of kidnapping; but because the jury was also given a lesser offense instruction on false imprisonment (though it did not find it), Defendant can be tried for false imprisonment on remand; and (3) even though Sec. 558.026 requires that offenses of "sodomy in the first degree, forcible sodomy, or sodomy" run consecutively, trial court plainly erred in ruling that conviction for second degree sodomy had to be consecutive to the felonious restraint conviction; the plain language of Sec. 558.026 does not include second-degree sodomy as one of the sentences which must run consecutively.

State v. Powell, 2019 WL 1904970 (Mo. App. W.D. April 30, 2019):
Holding: Even though Defendant used a general denial defense, where child sex Victim testified to two different acts of child molestation for touching Victim's genitals but the jury instructions allowed conviction if "the defendant touched the genitals," Defendant's right to a unanimous jury verdict, Mo. Const. Art. I, Sec. 22(a), was violated since the instructions failed to distinguish between the two different acts.
Discussion: A previous case, *State v. Escobar*, 523 S.W.3d 545 (Mo. App. W.D. 2017), held that where a Defendant asserts a general denial defense, there is no plain error. But in the prior case, the State focused on only one specific incident of abuse. Here, the State clearly presented at least two different incidents. From this evidence, jurors could have relied on either incident to convict.

State v. Hudson, 2019 WL 2091456 (Mo. App. W.D. May 14, 2019):
(1) Trial court plainly erred in omitting definition of "dangerous instrument' from first degree robbery instruction, where this element was disputed at trial; (2) new trial ordered unless State agrees on remand for entry of conviction for second degree robbery.
Facts: Victim claimed that Defendant approached her at a gas station, put "something" on her side which felt "like a sharp object," and stole her vehicle and purse. A few minutes later, police found Defendant and the vehicle. Defendant did not have a weapon. Defendant was charged with first degree robbery. At trial, he denied robbing Victim and

claimed he had "rented" her vehicle in exchange for drugs, and that Victim told Defendant to leave her purse in the vehicle.
Holding: To convict of first degree robbery, the jury was instructed to find that in the course of taking the property, Defendant displayed or threatened use of a "dangerous instrument." Note on Use 3 to MAI-CR3d 323.02 required "dangerous instrument" to be defined, but omitted the definition. The definition would have been any instrument which under the circumstances is readily capable of causing death or serious physical injury. The absence of the required definition omits an essential element of first degree robbery. This excused the State from having to prove this element. It was prejudicial because the parties disputed at trial whether Defendant used a dangerous instrument. While the jury did not find all the elements for first degree robbery, it did find the elements for second degree robbery. Thus, a new trial on first degree robbery is granted unless the State agrees on remand to a conviction for second degree robbery and sentence accordingly.

State v. Rhymer, 563 S.W.3d 714 (Mo. App. W.D. Nov. 13, 2018):
Holding: Trial court plainly erred in giving jury instruction, MAI-CR3d 319.24, on kidnapping charge which did not require the jury to find that Defendant unlawfully removed Victim for the purpose of facilitating a *felony*.
Discussion: MAI-CR3d 319.24 requires the jury to find defendant guilty of kidnapping if the defendant's purpose in removing victim was to facilitate a felony. The name of the felony is to be inserted into the instruction. Here, the State was required to prove Defendant removed Victim for the purpose of committing felony assault. But the instruction merely said "assault" and defined the offense to be, at most, a misdemeanor. The instruction created a likelihood that the State was relieved of its burden to prove a statutory element. The State argues that because Defendant was also convicted of second-degree murder based on a felony definition of assault, that there is no prejudice. But that does not bear on whether the evidence established an intent to commit a felony *at the time Defendant removed Victim from the property*. The murder happened later. The evidence of guilt of kidnapping was not overwhelming and was disputed at trial, so prejudice occurred.

State v. Henderson, 2018 WL 2407836 (Mo. App. W.D. May 29, 2018):
Holding: (1) Where Defendant was charged with felony-murder as an accomplice but not charged with the underlying felony itself, the verdict director for felony murder required a separate instruction for the attempted underlying felony, with a cross reference to that separate instruction in the felony-murder instruction; (2) where the attempt crime is submitted but the object crime is not, a paragraph defining the object crime must be given, and the term "substantial step" must be defined; and (3) where Defendant's liability for the underlying felony depends on accessory liability, the instruction dealing with the commission of the underlying felony must be modified using MAI-CR3d 304.04 to include a paragraph requiring the jury to find Defendant acted together with the co-defendants in committing the underlying felony
Discussion: Plain error exists when a verdict director omits an essential element, and the evidencing establishing the omitted element was seriously disputed at trial. Here, the verdict director attempted to submit felony-murder based on attempted possession of a

controlled substance. But Defendant was not charged with the actual felony. MAI-CR3d 314.06 and Notes on Use, thus, required a separate instruction for attempted possession of a controlled substance requiring the jury to find Defendant committed the felony with a cross reference to that separate instruction in the felony murder instruction. The instruction submitted also failed to follow the approved MAI for an attempt crime. The instruction did not require the jury to find the described conduct, which was missing, constituted a substantial step toward the object crime of possession of a controlled substance. Where the attempt crime is submitted but the object crime is not, a paragraph defining the object crime must be given, and the term "substantial step" must be defined. And where Defendant's liability for the underlying felony depends on accessory liability, the instruction dealing with the commission of the underlying felony must be modified using MAI-CR3d 304.04. Here, the instruction did not include a paragraph requiring the jury to find Defendant acted together with the co-defendants in committing the underlying felony. Without such a paragraph, the jury was not required to find the basis whereby Defendant was responsible for the conduct of another in the underlying felony. Reversed for new trial.

State v. Beck, 2018 WL 3118528 (Mo. App. W.D. June 26, 2018):
Holding: Even though in child sex case the State presented testimony from Child-Victim only on one instance of sexual conduct for each charged count, where the jury also heard Child-Victim's forensic interview were she detailed numerous other instances of sexual conduct that would fall within each charge, the trial court plainly erred in submitting jury instructions which did not specifically describe the particular criminal act that would support the charge, because this denied Defendant his right to a unanimous jury verdict under Mo. Const., Art. I, Sec. 22(a), on each charge.
Discussion: The State contends that no manifest injustice occurred because the prosecutor focused in closing argument on a single incident for each count. But closing argument is not evidence, and cannot cure the State's failure to specify in jury instructions the three instances of conduct used to support each charge. The State also cites a case where the appellate court found no manifest injustice where there was specific evidence only about two acts of abuse – one for each count – and Defendant made a general denial offense. But, here, while the State limited its testimony of Child-Victim only to once specific act per count, the State also played the forensic interview where Child-Victim detailed multiple possible acts for each count. Reversed for new trial.

State v. Swartz, 2017 WL 582669 (Mo. App. W.D. Feb. 14, 2017):
Holding: (1) Where Defendant was charged with failure to drive on the right half of roadway, Sec. 304.015, trial court erred in submitting jury instruction which failed to state that the road had to be of "sufficient width" to be able to drive on right side; and (2) trial court erred in excluding Defendant's evidence that road was less than 30 feet in width, which is required by Sec. 229.010, and which Defendant claimed caused him to drive in center of road.
Discussion: Where, as here, there is no MAI for the charge, trial court must give an instruction that conforms to the substantive law. The instruction told jurors to convict if they found Defendant "failed to drive on the right half of the roadway." Defendant

sought to use as a defense that he was driving in the center of the road because the road was not of "sufficient width." Sec. 229.010 requires roads built after 1939 to be 30 feet wide. The instruction failed to include the essential element of whether the road was of "sufficient width." Defendant was prejudiced because whether he was able to drive on the right side was factually disputed at trial.

State v. Drake, 2017 WL 1149193 (Mo. App. W.D. March 28, 2017):
Holding: Where (1) Defendant was charged with two counts of statutory sodomy, (2) Victim testified Defendant touched her many times, and (3) jurors were given identical instructions for two counts which said Defendant "knowingly touched the genitals of victim with his hand," Defendant's right to unanimous jury verdict was violated because instructions did not guarantee that jurors would be unanimous in the act they found Defendant guilty of; instructions should have distinguished the various acts, such as by location or time; this was plain error under *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011).

State v. Webber, 2016 WL 7094041 (Mo. App. W.D. Dec. 6, 2016):
Where a trial court misinstructs the jury as to the maximum range of punishment, manifest injustice results, even where the jury returns a lesser sentence; a sentence based on a materially false foundation violates due process.
Facts: Defendant was subject to jury sentencing for forcible rape, 566.030 RSMo. 1986, forcible sodomy, 566.060 RSMo. 1986, and attempted forcible sodomy, Sec. 566.060 RSMo. 1986, for sex crimes that occurred in 1991. The trial court instructed the jury that the range of punishment was life imprisonment, or a term of years not less than 10. The jury imposed 24 years on each count. The actual arrange of punishment was "a term of years not less than 10 and not to exceed 30, or life imprisonment," Sec. 558.011.1(1) RSMo. 1986.
Holding: The State concedes the jury was misinstructed but contends there is no plain error (manifest injustice) because the jury imposed less than the maximum sentence. However, where the sentencer has a mistaken belief about the range of punishment, manifest injustice results. A sentence based on a materially false foundation violates due process and requires resentencing.

*** Rehaif v. U.S., 2019 WL 2552487, ___ U.S. ___ (U.S. June 21, 2019):**
Holding: The "knowingly" element of the federal gun law, 18 USC §922(g) and 924(a)(2), that prohibits certain people – such as those convicted of felonies and aliens – from possessing firearm requires the Government to prove that a defendant both knew he possessed the firearm and knew of his relevant status when he possessed it; jury instruction to contrary was erroneous.

*** Marinello v. U.S., ___ U.S. ___, 138 S.Ct. 1101 (U.S. March 21, 2018):**
Holding: The Omnibus Clause of the Internal Revenue Code, 26 U.S.C. Sec. 7212(a), which makes it a felony to "corruptly or by force" "obstruct or imped[e] the due administration of this title," requires intent by a taxpayer to obstruct a particular investigation, audit or similar IRS proceeding; the Court rejected a broad interpretation of the statute, which would have made it a felony to engage in virtually any activity that

improperly avoided any tax, because the broad interpretation did not give defendants fair notice of conduct that is prohibited.

*** Kansas v. Carr, 2016 WL 228342, ___ U.S. ___ (U.S. Jan. 20, 2016):**
Holding: (1) The Eighth Amendment does not require that jurors in death penalty cases be instructed that mitigating circumstances need not be proven beyond a reasonable doubt; (2) capital codefendants' penalty phases need not be severed.

*** Musacchio v. United States, 2016 WL 280757, ___ U.S. ___ (U.S. Jan. 25, 2016):**
Holding: (1) Even though a jury instruction contains an extra element, sufficiency of the evidence should be assessed only against the statutory elements of the charged crime; (2) a statute-of-limitations defense under 18 U.S.C. Sec. 3282(a), the general federal criminal statute of limitations, cannot be raised for the first time on appeal; it must have been raised in the district court in order to be considered on appeal; the issue cannot be considered as plain error.

U.S. v. Latorre-Cacho, 102 Crim. L. Rep. 120 (1st Cir. 10/25/17):
Holding: Jury instruction which stated that involvement with firearms was "racketeering activity" under RICO was plainly erroneous.

U.S. v. Prado, 2016 WL 723350 and 2016 WL 726897 (2d Cir. 2016):
Holding: Jury instruction on aiding and abetting use or carrying gun in relation to crime of violence was plain error, where it did not require jury to find that Defendant joined the criminal enterprise with full knowledge of its scope, or that he had advance knowledge of the use of the gun when he could have chosen not to participate in the crime.

U.S. v. Mix, 97 Crim. L. Rep. 510 (5th Cir. 6/30/15):
Holding: New trial granted where jury was exposed to extrinsic evidence in that foreperson overheard a conversation about co-defendants also being charged in the case.

U.S. v. Houston, 97 Crim. L. Rep. 502 (6th Cir. 7/9/15):
Holding: Even though Defendant-inmate said he would kill his lawyer when he got out, trial court erroneously instructed jury to determine Defendant's intent based on what a "reasonable person" hearing the statement would have thought, instead of Defendant's subjective intent of criminal wrongdoing; Defendant could have been merely venting his anger.

U.S. v. Lomax, 2016 WL 878880 (7th Cir. 2016):
Holding: Even though there was some evidence Defendant was part of a drug conspiracy, Defendant was entitled to a buyer-seller instruction where other evidence indicated Defendant was a mere customer, there was no evidence of sales on credit, an agreement to look for customers, commission payments, or evidence that anyone provided business advice.

U.S. v. Lapier, 2015 WL 4664689 (9th Cir. 2015):
Holding: Even though only one conspiracy was charged, where the evidence at trial showed two conspiracies, this created a real possibility of juror confusion and, thus, a specific unanimity instruction was required.

U.S. v. Makkar, 98 Crim. L. Rep. 200 (10th Cir. 11/23/15):
Holding: Even though Defendants sold a substance called "Grim Reefer, the jury should not have been instructed that it could infer they had knowledge they were selling JWH-18 from the fact that they were aware that the substance they were selling had marijuana-like effects; just because a drug has similar effects does not mean that Defendants know the chemical structure of the drug they are selling.

U.S. v. Aunspaugh, 97 Crim. L. Rep. 505 (11th Cir. 7/8/15):
Holding: Even though Defendant-employee received money from a subcontractor, where Defendant claimed this was compensation for work performed rather than a kickback for steering a subcontract to them, this is not honest services fraud unless a bribe or kickback is involved; jury instruction which allowed conviction even without a bribe or kickback was erroneous.

Brown v. Kauffman, 2019 WL 6615187 (E.D. Pa. 2019):
Holding: Trial court's reasonable doubt instruction, which analyzed the burden of proof to the threshold of doubt a person would have to overcome to authorize medically recommended surgery for a loved one, created a reasonable likelihood of relieving the State of its burden of proof on every element of crime, and violated due process.

U.S. v. Williams, 99 Crim. L. Rep. 677 (D.C. Cir. 9/2/16):
Holding: Where Victim had consented to participate in a hazing incident in which he died, Prosecutor's remarks that jury could not consider Victim's "intent" and jury instruction that "consent is not a defense" to second-degree murder improperly misled jurors to believe they could not consider Victim's consent at all, which was relevant to the malice element of second-degree murder.

People v. Townsel, 368 P.3d 569 (Cal. 2016):
Holding: Jury instruction which told jurors that Defendant's intellectual disability could only be considered for whether he had mental state for first degree murder was erroneous; this disability should also have been considered for whether Defendant had the mental state for the aggravating factor of specific intent to kill a witness prevent witness from testifying.

Bado v. U.S., 97 Crim. L. Rep. 560 (D.C. 7/16/15):
Holding: Even though Defendant accused of misdemeanor would generally have no 6th Amendment right to a jury trial, where Defendant faced deportation if convicted, this was a severe penalty that triggered the right to a jury trial.

Griffin v. State, 2015 WL 1858180 (Fla. 2015):
Holding: Even though Defendant's defense was misidentification, Defendant was prejudiced by legally erroneous instruction on manslaughter, because Defendant's intent was material to what the jury had to consider.

Watson v. State, 2015 WL 5315650 (Ga. 2015):
Holding: Offense of sexual battery requires actual proof of Victim's lack of consent, regardless of Victim's age; thus, jury should not have been given instruction that underage Victim was not capable of consenting.

Batchelor v. State, 119 N.E.3d 550 (Ind. 2019):
Holding: Jury instruction on charge of fleeing police which gave a definition of fleeing based on civil negligence standard of what a "reasonable" driver would do in stopping impermissibly lowered State's burden of proof.

State v. Mahmoud, 99 Crim. L. Rep. 643 (Me. 8/16/16):
Holding: Maine overturns judicial ban on trial judges giving instructions on fallibility of eyewitness identification in light of growing scientific research questioning reliability of eyewitness identification.

Com. v. Allen, 48 N.E.3d 427 (Mass. 2016):
Holding: Instruction which told jurors that if Defendant used unreasonable or excessive force in defense of another, he did not act in lawful self-defense misstated the law; if Defendant used excessive force in defense of another, he did not lose self-defense altogether; rather, the crime was mitigated from murder to manslaughter.

Com. v. Bastaldo, 2015 WL 3885652 (Mass. 2015):
Holding: A cross-racial eyewitness jury instruction must be given unless all parties agree there was no cross-racial identification; this avoids the need for the judge to determine if the identification actually was cross-racial or whether jurors might perceive it to be.

State v. Huber, 2016 WL 1358024 (Minn. 2016):
Holding: Jury instruction regarding aiding and abetting was plainly erroneous where it did not explain that the aiding must be intentional and directed toward committing a crime.

New Jersey v. Carrero, 101 Crim. L. Rep. 184 (N.J. 5/22/17):
Holding: Even though Defendant (who was involved in a "love triangle murder") testified he acted in self defense and the gun went off by accident (which was inconsistent with passion/provocation), he was entitled to lesser manslaughter instruction based on passion/provocation because jury could have rational basis for acquitting of murder and convicting of passion/provocation manslaughter, regardless of Defendant's testimony.

State v. Bailey, 102 Crim. L. Rep. 403 (N.J. 1/22/18):
Holding: Where state law prohibited possession of a firearm if the person was convicted of certain prior offenses, the jury instruction in illegal-possession case must require the jury to find that Defendant committed the specific prior offense because this is a required element for conviction; the jury instructions cannot just instruct the jury to find that Defendant was convicted of some generic prior crime.

State v. Daniels, 2016 WL 513334 (N.J. 2016):
Holding: In prosecutor for robbery as an accomplice, Defendant was prejudiced when the court submitted an instruction on a renunciation defense, which Defendant did not request or want; such affirmative defense was inconsistent with Defendant's chosen defense, which was that he never participated in the conspiracy to begin with, and drew the jury's attention away from Defendant's chosen defense.

State v. Montoya, 2015 WL 1087060 (N.M. 2015):
Holding: Reckless child abuse resulting in death of a child was a lesser-included offense of intentional child abuse resulting in death; it was not possible to intentionally commit child abuse without also consciously disregarding a substantial and unjustifiable risk.

People v. Boone, 102 Crim. L. Rep. 278 (N.Y. 12/14/17):
Holding: Where identifying-Witness and Defendant are of different races, Defendant is entitled to instruction on lack of reliability of cross-racial identification.

People v. Walker, 2015 WL 6455383 (N.Y. 2015):
Holding: Jury instruction on "initial aggressor" was misleading where Defendant intervened in a fight that had already started between a victim and Defendant's brother in order to protect brother; instruction should have better explained the law where a Defendant intervenes to prevent harm to another.

State v. Stukes, 99 Crim. L. Rep. 167 (S.C. 5/4/16):
Holding: Jury instruction which told jurors that Victim's testimony in sexual assault case "need not be corroborated by other testimony" was an improper judicial comment on the facts of the case.

State v. Stietz, 101 Crim. L. Rep. 298 (Wis. 6/13/17):
Holding: Even though Defendant drew a gun on two Conservation Agents on property who were looking for illegal hunters, he was entitled to instruction on self-defense on theory the agents were trespassers because Wisconsin has "low bar" for receiving self-defense instruction and there need be only "some evidence" Defendant acted in self-defense.

People v. Cardona, 201 Cal. Rptr.3d 189 (Cal. App. 2016):
Holding: Jury instruction on "kill zone" theory of intent to commit murder should not have been given where Defendant fired five shots at a crowd at a party; Prosecutor called "kill zone" a "risk zone," which was not a term used by Calif. courts to describe the "kill zone" liability of transferred intent.

People v. Rojas, 2015 WL 3826839 (Cal. App. 2015):
Holding: Even though the information charged Defendant with a child sex crime committed "on or after" the effective date of a new statute, jury instruction which allowed conviction for acts "on or after" a date a year before the new statute took effect violated ex post facto.

People v. Coahran, 2019 WL 303029 (Colo. App. 2019):
Holding: Even though Defendant was charged with a property crime (where she kicked her ex-boyfriend's car during an argument), she was entitled to a self-defense instruction for taking steps reasonably necessary to defend herself, which could include kicking the car.

People v. Knobee, 2020 WL 238712 (Colo. App. 2020):
Holding: Trial court's remarks to jurors during voir dire that reasonable doubt was "a standard we use a lot of times" and was similar to that used to buy a home or choose a doctor constituted structural error requiring reversal, because this misstated the law and lowered the burden of proof; this is true even though the court gave a proper instruction at the close of trial.

Rodriguez v. State, 2015 WL 5026063 (Fla. App. 2015):
Holding: Where Defendant has presented evidence to support a duress theory of defense to underlying felony in felony-murder case, Defendant is entitled to the duress instruction as a defense to felony murder.

Williams v. State, 2015 WL 5158449 (Tex. App. 2015):
Holding: Jury instruction which allowed conviction without jury being unanimous as to whether the charged sex act involved penetration of Victim's vagina or anus violated right to unanimous verdict.

Phillips v. State, 2015 WL 3504487 (Tex. App. 2015):
Holding: Under jailhouse witness rule which requires independent evidence connecting Defendant to a crime and a cautionary jury instruction when Defendant allegedly makes statements "against his interest" to other inmates, the phrase "against interest" applies to any statement adverse to him, not just statements acknowledging guilt; thus, the rule applied where Defendant allegedly asked other inmates to lie for him at trial.

State v. Gonzalez, 2015 WL 9901888 (N.J. Super. Ct. App. 2016):
Holding: Jury instruction which repeatedly used "and/or" was ambiguous and failed to explain in clear English what elements the jury was to find.

Jury Issues – Batson – Striking of Jurors – Juror Misconduct

State v. Brandolese, 2020 WL 3529369 (Mo. banc June 30, 2020):
Holding: (1) Even though the sister of an assistant prosecutor who had worked on the case before trial served on the jury, it was not plain error for the court to fail to strike the juror; even assuming that Sister-Juror's service on jury violated Sec. 494.470.1 regarding disqualifying family relationships of jurors, Defendant has not shown how Sister-Juror was biased or unfair (she made no statements on voir dire evidencing bias), and has not shown Sister-Juror was even aware that her brother had previously worked on the case; even assuming this is "structural error," all errors alleging plain error under Rule 30.20 -- whether statutory, constitutional or structural – must be evaluated under the same manifest injustice framework; and (2) even though Defendant did not agree to the State's self-defense instruction (which was submitted), where Defendant also submitted proposed self-defense instructions that were improper and did not comply with MAI, Defendant "invited" error and cannot show plain error in submitting the State's instructions at trial.

Wood v. State, 2019 WL 3144027 (Mo. banc July 16, 2019):
Holding: Where Jury found aggravating circumstances but hung on whether to impose death penalty, the Sixth Amendment right to have all facts found by a jury beyond a reasonable doubt was not violated when Judge imposed death, because whether mitigating factors outweigh aggravating factors and whether death is an appropriate sentence are not factual elements that must be found by a jury; to the extent *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), presumes the weighing step is a factual finding constitutionally reserved for the jury, it should no longer be followed.
Editor's Note: Three judges dissented from this holding.

Brainchild Holdings LLC v. Cameron, 534 S.W.3d 243 (Mo. banc Dec. 5, 2017):
Holding: Even though Sec. 535.110 was amended in 2014 to remove a provision that allowed a trial *de novo* in circuit court where a jury trial could occur in rent and possession cases, nothing in Sec. 535.040.1 specifically excludes a jury trial, so parties are entitled to a jury trial in associate circuit court; Mo. Const. Art. XIII, Sec. 8, provides that right to jury trial "shall remain inviolate."

State v. Johnson, 524 S.W.3d 505 (Mo. banc Aug. 22, 2017):
(1) The predatory sexual offender statute, Sec. 558.018.5(3), allows a defendant to be found to be a predatory sexual offender based on committing acts against more than one victim in the charged offense; the acts need not be prior to the charged offense; (2) even though the statute allows a judge to find a defendant to be a predatory sexual offender for current acts, this does not necessarily render the statute unconstitutional as violating the Sixth Amendment right to a jury finding of predicate facts necessary to increase punishment, where the jury also convicts based on more than one victim; however, the statute may be unconstitutional, as applied, if the jury does not convict based on multiple victims; and (3) even though the trial court violated the timing requirements of Sec. 558.021.2 by not finding the Defendant to be a predatory sexual offender before the case

was submitted to a jury, this was not plain error where Defendant had waived jury sentencing before trial.

Facts: Defendant was charged with various sex offenses against three children. The State charged him with being a "predatory sexual offender" under Sec. 558.018.5(3), because he "[h]as committed an act or acts against more than one victim" in the instant offense. Defendant argued the statute applies only to prior acts, not acts that form the basis for the current offense. The State sought to have the trial court find Defendant to be a predatory sexual offender before the case was submitted to the jury, but the trial court initially agreed with Defendant's interpretation of the statute and denied the State's request. At sentencing, the State again requested that Defendant be found to be a predatory sexual offender. The trial court then agreed with the State's interpretation of the statute, and found and sentenced Defendant as a predatory sexual offender to life in prison without parole for 25 years.

Holding: (1) Regarding Defendant's claim that the statute only applies to prior offenses, this is belied by the plain language of Sec. 558.018.5(3), which declares a person to be predatory sexual offender if they have "committed an act or acts against more than one victim." The statue is unambiguous. Nowhere does subdivision 3 refer to "prior" or "previous" acts. Those are dealt with in Sec. 558.018.5(2). (2) Defendant claims the statute is unconstitutional under *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013), which requires that any fact, other than prior conviction, that increases the penalty for a crime must be submitted to the jury and determined by the jury. Here, however, both the judge and jury found the necessary facts of acts committed against more than one victim. *Alleyne* held only that the jury must find the necessary facts, not that a statute may not require a trial court to also find the facts. The trial court's pre-submission findings of predicate facts does not necessarily preclude the jury from also having to later find the same predicate facts. If either the circuit court or jury would fail to find the required facts, the defendant could not be sentenced as a predatory sexual offender. That the statute could be unconstitutional *as applied* when the jury does not also find the predicate facts does not render it facially unconstitutional. (3) The trial court violated the timing requirements of Sec. 558.021.2 because it did not find Defendant was a predatory sexual offender before the case was submitted to the jury, as required by Sec. 558.021.2. However, because Defendant did not object to violation of the timing requirements, this can only be reviewed for plain error. Here, no manifest injustice resulted from the violation of the timing requirements. The trial court's error did not deprive Defendant of any possible benefit of jury sentencing (because he waived jury sentencing prior to trial), did not give the State an unfair advantage, and did not lack foundational support in the evidence. Sentence as predatory sexual offender affirmed.

Concurring opinion: Judge Breckenridge would find that Sec. 558.018.5(3) is unconstitutional under *Alleyne*, as applied, when used to classify a defendant as a predatory sexual offender based on acts committed against multiple victims for which the defendant has not been previously convicted, as occurred here. However, under the facts here, she would not reverse for the *Alleyne* error.

Dissenting opinion: Judges Stith and Draper would reverse the sentence because of the violation of the timing requirements of 558.021.2, and because allowing a trial judge to designate a defendant as a predatory sexual offender based on current acts against multiple victims violates *Alleyne*. The majority's holding means the enhanced mandatory

minimum applies in every case with more than one victim, since it requires trial judges to make the predatory sexual offender finding before submission to the jury. If the judge does not so find, the judge would have to refuse to submit the charges to the jury at all and instead submit a judgment of acquittal on them. This is because the defendant could not be convicted of an act based on evidence insufficient to support such a finding. For each charge submitted, the defendant would either be acquitted and so subject to no sentence, or be convicted and automatically subject to the enhanced mandatory minimum. The one thing that will *never* happen is for the defendant to receive the sentence actually prescribed by the statute based on the jury's verdict. This cannot be what the legislature intended.

State v. Meeks, 2016 WL 4443993 (Mo. banc Aug. 23, 2016):

Prosecutor's explanation that she struck African-American Venireperson because Venireperson may have said she wanted to "open" a "can of worms" in response to a racist comment made by another venireperson, and Prosecutor did not want to "start out the case" with someone of "African-American descent upset about racial issues," was not a race-neutral explanation for striking Venireperson under Batson; this is because the Prosecutor did not strike all venirepersons in the row were the "can of worms" remark originated, and because the explanation explicitly referred to Venireperson's race.

Facts: During voir dire, a venireperson made a racist remark. Defense counsel said he didn't want to open a can of worms, and an unidentified juror in a particular row said, "let's open that can." When the prosecutor had only one peremptory left, she used it against an African-American Venireperson in the row where the can of worms remark originated.

Holding: *Batson* involves three steps: 1) the Defendant raises a *Batson* objection to a strike of a venireperson and identifies the venireperson as part of a cognizable racial group; 2) the State must offer reasonably specific and race-neutral explanation for the strike; and 3) the defendant will then need to show that the State's strike was pretextual. The instant case is about Step Two only. Disparate treatment of venirepersons plays no role in determining if the Prosecutor has offered race-neutral reasons. Disparate treatment only applies in Step 3. Further, an appellate court need not defer to the trial court's determinations of credibility in deciding if a strike was objectively race-neutral. Here, the Prosecutor's explanation might have explained striking everyone in the row, but that's not what the Prosecutor did. The Prosecutor struck the African-American Venireperson. The Prosecutor's explanation expressly referred to Venireperson's race; thus, the explanation cannot be race-neutral. Reversed and remanded for new trial.

Smotherman v. Cass Regional Medical Center, 2016 WL 6914974 (Mo. banc Sept. 20, 2016):

Even though prejudice is presumed when a juror engages in misconduct by researching facts outside the case, this presumption of prejudice is rebuttable; thus, even though Juror testified that he Googled certain facts regarding the case during trial, where 8 other jurors testified that they either did not hear about these extrajudicial facts or the facts were immaterial to them, the trial court did not abuse its discretion in finding that the presumption of prejudice was rebutted.

Discussion: Juror testimony is generally not admissible to impeach a verdict. But an exception exists to show that a juror committed misconduct by improperly gathering evidence outside a trial. Here, a Juror Googled certain facts during trial. This research constituted misconduct; it raises a presumption of prejudice, and shifts the burden to the opposing side to rebut that presumption. Here, 8 other jurors testified that they either didn't hear about the extrajudicial facts, or the facts weren't material to them. The trial court was free to credit these 8 jurors, and also free to find that the extrajudicial facts were not material to the case. Appellant in effect asks the Court to adopt a new rule that the non-offending jurors' testimony not be given any weight. But such rule is not in accord with the trial court being in the better position to determine what effect, if any, misconduct had on the jury. The presumption of prejudice was rebutted. Verdict affirmed.

State v. Celian, 2020 WL 891008 (Mo. App. E.D. Feb. 25, 2020):
Holding: Where Prosecutor asked venirepersons during voir dire whether they would "agree" that charged road rage shooting was a "big deal" and "does everybody agree then that that's something that [Defendant] should be accountable for, if he did," trial court abused discretion in overruling Defendant's objections to this questioning, because this violated Defendant's right to a fair and impartial jury by predisposing them and committing them to react to evidence in a certain way.
Discussion: While some inquiry into critical facts of a case is necessary to discover bias, a presentation of facts that attempts to elicit a commitment from venirepersons as to how they'd react to facts is improper. Questions asking venirepersons about what they "would" do or believe in light of particular facts about the case are irrelevant and properly excluded. Questions asking if jurors "agree" with some proposition run a danger of seeking commitments.

In the Matter of Care and Treatment of D.N., 2019 WL 2943377 (Mo. App. E.D. July 9, 2019):
Trial court abused discretion, in sexually violent predator trial, in prohibiting Defendant from telling jurors the ages of Defendant's young victims (4 and 8) and asking if their young ages would cause bias or prejudice.
Facts: During voir dire, Defendant sought to ask venire about the specific ages of the victims and how this would impact them. The State objected that this was "too inflammatory." The trial court sustained the objection.
Holding: A defendant is entitled to inquire about "critical facts" in a case to uncover disqualifying bias and prejudice. Child abuse evokes strong emotional reactions in society. Defendant was denied his right to a fair and impartial jury when he was prohibited from asking jurors about these critical facts. He was prejudiced because State emphasized young ages of victims throughout its case.

Grand Juror Doe v. McCulloch, 2017 WL 6327682 (Mo. App. E.D. Dec. 12, 2017):
Holding: Grand Juror, on the jury that declined to indict Officer Darren Wilson in the shooting death of Michael Brown, did not show any exception to the secrecy obligations of Secs. 540.080, 540.310 and 540.320, to allow her to speak publicly about her experience on the grand jury in the case.

Thomas v. Mercy Hospitals East Communities, 2016 WL 4761435 (Mo. App. E.D. Sept. 13, 2016):
Holding: Trial court abused discretion in failing to strike Juror (who served on jury) who showed a disqualifying bias when she said on voir dire that she would "start off slightly in favor" of Mercy Hospital in medical malpractice case; further, even though Juror later said she would "do her level best" to follow the instructions and decide the case solely on the evidence, this did not rehabilitate her because Juror cannot judge her own qualification to serve, and this was merely a bare commitment to do her "best"; no one questioned Juror about the nature, character or cause of her bias.

State v. Rashad, 2016 WL 1110250 (Mo. App. E.D. March 22, 2016):
Holding: Even though the State struck two African-American venirepersons who had felony arrests, but did not strike a white venireperson with a felony arrest, where (1) the State claimed the failure to strike the white venireperson was a "mistake" or "oversight," and (2) the trial court found this explanation credible, appellate court defers to trial court's credibility determination and finds no *Batson* violation, especially in light of no other evidence of racial discrimination in case; the final jury included four African-Americans, and the victim, Defendant, and main police investigator were African-American.

Editor's Note: A concurring opinion cites studies showing how purposeful or unconscious racial bias impacts jury selection, cites both USDOJ reports following Ferguson, which found racial disparity in treatment of defendants in St. Louis County, and says "Missouri courts cannot ignore … the growing body of evidence that racial bias, whether purposeful or unconscious, impacts jury selection to the detriment of citizens of color and the integrity of our justice system."

State v. Snyder, 2019 WL 6124493 (Mo. App. S.D. Nov. 19, 2019):
Holding: (1) Southern District will not engage in plain error review of *Celis-Garcia* claim, because trial counsel may have made a strategic decision not to object to the jury instructions, and the record on direct appeal is not developed for purposes of understanding counsel's motivation for not objecting; but ineffectiveness claim may be raised in postconviction (2) Southern District notes there is a "somewhat lower" standard for obtaining relief on basis of ineffective assistance (reasonable probability of different outcome test), than plain error (outcome determinative test).

Spence v. BNSF Railway Co., 2016 WL 7439115 (Mo. App. S.D. Dec. 27, 2016):
Holding: Rule 69.025, which requires a party to conduct a "reasonable investigation" on Case.net of potential jurors' "litigation history," did not apply to situation where juror failed to answer voir dire question as to whether any jurors had "been in an auto accident;" although a Case.net search would have revealed that Juror had been involved in a *lawsuit* over an auto accident, Rule 69.025 applies to *litigation history only* and the question asked was not about that, so defendant did not waive claim of Juror's nondisclosure by failing to discover this on Case.net before trial; Juror's intentional non-disclosure requires new trial.

State v. Brandolese, No. WD80893 (Mo. App. W.D. Dec. 26, 2018):
Holding: Even though (1) defense counsel said he had no objection to Venireperson, whose brother had been an Assistant Prosecutor in the case and had signed some papers and made some pretrial appearances, serving on jury; (2) Assistant Prosecutor did not conduct the actual trial; and (3) Venireperson served on jury at trial, trial court plainly erred in not striking Venireperson for cause because Sec. 494.470.1 provide that no person who is related to the prosecuting attorney in a criminal case within the fourth degree "shall be sworn as a juror in the same case."

State v. Lutes, 2018 WL 3026963 (Mo. App. W.D. June 19, 2018):
Holding: (1) Where, in child sex cases, the State will be admitting prior sex acts as evidence of propensity under Mo.Const. Art. I, Sec. 18(c), the Defendant is allowed on voir dire to question the venire on bias about prior sex offenses, but the questions must be factually accurate and not run afoul of Sec. 18(c)'s purpose to allow prior bad acts as evidence of propensity; (2) an example of a permissible question would be to state what Defendant is presently charged with; state precisely what he was convicted of in the past; and ask, "though for a case such as this one a jury is entitled to consider my client's prior conviction as demonstrating propensity to commit the crime with which he is presently charged, are there any members of the venire that would be so impacted upon the hearing of such prior conviction that you do not believe that you would be able to fairly and impartially consider any other evidence that you will hear in this case in determining whether the State has met its burden of proving beyond a reasonable doubt that my client is guilty of the presently charged offense?"

King v. Sorensen, 2017 WL 3707067 (Mo. App. W.D. Aug. 29, 2017):
Holding: Trial court erred in holding that Plaintiffs had waived their claim that Juror had intentionally failed to disclose involvement in prior litigation on grounds that Plaintiffs had not conducted a "reasonable investigation" of Juror as required by Rule 69.025 before trial, where Plaintiffs had conducted a pre-trial Case.net search of jurors using the name of Juror which was provided by the court on the venire list, but which name was actually erroneous.
Discussion: Rule 69.025 provides that a party waives the right to seek relief based on juror nondisclosure if the party fails to conduct a "reasonable investigation" of jurors before the jury is sworn. The Rule defines "reasonable investigation" as a "review of Case.net before the jury is sworn." Here, Plaintiffs reviewed Case.net using the name provided by the court on the venire list, but that name was, in fact, erroneous. It was the trial court, not counsel for Plaintiffs, that incorrectly identified Juror's first name. Where a litigant has performed a Case.net search by inserting names provided by the trial court, such a search cannot be deemed anything but "reasonable." Case remanded for hearing on whether Juror's nondisclosure was intentional.

State v. Mosley, 2017 WL 2773955 (Mo. App. W.D. June 27, 2017):
Holding: Where during voir dire, (1) defense counsel noted that Defendant was African-American and asked venirepersons (on a mostly white panel) if they understood that Defendant is concerned that he'd be judged by his skin color; and (2) an African-American juror answered that she "grew up here, so I deal it every day," the Prosecutor's

peremptory strike of her on grounds that "she would understand the defendant's' position being prejudged … *because of her status here*" was not race-neutral, and trial court erred in not finding a *Batson* violation.
Discussion: A neutral explanation means one based on something other than the race of the juror. Here, the State's explanation was expressly based on Juror's race because she "would understand the defendant's position of being prejudged … *because of her status here*," i.e., her African-American status. That explanation is inherently discriminatory.

Larsen v. Union Pacific Railroad Co., 2016 WL 4480770 (Mo. App. W.D. Aug. 23, 2016):
Holding: Rule 78.08's plain error provision can be used to raise issue of Juror nondisclosure after time for filing New Trial Motion has expired.

* **Ramos v. Louisiana, ___ U.S. ___, 140 S.Ct. 1390 (U.S. April 20, 2020):**
Holding: Sixth Amendment requires a unanimous verdict to convict; Court strikes down Louisiana and Oregon procedures that allowed convictions by non-unanimous vote of jurors.

*** U.S. v. Haymond, 2019 WL 2605552, ___ U.S. ___ (U.S. June 26, 2019):**
Holding: 18 USC §3583(k) that requires a judge to impose a mandatory minimum five-year term and up to life in prison for certain violations of supervised release, such as possession of child pornography, violates the Fifth and Sixth Amendment right to a jury trial; statute allows a judge (not a jury) to engage in factfinding to increase the minimum penalty, and to do so without proof beyond a reasonable doubt.

*** Flowers v. Mississippi, 2019 WL 2552489, ___ U.S. ___ (U.S. June 21, 2019):**
Holding: Prosecutor's history of discriminatory peremptory strikes, disparate questioning of black and white jurors, and not striking similarly situated white jurors established a *Batson* violation.

* **Tharpe v. Sellers, ___ U.S. ___, 138 S.Ct. 545 (U.S. Jan. 8, 2018):**
Holding: Even though state court had determined that habeas Petitioner (who was black) failed to present clear and convincing evidence that allegedly racist Juror's presence on the jury had prejudiced him, where Petitioner presented an affidavit from Juror in which Juror made racist remarks about blacks and Petitioner (but denied that his views affected his verdict), lower court erred in denying a certificate of appealability because jurists of reason could debate whether Petitioner has shown by clear and convincing evidence that the state court's factual determination finding no prejudice was wrong.

*** Pena-Rodriguez v. Colorado, 2017 WL 855760, ___ U.S. ___ (U.S. March 6, 2017):**
Holding: Rules against impeachment of verdicts must give way to evidence that a verdict was based on racial animus; thus, trial court must consider evidence from jurors who came forward after trial to tell defense counsel that another juror had made statements during deliberations showing that racial bias was a motiving factor in his vote.

*** Foster v. Chatman, ___ U.S. ___, 136 S.Ct. 1737 (U.S. May 23, 2016):**
Holding: Prosecutors violated *Batson* by, among other reasons, making notes in their file that focused on potential jurors' race, giving shifting explanations for their strikes during the litigation, misrepresenting the record; whether purposeful discrimination occurred is to be determined based on all circumstantial evidence of intent as may be available.

* **Dietz v. Bouldin, ___ U.S. ___, 136 S.Ct. 1885 (U.S. June 9, 2016):**
Holding: Federal judges can, in limited circumstances, recall a jury after it has been dismissed in order to correct a legal mistake in the verdict. In determining whether a jury can be recalled, courts should consider the length of delay between discharge and recall; whether jurors have spoken to anyone after discharge or accessed information about the case from external sources, including the internet; and courtroom or public reaction to the verdict which might bias recalled jurors. The Court expressly noted it was not deciding whether judges can recall juries in criminal cases: "Given additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here whether it would be appropriate to recall a jury after discharge in a criminal case."

*** Hurst v. Florida, 2016 WL 112683, ___ U.S. ___ (U.S. Jan. 12, 2016):**
Holding: The Sixth Amendment requires that a jury, not a judge, find each fact necessary to impose a death sentence; capital sentencing scheme which authorized an advisory sentencing recommendation by a jury, followed by independent fact-finding by a judge, violated *Ring*.

U.S. v. Zimmy, 100 Crim. L. Rep. 374 (1st Cir. 1/24/17):
Holding: Defendant entitled to evidentiary hearing over juror misconduct arising from Juror posting things about trial on internet, and effect on other jurors.

Porter v. Zook, 103 Crim. L. Rep. 18 (4th Cir. 8/3/18):
Holding: Defendant was entitled to hearing on his juror non-disclosure claim where venire was asked if they were related to law enforcement, and juror failed to disclose that his brother was a police officer.

Chamberlin v. Fisher, 101 Crim. L. Rep. 109 (5th Cir. 4/27/17):
Holding: *Batson* violated where Prosecutor didn't strike two white jurors who were "identical in all respects" to two black jurors who prosecutor struck.

English v. Berghuis, 103 Crim. L. Rep. 541 (6th Cir. 8/21/18):
Holding: Juror in child sex case deliberately failed to disclose that she had been sexually abused as child where Juror failed to answer voir dire question whether they had any personal experiences that might affect their decision.

Garcia-Dorantes v. Warren, 2015 WL 5167025 (6th Cir. 2015):
Holding: An absolute disparity for African-Americans of 3.45% and 1.66% for Hispanics and a corresponding 42% and 27.64% comparative disparity was sufficient to

show violation of fair cross section requirement for selecting venirepersons under 6th Amendment, which was caused by a computer glitch.

U.S. v. Mahbub, 2016 WL 1211861 (6th Cir. 2016):
Holding: Even though Defendant failed to show that she was a member of a cognizable racial group, this did not prevent her from raising a *Batson* challenge.

Currie v. McDowell, 2016 WL 3192396 (9th Cir. 2016):
Holding: State court unreasonably found no *Batson* violation where Prosecutor had history of *Batson* violations; gave explanations for strikes that were suggested by the judge; struck a juror with a family history of drug problems but did not strike another juror who personally had drug problems; and failed to strike white jurors who had the same inconsistency in answering regarding family criminal history as jurors Prosecutor did strike.

Tarango v. McDaniel, 98 Crim. L. Rep. 541 (9th Cir. 3/3/16):
Holding: Outside contact with a juror need not be a "communication" in order to require a hearing on prejudice; here, a police officer closely followed a "holdout" juror for seven miles during an overnight recess; the juror interpreted this incident to mean the police knew he was the holdout, and this caused the juror to change his vote to guilty.

Crittenden v. Chappell, 98 Crim. L. Rep. 117, 2015 WL 6445531 (9th Cir. 10/26/15):
Holding: 9th Circuit *Batson* rule that prosecutor's strikes are unconstitutional if they are "motivated in substantial part" by race – even if there is also a secondary race-neutral reason – is retroactive.

Shirley v. Yates, 2015 WL 7422606 (9th Cir. 2015):
Holding: Prosecutor's reason for striking black venireperson – that he prefers persons with more life experience and education – was not race neutral where prosecutor failed to strike similar white venirepersons.

Young v. Gipson, 98 Fed. R. Evid. Serv. 625 (N.D. Cal. 2015):
Holding: Defendant entitled to habeas relief where Juror failed to reveal on voir dire that he was familiar with the neighborhood where the crime took place, and where juror provided contradictory information on juror questionnaires and in voir dire about whether he owned weapons, and whether he belonged to groups that advocated right to own weapons.

Wofford v. Woods, 2018 WL 5786212 (E.D. Mich. 2018):
Holding: Defendant was deprived of 6th Amendment right to unanimous jury where judge removed juror after the jury sent notes to the judge saying "11 to 1 with no chance of one moving their view," "one of the juror's doubts are unreasonable, what do we do?", and "We have a Jury member who seriously doesn't understand reasonable doubt! Help!" and an attorney representing the removed juror told the judge that the juror was being harassed and abused by other jurors.

People v. Gutierrez, 101 Crim. L. Rep. 241 (Cal. 6/1/17):
Holding: Prosecutor's strike of Hispanic juror for ties to law enforcement violated *Batson* where Prosecutor didn't strike whites with same ties.

People v. Woodruff, 103 Crim. L. Rep. 402 (Cal. 7/19/18):
Holding: Death penalty venireperson should not have been automatically dismissed because he said he opposed death penalty on written questionnaire; venireperson should have been questioned on voir dire to see if can set aside views; new penalty phase ordered.

People v. Nelson, 99 Crim. L. Rep. 642 (Cal. 8/15/16):
Holding: Judge improperly interfered in jury deliberations by giving a questionnaire to deadlocked jurors and then replacing one of them after quizzing her about her answers.

People v. Covarrubias, 99 Crim. L. Rep. 693 (Cal. 9/8/16):
Holding: Even though potential death penalty juror wrote on pretrial questionnaire that he "strongly" opposed death penalty and would "probably" refuse to impose it, trial court erred in striking him from panel based on the questionnaire without calling him in for actual voir dire.

People v. Leon, 2015 WL 3937629 (Cal. 2015):
Holding: Even though capital venirepersons wrote on their questionnaires that they would automatically give life, where they also wrote that they would consider both punishments if instructed to do so, trial court erred in striking the venirepersons without questioning them during voir dire.

State v. Carroll, 2020 WL 400618 (Haw. 2020):
Holding: Trial court abused discretion in denying for-cause challenge to Juror who was very upset by the charged crime, said Defendant would need "pretty good evidence" to prove his innocence, and who gave only conclusory "yes" answers to rehabilitative questions.

State v. Auld, 2015 WL 7459130 (Haw. 2015):
Holding: Defendant was entitled to have a jury find all the necessary facts to support a sentencing enhancement based on prior convictions; jury was required to find that Defendant had a prior, that it was a specifically enumerated prior, that it occurred within a certain time frame, and that Defendant was represented by counsel or waived counsel.

State v. Logsdon, 2016 WL 1265785 (Kan. 2016):
Holding: Sentencing scheme for imposing life without parole for 50 years violated 6th Amendment right to jury trial, where scheme allowed Judge to find certain facts by preponderance of evidence, rather than jury find them beyond a reasonable doubt.

Brewer v. Com., 2015 WL 5667020 (Ky. 2015):
Holding: A "trifurcated" trial with three phases (including two penalty phases) was necessary to deal with factual issues jury must make regarding guilt and sentencing enhancements.

Futrell v. Com., 2015 WL 5626423 (Ky. 2015):
Holding: Venireperson, who had previously been represented by Prosecutor and whose son was currently being represented by Prosecutor in unrelated case, should have been struck for cause, even though Venireperson said he would not be biased by this.

Kazadi v. State, 2020 WL 398840 (Md. 2020):
Holding: On request, during voir dire, trial court must ask prospective Jurors if they are unwilling or unable to follow law on presumption of innocence, State's burden of proof, and Defendant's right not to testify.

Ray-Simmons v. State, 98 Crim. L. Rep. 482 (Md. 2/22/16):
Holding: Prosecutor violated *Batson* by striking a black venireperson and offering as an explanation that she planned to replace the venireperson with another black venireperson on the panel; this rationalization was not race-neutral, and did not in any way explain the Prosecutor's reason for the strike.

Com. v. Williams, 116 N.E.3d 609 (Mass. 2019):
Holding: Where venireperson expressed her belief that justice system was "rigged against young African-American males," trial court erred in questioning her about "putting that out of [her] mind" and implying that looking at situations based on her experience was impermissible.

People v. Lockridge, 2015 WL 4562293 (Mich. 2015):
Holding: Sentencing guidelines which increased the mandatory minimum sentence violated 6th Amendment right to jury trial to the extent that they required judge to make factual findings not admitted by Defendant or found by a jury.

People v. Mendez, 2015 WL 6455348 (N.Y. 2015):
Holding: Where certain recordings admitted during trial were in Spanish and jurors were allowed to use a Spanish-to-English transcript at trial as an aid to understanding the recordings, but the transcripts themselves were not admitted into evidence, the trial court erred in simply telling jurors that the transcripts were not in evidence when the jurors asked for them during deliberations; the jury would need the transcripts to understand the recordings, and the judge had invited them to ask for the transcripts.

Com. v. Wolfe, 2016 WL 3388530 (Pa. 2016):
Holding: Statute which provided mandatory minimum 10-year sentence where the sentencing court found certain facts violated 6th Amendment right to have a jury determine all facts necessary to increase the penalty for a crime, even though statute stated that the facts to be found were not elements of the crime.

Com. v. Hopkins, 2015 WL 3949099 (Pa. 2015):
Holding: Sentencing statute which increased mandatory minimum sentence for selling drugs within 1000 feet of a school violated Defendant's 6th Amendment right to fact-finding by a jury because it required judge to make certain fact determinations.

People v. Denard, 2015 WL 7774288 (Cal. App. 2015):
Holding: Trial court could not rely on the facts stated in probable cause affidavit from Florida to find a prior conviction for "strike" purposes, because the affidavit contained multiple hearsay, Defendant was not ultimately convicted of that offense, and reliance of the affidavit constituted judicial fact-finding in violation of 6th Amendment right to jury trial.

People v. Cisneros, 2015 WL 521878 (Cal. App. 2015):
Holding: Prosecutor's explanation that she struck two male jurors because she preferred the next prospective juror was a truism which was not gender-neutral under *Batson*; whenever counsel exercises a peremptory, counsel prefers the "next" juror, so this cannot be an adequate explanation for striking jurors under *Batson*.

People v. Johnson, 195 Cal. Rptr.3d 561 (Cal. App. 2015):
Holding: A court considering whether Defendant made a prima facie showing of good cause to obtain juror information cannot judge credibility based merely on the affidavits submitted with the petitioner for disclosure; rather, the prima facie showing triggers an evidentiary hearing where a court can judge credibility.

People v. Morris, 2015 WL 3932754 (Cal. App. 2015):
Holding: Defendant's right to a fair trial was violated when State called an excused juror to testify that juror overheard Defendant make incriminating remarks at the courthouse; there was an unacceptable probability that other jurors would be biased toward the testimony since they had served with the juror.

People v. Viburg, 2020 WL 238715 (Colo. App. 2020):
Holding: Prior convictions for DWI are elements of felony DWI that must be found by a jury beyond a reasonable doubt.

People v. Skinner, 2015 WL 4945986 (Mich. App. 2015):
Holding: 6th Amendment right to jury trial was violated by statute which allowed trial court to enhance a sentence from a term of years in murder cases to a life without parole sentence upon motion by the prosecutor; any fact which exposes a defendant to a greater sentence must be found by a jury.

People v. Watson, 2016 WL 2636643 (N.Y. App. 2016):
Holding: Even though prosecutor offered race-neutral reasons under *Batson*, trial court erred in denying Defendant opportunity to show those reasons were pretextual.

State v. Singletary, 2016 WL 1742818 (N.C. App. 2016):
Holding: Statute that allowed court to lengthen sentence based on severity of crime and other aggravating factors violated *Apprendi*, which requires any fact (other than prior conviction) that increases punishment be found by a jury.

Nixon v. State, 2016 WL 735867 (Tex. App. 2016):
Holding: Where jury returned verdict form with a note saying that its sentences should be consecutive, this was an unauthorized verdict, not an "informal verdict," and so court was required to reform the verdict to comport with the law by omitting the unauthorized portion (that sentences be consecutive), rather than sending the jury back to resume deliberations.

Melton v. State, 2015 WL 167207 (Tex. App. 2015):
Holding: Even though the fine that the jury assessed exceeded that permissible by law, trial judge violated right to jury secrecy in deliberations and Defendant's right to have a jury free from outside influence, when trial judge required jury to deliberate in open court over a new fine amount; the remedy was to remand for a new punishment hearing on the fine only, not the other sentences that were also imposed.

State v. Guevara Diaz, 2020 WL 415904 (Wash. App. 2020):
Holding: Juror's pretrial answer on questionnaire that she could not be fair to both sides in sex assault trial demonstrated actual bias, and violated Defendant's right to a fair and impartial jury when Juror served on jury; no one questioned Juror during voir dire about her questionnaire answers.

State v. Mullen, 2015 WL 1035633 (Wash. App. 2015):
Holding: Where Defendant's prior offense was for reckless driving – which may or may not have involved alcohol or drugs – Defendant had 6th Amendment right to a jury finding that the prior offense involved alcohol or drugs before it could be used as an enhancer for a new DWI charge.

State v. Mahoney, 2016 WL 687142 (N.J. Super. Ct. 2016):
Holding: Jurors from trial are not permitted to participate in Defendant's sentencing hearing; thus, jurors could not testify that they believed Defendant needed treatment, instead of punishment.

State v. Brown, 2015 WL 5117950 (N.J. Super Ct. App. 2015):
Holding: Trial court abused its discretion in failing to remove a Juror during deliberations who disclosed racial bias to other jurors and the court; the Juror reported to other jurors and court that she had seen two African-American men in her all-white neighborhood and she believed, without evidence, that this was a sign of possible retaliation by the Defendant, who was African-American.

Com. v. Kelly, 2016 WL 638716 (Pa. Super. 2016):
Holding: Even though Police Officer-Venireperson was not a member of the same police force as any of the law enforcement officers who would be testifying in the case,

where Officer-Venireperson knew 10 of the officer-witnesses and had an ongoing relationship with the Prosecutor's Office which was prosecuting the case, Officer-Venireperson should have been excluded for cause.

Juvenile

State v. Barnett, 2020 WL 1861732 (Mo. banc April 14, 2020):
Holding: Sec. 565.020, which mandates life without parole for first-degree murder, is not unconstitutional as applied to Defendant, who was 19 years old at the time of his offense; the U.S. Supreme Court's jurisprudence on the necessity to consider mitigating circumstances for juveniles before sentencing them to life in prison without parole applies only to persons younger than 18 years old.

In the Interest of D.E.G. v. Juvenile Officer of Greene Cnty., 2020 WL 3248270 (Mo. banc June 16, 2020):
Juvenile can directly appeal juvenile division's judgment dismissing jurisdiction over him and allowing his case to be transferred to circuit court following a certification hearing, i.e., juvenile can immediately appeal outcome of certification hearing, because Sec. 211.261.1 provides that "an appeal shall be allowed to the child from any final judgment, order or decree made under the provisions of this chapter"; cases to contrary are overruled.
Facts: Juvenile Office recommended Juvenile be certified to stand trial in a court of general jurisdiction. Juvenile challenged the constitutionality of various matters at his certification hearing. The objections were overruled. Following the certification hearing, the court entered its judgment of dismissal per Sec. 211.071, which dismissed the juvenile petition, and transferred jurisdiction over Juvenile to court of general jurisdiction.
Holding: The right to appeal is purely statutory. Sec. 211.261 governs the right to appeal in juvenile cases. *In re T.J.H.*, 479 S.W.2d 433 (Mo. banc 1972), previously held that an order dismissing a petition and relinquishing juvenile jurisdiction was not a final, appealable order. Sec. 211.261.1 states: "An appeal shall be allowed to the child from any final judgment, order or decree made under the provisions of this chapter." Here, the juvenile division entered a "Judgment of Dismissal" which "ordered and adjudged" that Juvenile be discharged from its jurisdiction. This judgment was signed by a judge. Hence, the judgment dismissing juvenile division's jurisdiction was a final, appealable judgment. *T.J.H.* ignored the fundamental obligation to follow the statutory guidance of the legislature. Sec. 211.261.1's clear, unambiguous language allows for an appeal from "*any* final judgment, order or decree made under the provisions of this chapter." *T.J.H.* and its progeny failed to follow the plain language of Sec. 211.261.1. Their holdings that a juvenile's dismissal from a juvenile division's jurisdiction may be challenged only in a court of general jurisdiction are overruled and no longer to be followed. An aggrieved party may appeal from any final judgment in chapter 211.

Hicklin v. Schmitt, 2020 WL 6881220 (Mo. banc Nov. 24, 2020):
Holding: (1) Even though Petitioner was convicted of first-degree murder and sentenced to life-without-parole when she was a Juvenile, Missouri has complied with *Miller* and *Montgomery* by granting parole-eligibility after 25 years, and allowing Parole Board to determine whether such Juveniles should be released, Sec. 558.047.1(1); *Montgomery* allowed States discretion whether to grant new sentencing hearings to such Juveniles or grant parole-eligibility, and Missouri chose the latter; and (2) challenges to the constitutionality of statutes are brought as a declaratory judgment action, but attacks on validity of sentence should be brought in habeas corpus; to the extent Petitioner seeks a judgment about the constitutionality of the first degree murder statute, Sec. 558.047, and their application to her, declaratory judgment is proper; declaratory judgment is also proper to determine when Petitioner is eligible for parole under applicable statutes, and to challenge what process a parole hearing must use to comply with relevant statutes.

In the Interest of D.C.M. v. Pemiscot County Juvenile Office, 578 S.W.3d 776 (Mo. banc Aug. 13, 2019):
Holding: (1) Even though Juvenile turned 18 and was released from supervision while appeal of his adjudication (juvenile conviction) was pending, the case is not moot since his juvenile adjudication could be used against him in any later adult proceeding, and there is a stigma that flows from the judgment against him; (2) Juveniles have right to effective assistance of counsel but no statute or case provides a mechanism to raise such a claim, so Court holds that (a) if the claim can be adjudicated from the direct appeal record, court will resolve the claim on direct appeal, but (b) if the claim requires an evidentiary hearing (which will be likely for claims of failure to investigate or prepare, or pursue particular defenses or witnesses), case will be remanded to juvenile court for evidentiary hearing; and (3) if counsel is found ineffective, Juvenile will receive a new adjudication hearing.

State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. banc July 11, 2017):
Holding: Where Juvenile had been convicted in 1980s under murder scheme, Sec. 565.001 RSMo. 1978, which provided mandatory sentence of life without parole for 50 years, this violated 8th Amendment under *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), because sentencer had no opportunity to consider his age, maturity or capacity for rehabilitation; Defendant must be resentenced pursuant to the procedure in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013).
Discussion: Habeas relief is available to inquire into the validity of a criminal conviction which violates fundamental fairness. Although prisoners are generally required to raise constitutional claims on direct appeal or in postconviciton, a defendant has cause for failing to raise such claims where a new constitutional rule may be applied retroactively on collateral review. *Miller* controls because Defendant was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme without the jury having any opportunity to consider mitigating circumstances attendant to youth.

Willbanks v. Mo. Dept. of Corrections, 522 S.W.3d 238 (Mo. banc July 11, 2017):
Juvenile's multiple consecutive sentences for multiple non-homicide offenses (which totaled more than 300 years) did not violate Graham, even if Juvenile would not be eligible for parole until beyond his normal life expectancy.
Facts: Juvenile was convicted of kidnapping, assault, robbery and armed criminal action and sentenced to consecutive sentences which totaled more than 300 years. He would not be eligible for parole until he is 85 years old. He claimed his sentence exceeded his life expectancy and violated the 8th Amendment under *Graham v. Florida*, 560 U.S. 48 (2010).
Holding: *Graham* held that the 8th Amendment prohibits sentencing a juvenile to a *single* sentence of life without parole for a non-homicide offense. *Graham* is different than the instant case, which involves Juvenile convicted of *multiple* non-homicide offenses who received multiple fixed-term sentences. The U.S. Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life in prison without parole. Sec. 558.047 (2016), which allows juveniles sentenced to life without parole to apply for parole after serving 25 years, is limited to juveniles serving life without parole; Supreme Court will not extend statute to Juvenile's situation, since beyond the terms of the statute.
Dissenting opinion: Three judges would follow three circuits and the majority of state supreme courts to hold that imposition of lengthy aggregate sentences that are the functional equivalent of life without parole violate the juvenile's 8th Amendment rights under *Graham*. "To do so does not require extending existing law but merely applying *Graham* to new facts, something courts do every day." The dissenting judges would also apply the framework of Sec. 558.047 (2016) to juveniles. "To be clear, this remedy is offered not to suggest this Court should hold the statute applies directly … but rather because the statute sets out what the legislature has defined as a meaningful opportunity for release."

State v. Nathan, 522 S.W.3d 881 (Mo. banc July 11, 2017):
Juvenile's multiple consecutive sentences for a homicide (second-degree murder) and multiple non-homicide offenses did not violate Graham or Miller even if the sentences amount to de facto life in prison without parole.
Facts: Juvenile was convicted of second-degree murder and related non-homicide offenses. The trial court sentenced him to life in prison, plus a consecutive 30 year sentence for robbery and a consecutive 15 year sentence for kidnapping.
Holding: *Graham v. Florida*, 560 U.S. 48 (2010), held that the 8th Amendment prohibits imposition of life without parole on juveniles who do not commit homicide offenses. What the Supreme Court did not have before it in *Graham*, but which is present here, is whether the 8th Amendment is violated when a juvenile commits multiple non-homicide offenses along with a homicide offense and receives consecutive, lengthy sentences. *Graham* does not clearly establish that consecutive, fixed term sentences for juveniles who have committed multiple non-homicide offenses are unconstitutional when they amount to the practical equivalent of life without parole. While the Supreme Court has said that youth diminishes the penological justification for life without parole solely for non-homicide offenses, and *mandatory* life without parole for homicide offenses, *Miller*

v. Alabama, 132 S.Ct. 2455 (2012), it has never applied that rationale to a system that recognized multiple violent crimes deserve multiple punishments.
Dissenting opinion: Three dissenting judges would follow the majority of state supreme courts and two federal appellate courts, which have prohibited imposition of sentences that aggregate to a term of years that approaches or exceeds a juvenile's life expectancy absent a determination by a jury that the juvenile is irredeemably corrupt.

State v. Hartman, 2016 WL 1019271 (Mo. banc March 15, 2016):
(1) Where the State alleged that only one person shot Victim, trial court abused discretion in excluding testimony that a person other than Defendant said he (the other person) did the shooting; this was an out-of-court statement that would have exonerated Defendant and it had indicia of reliability; and (2) even though Defendant-Juvenile was convicted of second-degree murder during a "Hart procedure" penalty phase where the jury found LWOP to be inappropriate, Defendant can be tried again for first-degree murder on remand under the "Hart procedure" again.
Facts: Defendant-Juvenile was charged with first-degree murder. He was not charged as an accomplice. He was alleged to have committed the shooting. The evidence at trial was somewhat conflicting, but was that a group of people went to Victim's house and Victim was shot. Various witnesses made plea agreements to testify against Defendant. The trial court precluded Defendant from calling a Witness to testify that one of the other people who went to the house ("Other Person") said he (the Other Person) shot Victim. Defendant was convicted of first-degree murder. Pursuant to the "*Hart* procedure," a penalty phase was held, during which the jury found that life without parole was not appropriate; thus, the trial court vacated the first-degree murder verdict and found Defendant guilty of second-degree murder.
Holding: Hearsay statements, or out-of-court statements used to prove the truth of the matter asserted, are generally inadmissible. However, due process requires that such statements be admitted where they exonerate the accused and are made under circumstances providing assurance of reliability. To meet this test, the statement must be made spontaneously to a close acquaintance shortly after the crime occurred, be corroborated by some evidence in the case, and be self-incriminatory and against interest. The Other Person's statements to Witness meet this test. Other Person made the statements to a friend (Witness) on the night of the murder. Other witnesses placed Other Person at the scene of the crime. Other Person's statements implicate only him (the Other Person). Defendant denied any participation in the crime. Had Witness' testimony been admitted, the jury could have exonerated Defendant. A new trial is ordered. On retrial, Defendant can be tried for first-degree murder, but the court must again use the "*Hart* procedure" because Defendant was a juvenile at the time of the crime, even though he is now an adult.

State v. Thomas, 2020 WL 7349272 (Mo. App. E.D. Dec. 15, 2020):
Holding: The forcible rape statute, which imposes a 15-year minimum prison sentence, did not violate 8th Amendment as applied to Juvenile-Defendant, because the 8th Amendment protects Juveniles only from the "harshest possible penalty" (such as a death sentence or automatic life-in-prison without parole); here, Juvenile-Defendant was sentenced to a sentence that allows parole, and the trial court considered mitigating circumstances in imposing sentence.

In the Interest of D.R.C., 2019 WL 4419695 (Mo. App. E.D. Sept. 17, 2019):
Holding: Where Juvenile turned 18 and was discharged from DYS during the pendency of his direct appeal, the case is moot and no exception to mootness applies, because Juvenile has not challenged his adjudication of delinquency on appeal, and has admitted committing the offenses; thus, collateral consequences concerns are not an issue in this appeal.
Discussion: Juvenile seeks remand for a new dispositional hearing. Implicitly, he seeks discharge from his commitment to DYS. But DYS has already discharged him. He has received all relief he's entitled to from this court or the juvenile court. We acknowledge that exceptions exist to mootness, but those exceptions don't apply here. The critical distinction between Juvenile's case and those found not to be moot is that cases found not to be moot were challenging the initial adjudication of delinquency (such as challenging sufficiency of evidence, or denial of right to counsel). Those cases were found not to be moot because Juveniles could suffer collateral consequences as an adult. But Juvenile here doesn't challenge his adjudication of delinquency. That adjudication would stand, regardless of the result reached on appeal on the merits.

In the Interest of A.C.C., 561 S.W.3d 425 (Mo. App. E.D. Oct. 2, 2018):
Holding: (1) In case of first impression, appellate court holds that Juveniles who are admitting to facts in a delinquency proceeding (guilty plea) are entitled by due process to the same rights afforded adults at a guilty plea; i.e., the plea must be knowing and intelligent and done with sufficient awareness (warnings by the court) of the relevant circumstances and likely consequences of the plea; (2) even though Juvenile was convicted for deviate sexual intercourse with a child not yet age 14, Sec. 566.062, this offense, using the "categorical approach," is not equal to or more severe than aggravated sexual abuse in 18 U.S.C. Sec. 2241, so plea court did not incorrectly advise Juvenile that he would not have to register as a sex offender after age 21.
Discussion: Sec. 211.425.1 provides that a Juvenile who is 14 or older is required to register after age 21 if the offense "adjudicated" would be considered a felony under chapter 566 if committed by an adult, which is "equal to or more severe than aggravated sexual abuse under 18 U.S.C. 2241." In deciding this question, the "categorical approach" looks only to the statutory offense. The "non-categorical" approach looks at the underlying facts of the offense. Here, the "categorical approach" would result in the offense being less severe than the federal offense, but the "non-categorical approach" would result in the offense being more severe. The use of the term "adjudicated" in the statute is key because it requires courts to look at what has been judicially decided, not at the underlying facts of the offense. The Eastern District had previously ruled that a "non-categorical" approach be used when dealing with adult sex offenders. But the statutory

language for adults is different than the language for Juveniles. Also, the U.S. Attorney General guidance on SORNA says that States should have some discretion on how to deal with registration for Juveniles. Sec. 566.062 "adjudicated" Juvenile guilty of having deviate sexual intercourse with a child "not yet age 14." 18 U.S.C. 2241 describes aggravated sexual abuse as having sex with a victim under "age 12." Thus, using the categorical approach, Juvenile's offense was "not equal to or more severe" than the federal offense. The trial court did not incorrectly advise Juvenile that he would not have to register after age 21.

State v. Campbell, 2018 WL 3978146 (Mo. App. E.D. Aug. 21, 2018):
Holding: (1) Even though Defendant-Juvenile committed the charged first degree murder in 2011, and Sec. 565.033 (which specifies certain procedures and possible less than life without parole sentences for first degree murder) was not enacted until 2013, application of Sec. 565.033 to Defendant-Juvenile was not *ex post facto* because Sec. 565.033 did not increase the penalty for first degree murder in effect at the time of the offense and, in fact, created the possibility of a lower sentence (which Defendant, in fact, received); and (2) although Sec. 565.033 permits a sentence of LWOP for juveniles convicted of first degree murder, a trial court does not have authority to impose LWOP unless the State had filed a notice of intent to seek LWOP pursuant to Sec. 565.034.1.

In the Interest of S.B.A., 530 S.W.3d 615 (Mo. App. E.D. Oct. 17, 2017):
Holding: Even though juvenile court terminated jurisdiction over Defendant-Juvenile while appeal of his adjudication for a misdemeanor was pending, appellate court will not dismiss case as moot because the misdemeanor adjudication could have significant collateral consequences on Defendant in the future.

Edwards v. Steele, 533 S.W.3d 238 (Mo. App. E.D. Nov. 7, 2017):
Holding: Defendant, who was 17 years old when he was convicted of capital murder sentenced to mandatory life without parole for 50 years under Sec. 565.001 (1978), was entitled under *Miller* and *Montgomery* to resentencing under *Hart* procedure whereby consideration of his youth and related circumstances would occur.
Discussion: The State argues Defendant is not entitled to relief because the Missouri Supreme Court in *Carr* gave relief to a 16 year old. While Missouri law defines juvenile offenders to be under 17, Sec. 211.031.1(3), the U.S. Supreme Court in *Miller* defines "juvenile offenders" as "under the age of 18 at the time of the crime."

State v. Prince, 2017 WL 2644431 (Mo. App. E.D. June 20, 2017):
Holding: Even though new Mo. Const. Art. I, Sec. 18(c) allows "relevant evidence of prior criminal acts" to be admitted to show propensity in child sex cases, Sec. 211.271(3), which states that juvenile records are "not lawful or proper evidence," bars admission of Defendant's juvenile records to show propensity (but Eastern District transfers case to Supreme Court due to general interest of issue).

In the Interest of N.R.W., 2016 WL 720634 (Mo. App. E.D. Feb. 23, 2016):
(1) Even though Juvenile turned 18 before appeal of his adjudication of delinquency was filed, appeal is not moot because his act was a felony and he may be subject to collateral consequences during adulthood from the adjudication; (2) where trial court did not offer counsel to Juvenile or his parents during adjudication hearing, and never obtained a waiver of counsel on the record, Juvenile and parents were denied right to counsel, even though the court appointed an attorney for Juvenile at a later, post-adjudication stage before sending Juvenile to DYS.
Facts: Juvenile was charged with felony drug possession. An adjudication hearing was held, at which Juvenile was represented by his Father, who was not an attorney. No record was made regarding the right to counsel, or waiver of counsel. Juvenile was found guilty. Later, when juvenile violated terms of his post-adjudication supervision, the court held a hearing and ordered Juvenile to DYS. The court appointed counsel for Juvenile at that hearing, but did not appoint counsel for Father, who requested counsel.
Holding: Juvenile is entitled to counsel in all juvenile court proceedings under Sec. 211.211.1. After a petition is filed, 211.211.3 requires appointment of counsel unless counsel is knowingly and intelligently waived. If the record does not disclose a knowing waiver, the presumption arises that it was not. The State has the burden of showing a valid waiver. A waiver must be made with an understanding of the nature of the charges, the range of punishment, possible defenses and mitigation, and other relevant circumstances. Also, there must be a *record* demonstrating a knowing and intelligent waiver *before* the waiver takes place. None of that occurred at the adjudication hearing; thus, reversal is required. The court also erred in not appointing counsel for Father. Sec. 211.211.4 allows a child's custodian to be appointed counsel where the custodian is indigent and requests counsel.

In the interest of K.L.C. v. Reynolds County Juvenile Officer, 562 S.W.3d 358 (Mo. App. S.D. Oct. 19, 2018):
Holding: Juvenile court erred in convicting Juvenile of acts that would be a crime if committed by an adult based on standard of "clear, cogent and convincing" evidence, rather than more stringent "proof beyond a reasonable doubt" standard.
Discussion: In juvenile proceedings, where a juvenile is accused of committing an act that would be a crime if committed by an adult, the constitutionally required standard of proof is "beyond a reasonable doubt." Applying the lesser-standard was structural error that requires reversal.

In re Allen v. Norman, 564 S.W.3d 388 (Mo. App. S.D. Nov. 27, 2018):
Holding: Even though Juvenile had two consecutive "soft" life sentences which were to follow a sentence of life without parole for 50 years, Secs. 565.001 and 565.008.1 (1978), the life without parole sentence imposed without considering mitigating circumstances based on youth violates 8th Amendment and requires re-sentencing under the *Hart* procedure.
Discussion: The State contends that because Juvenile has two "soft" life sentences consecutive to the life without parole for 50 years sentence, that his case is controlled by *Willibanks v. DOC*, 522 S.W.3d 238 (Mo. banc 2017), which held that even though a juvenile may receive numerous consecutive sentences that are, *de facto*, life without

parole, there is no 8th Amendment violation. *Willibanks* is distinguishable, though, becaue no single sentence imposed in *Willibanks* violated the 8th Amendment. Here, the life without parole for 50 year sentence, standing alone, violates the 8th Amendment. Juvenile has an actual LWOP 50 sentence that is separate from any of his additional sentences. He is entitled to habeas relief on that sentence, and re-sentencing under the *Hart* procedure.

In the Interest of I.D. v. Juvenile Officer, 2020 WL 5776041 (Mo. App. W.D. Sept. 29, 2020):

(1) The presumption of doli incapax (that a minor between ages of 7 and 14 lacks capacity to commit a crime) does not apply to delinquency proceedings which are civil in nature, but only applies to criminal proceedings where a child faces adult criminal sentencing; but (2) in reviewing the sufficiency of evidence for mens rea of a 10-year-old child for acting recklessly or negligently, the court uses the lower standard of care of a child of "the same age, capacity and experience."

Facts: During a night of rowdy behavior with other youth, Juvenile, who was 10 years old, lit a sofa on fire in a house where someone was sleeping. Juvenile was told by another juvenile to wake up the sleeping person, but Juvenile didn't. The sleeping person died in the fire. Juvenile was adjudicated delinquent for acts of first-degree arson and second-degree involuntary manslaughter. On appeal, he challenged sufficiency of evidence to convict.

Holding: (1) Juvenile contends the Court must apply the infancy presumption of *doli incapax*, a common law presumption that a minor between 7 and 14 lacks the capacity to commit a crime. This presumption requires the prosecuting party to rebut it "beyond all doubt." However, this presumption has not been applied to delinquency proceedings in Missouri. *Doli incapax* applies only in criminal proceedings where a child faces adult criminal sentencing. Delinquency proceedings are civil, and are designed to allow for the care, protection, discipline and rehabilitation of child. Applying *doli incapax* to delinquency proceedings would frustrate that purpose. (2) The offenses for which Juvenile was adjudicated require a mental state of recklessly or criminal negligence. In reviewing sufficiency of evidence, Defendant's youth requires application of a reduced standard of care for a child of similar age. The test for criminal negligence is a child of the "same age, capacity, and experience." The test for recklessly must consider the child's ability to subjectively understand his conduct due to his age, capacity or experience. Applying the lower standards here, the evidence was sufficient.

In the interest of D.G.E. v. Juvenile Officer, 2020 WL 1918703 (Mo. App. W.D. April 21, 2020):

Holding: Even though Juvenile in an online chat (1) asked child-Victim if he could send her "some nudes;" (2) Victim received via computer a photo of a penis several days later; (3) Juvenile later apologized to Victim for "his" actions; (4) Juvenile bragged at school about sending "nudes" to Victim; and (5) Victim testified she "believed" the photo was on Juvenile's penis, the evidence was insufficient to convict Juvenile of first-degree sexual misconduct, Sec. 566.093.(1), because the evidence was insufficient to prove the photo was of *his* penis; Sec. 566.093.1 prohibits a person from exposing "his" own genitals under circumstances he knows are likely to cause affront or alarm.

Discussion: The State argues that Juvenile's conduct before, during and after the offense allows an inference that the photo was his penis. This is an example of a permissive inference. But the ultimate fact still must be more likely than not to flow from those facts. The question is whether the evidence here supports a finding that the ultimate fact – that Juvenile exposed *his* penis – is more likely than not to flow from the facts presented. The State argues the term "send some nudes" is commonly understood to mean "send your own nudes." But Victim received the photo several days later, so there is no connection between the "send nudes" conversation and when Victim received the photo. Even though Victim "believed" the photo was of Juvenile's penis, Sec. 566.093.1(1) requires proof beyond a reasonable doubt, not that Victim merely "believed" it was his penis, even if her belief was reasonable. The Court cannot give the State the benefit of speculative or forced inferences. Juvenile ordered discharged.

In the Interest of B.O. v. Juvenile Office, 2020 WL 889143 (Mo. App. W.D. Feb. 25, 2020):
Holding: Even though Juvenile had a prior dispositional hearing when he was originally placed on probation, where he later had an adjudication hearing for violating probation, Rules 128.02 and 128.03 required that he be given a new dispositional hearing following the adjudication hearing.

Jones v. Mo. Dept. of Corrections, 2019 WL 4418279 (Mo. App. W.D. Sept. 17, 2019):
Holding: Even though Sec. 558.047 grants pre-*Miller* Juveniles who were sentenced to life in prison without parole the right to a parole hearing after serving 25 years, nothing within 558.047 expunges other sentences Juvenile may be serving; thus, even though Juvenile is entitled to a parole hearing regarding his first-degree murder conviction after 25 years, he must still serve the normal three-year mandatory minimum (beyond 25 years) for each consecutive ACA sentence he was also serving.

Elliott v. State, 2016 WL 6081673 (Mo. App. W.D. Oct. 18, 2016):
Holding: (1) Because a prosecutor has discretion to nolle prosequi a case and then refile charges, trial court did not plainly err in allowing Prosecutor to dismiss charges against Juvenile and then refile them, even though the resulting delay might have caused Juvenile to lose the opportunity for dual jurisdiction sentencing under Sec. 211.073.1 because he would be more than 17 years six months old at time of "conviction;" but (2) appellate court notes that Sec. 211.073.1 appears to indicate that a Juvenile need only be under 17 years six months at the time of **transfer** to court of general jurisdiction to be eligible for dual jurisdiction, not under this age at time of "**conviction**." However, since the parties assume the Juvenile's age is determined at time of "conviction," the appellate court doesn't decide this.
Discussion: Juvenile contends that an offender must be under 17 years six months years old at time of "conviction" in order to be considered for dual jurisdiction in sentencing. But there is no authority holding that age at time of "conviction" is the correct rule. Sec. 211.073.1 states that "the court shall, when the offender is under 17 years and six months of age, and has been transferred to a court of general jurisdiction … and whose prosecution results in conviction … consider dual jurisdiction." A plain reading of Sec.

211.073.1 would suggest the Juvenile need only be under 17 years six months when transferred to a court of general jurisdiction in order to be eligible for the dual jurisdiction program. This reading would make the delay that occurred here (which caused Juvenile to be over that age at time of "conviction") to be irrelevant, as Juvenile would be eligible for dual jurisdiction. However, as this issue was not raised by the parties, the court does not address it.

In the Interest of J.L.H, Juvenile Officer v. J.L.H., 2016 WL 880561 (Mo. App. W.D. March 8, 2016):
(1) Where Officer questioned Juvenile about the location of a gun without giving the right-to-silence or other warnings required by Sec. 211.059, Juvenile's statements must be suppressed; and (2) there is no "public safety" exception to Sec. 211.059.
Facts: Officers received a tip that Juvenile may be carrying a gun. Officers chased Juvenile, caught him and handcuffed him. Without providing any right-to-silence warnings, Officer asked Juvenile where he threw the gun. Juvenile made an incriminating statement about the gun. He was charged with a gun offense. He filed a motion to suppress statements under Sec. 211.059. The trial court overruled the motion. The only evidence at trial connecting Juvenile to the gun was his incriminating statement.
Holding: Sec. 211.059 provides that when a Juvenile is taken into custody, the Juvenile "shall" be advised before questioning that he has the right to remain silent; that any statement he makes may be used against him; that he has a right to have a parent, guardian or custodian be present; and that he has a right to counsel. The State argues these warnings were not required here, because there is a "public safety" exception to Sec. 211.059; this is an issue of first impression. There is a "public safety" exception to *Miranda* warnings which was recognized in *New York v. Quarles*, 467 U.S. 649 (1984); there, the Supreme Court allowed questioning about a gun in the absence of *Miranda* warnings. However, Sec. 211.059 is independent of federal constitutional decisions. The Legislature has provided greater protection under Sec. 211.059 than the federal constitution requires. Sec. 211.059 gives Juveniles broader rights than *Miranda* does. E.g., it gives the right to have a parent present at questioning. Sec. 211.059 was enacted after *Quarles*; the Legislature could have included a public-safety exception in the statute, but did not. Missouri courts have not previously addressed what remedy should occur for violation of Sec. 211.059. However, the Missouri Supreme Court has concluded that violation of similar Juvenile Code provisions constitutes reversible error. Juvenile's statements should have been suppressed. Reversed and remanded for new trial.

*** Virginia v. LeBlanc, ___ U.S. ___, 137 S.Ct. 1726 (U.S. June 12, 2017):**
Holding: State court did not unreasonably apply clearly established federal law in holding that Virginia law -- which provided that juveniles convicted of non-homicide offenses and sentenced to life in prison without parole would nevertheless be eligible for "geriatric release" (which had the same standards as parole) -- did not violate *Graham v. Florida*, which requires that juveniles convicted of non-homicide offenses be given an opportunity to demonstrate maturity and rehabilitation and be eligible for release. Court emphasizes the narrowness of its review in this federal habeas case, in that the ruling here is not a ruling on the merits approving Virginia's scheme. "Perhaps the next logical step

from *Graham* would be to hold that a geriatric release program does not satisfy the Eighth Amendment, but perhaps not." The Court merely holds the Virginia court's ruling was "not objectively unreasonable in light of this Court's current case law."

*** Tatum v. Arizona, ___ U.S. ____, 137 S.Ct. 11 (U.S. Oct. 31, 2016)(Sotomayor, J., concurring in decision to grant, vacate and remand):**
Holding: The Supreme Court summarily vacates and remands various Juvenile life without parole cases for reconsideration in light of *Miller* and *Montgomery*. Justice Sotomayor writes concurring opinion noting that even though the judges in these cases *did consider* Juveniles' youth before imposing life without parole, such sentences still violate the 8th Amendment for children whose crimes reflect transient immaturity. "On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'"

*** Montgomery v. Louisiana, 2016 WL 280758, ___ U.S. ___ (U.S. Jan. 25, 2016):**
Holding: *Miller* (holding that automatic life without parole for juveniles is unconstitutional) is retroactive; retroactive application is given to substantive rules of constitutional law, which include rules prohibiting a certain category of punishment for a certain class of defendants because of their status or offense; States are not required to relitigate JLWOP sentences, but may provide juveniles with parole hearings.

U.S. v. Grant, 103 Crim. L. Rep. 35 (3d Cir. 4/9/18):
Holding: Sentencing Juvenile to RICO sentence so long that it may be de facto life without parole violated 8th Amendment.

U.S. v. Pete, 99 Crim. L. Rep. 70 (9th Cir. 4/11/16):
Holding: Juvenile who won resentencing under *Miller* was entitled to an expert to show that he had matured and been rehabilitated in prison.

McKinley v. Butler, 98 Crim. L. Rep. 306 (7th Cir. 1/4/16):
Holding: 8th Amendment prohibits de facto juvenile LWOP unless judge considers mitigating circumstances; juvenile who received 100 year sentence must be resentenced with consideration of his youth.

A.W. v. Nebraska, 101 Crim. L. Rep. 511 (8th Cir. 7/31/17):
Holding: Even though Juvenile who as adjudicated a "delinquent" in Minnesota was ordered by Minnesota to register as sex offender, where Juvenile moved to Nebraska before the order, he was not required to register in Nebraska because a "delinquent" is not a sex offender under either Nebraska or Minnesota law.

Budder v. Addison, 100 Crim. L. Rep. 603 (10th Cir. 3/21/17):
Holding: Even though a state appellate court changed Juvenile's sentence from life without parole to life with parole plus 20 years, this did not comply with *Miller* where it was still effective life without parole since the state had an 85% service requirement.

Dumas v. Clarke, 2018 WL 6379074 (E.D. Va. 2018):
Holding: Even though state's courts would view Juvenile-Defendant's life plus multiple consecutive terms of years independently, where habeas court granted relief under *Miller* on the life sentence, it was appropriate to resentence on all counts.

In re S.W., 2015 WL 5474170 (D.C. 2015):
Holding: Where Officer told Juvenile that Officer was protecting him from "the lions," that "everybody" was saying that Juvenile "did a whole bunch of stuff," that "they're gonna try to say that you did it all," and that he should take the opportunity to "give his version of what happened," Juvenile's confession was not voluntary.

Landrum v. State, 2016 WL 3191099 (Fla. 2016):
Holding: Non-mandatory life without parole imposed on Juvenile for second-degree murder violated 8th Amendment because court did not provide for individualized sentencing and consideration of youth required by *Miller*.

Atwell v. State, 2016 WL 3010795 (Fla. 2016):
Holding: Juvenile's sentence for murder resembled a life without parole sentence in that it resulted in prospective release dates decades beyond a natural lifespan, and failed to account for individualized sentencing required under 8th Amendment.

People v. Holman, 101 Crim. L. Rep. 657 (Ill. 9/21/17):
Holding: Trial court must consider Juvenile's youth even when imposing discretionary life sentence.

In re D.L.H. Jr., 2015 WL 2411927 (Ill. 2015):
Holding: Even though 9-year-old Juvenile's father was present during police interrogation and police adopted a conversational tone, Juvenile's statements were not voluntary where police used child's fear that his family would go to jail and be taken away to elicit the statements.

State v. Sweet, 2016 WL 3023726 (Iowa 2016):
Holding: Iowa Const. categorically prohibits LWOP for juveniles; courts should not be required to make speculative up-front decisions about whether Juvenile can be rehabilitated when the lack adequate predictive information supporting such a conclusion; Parole Bd. is in best position to determine rehabilitation and irreparable corruption after passage of time.

State v. Seats, 2015 WL 3930169 (Iowa 2015):
Holding: Where judge has discretion to sentence juvenile to LWOP, judge must consider mitigating circumstances before doing so.

Deal v. Comm'r of Corr., 102 Crim. L. Rep. 182 (Mass. 11/9/17):
Holding: Juveniles serving life sentences for murder are entitled to detailed written explanation why they are ineligible for minimum security imprisonment.

In re State ex rel. C.K., 103 Crim. L. Rep. 114 (N.J. 4/24/18):
Holding: A categorical requirement of lifetime sex offender registration for persons who committed their offenses as Juveniles violates due process clause of New Jersey Constitution.

State v. DeAngelo, 98 Crim. L. Rep. 72 (N.M. 10/15/15):
Holding: Under state statute, juveniles under 15 cannot validly Miranda rights unless they can explain to police on the record in their own words what waiver of those rights means; responding "yes" to police questions or signing a waiver form is not sufficient.

State v. Boston, 98 Crim. L. Rep. 308 (Nev. 12/31/15):
Holding: 8th Amendment prohibits "functional equivalent" of LWOP for juveniles for non-homicide offenses.

State v. Hand, 99 Crim. L. Rep. 655 (Ohio 8/25/16):
Holding: Because Ohio does not have a constitutional right to jury trial in juvenile adjudications, it violates due process to allow a juvenile adjudication to later be used to enhance an adult sentence.

State v. Baker, 2016 WL 1697911 (Ohio 2016):
Holding: (1) Even though a statute created a presumption that a recorded confession is voluntary, the presumption does not apply to whether the waiver of *Miranda* rights before making the confession was voluntary; (2) applying the statutory presumption to juveniles violates due process.

Com v. Batts, 101 Crim. L. Rep. 429 (Pa. 6/26/17):
Holding: Where court found that Juvenile could be rehabilitated but still sentenced him to life without parole, this violated *Miller*.

State v. Houston, 2015 WL 773718 (Utah 2015):
Holding: Even though Juvenile did not preserve his claim that he could not be sentenced to LWOP, the claim was reviewable on appeal under rule allowing court to correct an illegal sentence; this was a legal issue only, that did not require the appellate court to delve into the record or make findings of fact.

People v. Lozano, 2016 WL 164133 (Cal. App. 2016):
Holding: In resentencing a Juvenile under *Miller*, trial court must consider Defendant's post-offense rehabilitative conduct in prison.

People v. Lopes, 2015 WL 4397765 (Cal. App. 2015):
Holding: Even though Defendant had prior "felony" DWI as a juvenile and was committed to DWI Youth Program, this was not a "prior violation punished as a felony" that would enhance a later adult DWI charge; the juvenile violation and sentence to the Youth Program was not a true prior felony conviction, even though it was labeled as such.

State v. Baxter, 2015 WL 5554645 (Ga. App. 2015):
Holding: Statutory time limit of 180 days for State to obtain an indictment of a juvenile was a mandatory requirement that could not be waived by the juvenile, since statute uses the word "shall."

People v. House, 2015 WL 9428803 (Ill. App. 2015):
Holding: Imposition of mandatory natural life sentence on 19-year-old Defendant for murder as an accomplice violated 8th Amendment, where Defendant was not present at scene of murder, did not help plans the crimes, but only acted as a lookout and took orders from higher gang members.

Hawkins v. New York Dept. of Corrections and Comm. Supervision, 2016 WL 1689740 (N.Y. App. 2016):
Holding: Defendant who was convicted of murder as Juvenile was entitled to a parole hearing which gave him a meaningful opportunity for release and consideration of his youth and mitigating circumstances, as required by *Miller*; Parole Bd. had denied release based on "seriousness of the offense."

Malpractice

Laughlin v. Perry, 2020 WL 3529374 (Mo. banc June 30, 2020):
Holding: Public Defenders have official immunity from malpractice suits because client representation involves performance of discretionary acts; even though State Legal Expense Fund covers damage awards against public employees, Sec. 105.726.1's plain language does not preclude the employees from asserting other defenses such as official immunity.

Fuller v. Partee, 2018 WL 1158907 (Mo. App. W.D. March 6, 2018):
Even though criminal defendants who are convicted of crimes generally cannot recover damages for malpractice against their attorneys unless the criminal defendants can prove they are actually innocent, where Plaintiff-criminal-defendant had contracted with Attorney to brief and orally argue his case on appeal, Plaintiff can recover damages for breach of contract for failing to conduct oral argument, although the damages would be limited to the amount paid for the oral argument services that weren't delivered.
Facts: Plaintiff-criminal-defendant paid Attorney $6000 to brief and orally argue his case on appeal. The contract specifically called for briefing and oral argument. However, Attorney ultimately did not orally argue the case. Plaintiff sued attorney for breach of contract.
Holding: It is a question of first impression whether a criminal defendant can obtain damages for specifically contracted for services that weren't performed. The policy behind the rule that criminal defendants cannot recover in malpractice unless they can prove actual innocence is that criminal defendants should not be allowed to profit from their crimes or shift blame to their attorneys. But where a claim is solely for services contracted for, but not rendered, this policy consideration does not apply. Plaintiff's

claim is not a generalized claim that his Attorney provided unsatisfactory representation. It is that he paid for oral argument but Attorney did not provide it. This is an actionable claim. However, because Plaintiff makes no claim of actual innocence, his damages are limited to the amount he paid for oral argument.

Laughlin v. Perry, No. SD35589 (Mo. App. S.D. June 10, 2019):
Holding: Public Defenders do not have "official immunity" from malpractice suits, but are covered by the state Legal Expense Fund, §105.711, which provides that state employees shall not be personally liable for suit in connection with their official duties but such suits shall be payable from the Fund; under this statute, the State has voluntarily assumed financial risk of employee negligence without precluding rightful claims of victims of negligence.

Mental Disease and Defect – Competency – Chapter 552

State ex rel. Kelly v. Inman, 2020 WL 203148 (Mo. banc Jan. 14, 2020):
(1) Where trial court, in the same order, found Defendant incompetent to proceed and accepted an NGRI plea, the court exceeded its authority under Sec. 552.020, because a court cannot accept a plea while a Defendant is incompetent; and (2) habeas corpus is the proper procedure to remedy this violation because Defendant could not do a direct appeal (since an NGRI plea is an "acquittal") and cannot pursue a Rule 24.035 action (since he was not "convicted").
Facts: In 1991, trial court entered an order finding Defendant incompetent to proceed under Sec. 552.020 because he could not understand the proceedings or assist counsel, and simultaneously accepting an NGRI plea because he did not understand the wrongfulness of his crime or was incapable of conforming his conduct to the requirements of law. Decades later, Defendant filed a habeas corpus action in the county where he was being held, seeking to set aside his NGRI plea.
Holding: (1) Sec. 552.020.8 provides that if a court determines that a defendant is incompetent, it must suspend the proceedings until a defendant is restored to competency. The trial court did not suspend the proceedings. Instead, the trial court accepted an NGRI plea; acquitted Defendant; and committed him to the Department of Mental Health. By accepting the NGRI plea despite finding him incompetent to proceed, the court violated Defendant's due process rights. The remedy is to put him back in the position he would have been if he had not pleaded NGRI, so the court vacates the NGRI plea and orders an updated competency evaluation. (2) The State argues Defendant's claim is procedurally barred because he didn't file a direct appeal. But Defendant could not have done a direct appeal because he was acquitted as a result of the NGRI plea, and he could not do a Rule 24.035 action because he was not "convicted." Habeas is the proper remedy.

Caruthers v. Wexler-Horn, 2019 WL 1911892 (Mo. banc April 30, 2019):
Holding: (1) Even though Defendant planned to use a diminished capacity defense to first degree murder, the trial court lacked authority under Chapter 552 to order a mental evaluation of Defendant, because such evaluations are authorized only for competency or where Defendant has pleaded NGRI, which is not the same as diminished capacity; but

(2) court takes no position on whether the criminal rules of discovery would authorize an evaluation in this circumstance.
Discussion: The State sought a mental exam of Defendant under Chapter 552 after Defendant endorsed an expert who would testify Defendant had a diminished capacity at time of the charged murder. However, Chapter 552 authorizes a mental exam only for competency to stand trial or NGRI. NGRI and diminished capacity aren't the same. NGRI is an affirmative defense that absolves of all responsibility. Diminished capacity merely contests the element of deliberation for first degree murder; Defendant would still be guilty of second degree murder. The court exceeded its authority under Chapter 552 in ordering a mental exam under these circumstances. But court takes no position on whether the State can obtain a mental exam under the criminal discovery rules.

State ex rel. Hawley v. Heagney, 2017 WL 2119351 (Mo. banc May 16, 2017):
Holding: Nothing in Sec. 552.030.2 requires a defendant personally to sign a notice of intent to rely on defense of NGRI; habeas court erred in vacating NGRI plea on grounds that petitioner had not personally signed the notice of intent to rely on defense of NGRI filed by defense counsel.
Concurring opinion: Concurring opinion says relief should not have been granted by St. Louis City judge in any event because after habeas case was filed in St. Louis, Petitioner was moved to DMH in Callaway County; as a result, Petitioner's habeas petition named the wrong Respondent (the St. Louis DMH hospital head rather than the Fulton DMH hospital head) and also venue should have been in Callaway County under Rule 91.02(a) because that is where Petitioner was held. St. Louis City judge had no authority to grant relief.

Washington v. State, 2020 WL 1522585 (Mo. App. E.D. March 31, 2020):
Holding: (1) Even though Defendant-24.035 Movant said she was "clearheaded" where (a) Defendant-Movant stabbed a police officer while off her medications for schizophrenia; (b) Defendant-Movant had been incompetent and committed to DMH for a period of time prior to her guilty plea; (c) DMH doctors had reported to court that Defendant-Movant would be competent only if she took her medication; (d) after Defendant-Movant was discharged from DMH, she was placed in county jail for more than a year before her guilty plea and later sentencing; and (e) Defendant-Movant said she was not taking her medication and made remarks at her later sentencing reflecting possible delusions about her mother, trial court erred in not, *sua sponte*, ordering a new competency evaluation before sentencing, because a reasonable judge would have had doubts as to Defendant-Movant's competency at sentencing; and (2) Movant was entitled to evidentiary hearing on her claims that plea counsel was ineffective in advising her to plead guilty when she may have been incompetent, and in failing to investigate and pursue an NGRI defense; Movant's allegations that she had decompenstated since being discharged from DMH and become incompetent, and that doctors would testify she was NGRI at time of crime were not refuted by the record.
Discussion: When counsel is representing an accused diagnosed with a mental disease or defect *and* multiple exams agree medication impacts her competence *and* she is not on medication at the time of the plea *and* she exhibits the same delusions as appear in the exam reports, this indicates a questionable mental condition that makes counsel

ineffective without investigating it. To show prejudice, Movant must show a reasonable probability she was not competent. Here, she has alleged that doctors would testify she wouldn't be competent if she wasn't on her medication. Similarly, counsel should have investigated an NGRI defense since counsel knew or should have known Movant wasn't medicated at time of crime. None of the pretrial DMH reports addressed NGRI. Sentence vacated, and remanded for evidentiary hearing on whether plea should be vacated.

Caruthers v. Wexler-Horn, 2018 WL 3355492 (Mo. App. E.D. July 10, 2018):
Even though Defendant was asserting a diminished capacity defense, trial court did not have authority to order a mental exam of Defendant (1) under Sec. 552.015, because that section relates only to when evidence of a mental disease or defect is admissible; it does not provide authority for ordering an exam; (2) under Sec. 552.020, because that section allows a court to order an exam only for competency to stand trial, or where a Defendant has pleaded NGRI, which is different than diminished capacity; or (3) under Rule 25.06(B)(9), because a court has authority to order a mental exam only if the requirements of Secs. 552.020 (competency) or 552.030 (NGRI) are met.
Facts: Defendant, charged with murder, intended to use a diminished capacity defense. The State filed a motion for a mental exam under Secs. 552.015 and 552.020, which the trial court granted. Defendant sought a writ of prohibition.
Holding: (1) Sec. 552.015 does not apply because that section relates only to when evidence of a mental disease or defect is *admissible*. It does not grant any authority to order an exam. (2) Sec. 552.02 allows a court to order an exam for competency purposes, i.e., for determining Defendant's mental capacity *at the time of the relevant criminal proceeding*, or when a Defendant give notice of intent to use NGRI as a defense. The State claims diminished capacity is the same as NGRI, but it is not. Unlike NGRI, which is an affirmative defense, the State's burden is not altered by diminished capacity. Diminished capacity, if successful, does not absolve a defendant of responsibility entirely, but makes him responsible only for the crime whose elements the State can prove. (3) The State suggests it is entitled to an exam under Rule 25.06(B)(9), which grants courts authority to require defendants to submit to an exam upon a showing of good cause. But while 25.06 *generally* allows a court to order a mental exam upon a showing of good cause, Secs. 552.020 and 552.030 mandate specific prerequisites before a court may order an exam regarding a defendant's mental state *at the time of alleged crime*.
Concurring opinion: A concurring opinion argues the court has authority to order an exam under Rule 25.06(B).

State v. Bolden, 2016 WL 7106291 (Mo. App. E.D. Dec. 6, 2016):
Even though Defendant wanted to represent himself, trial court deprived him of his 6th Amendment right to counsel by allowing him to waive counsel, without representation of an attorney, before determining his competency.
Facts: Defendant, who did not have any counsel, wanted to proceed *pro se*. The trial court granted the request, but because it did not find Defendant's behavior to be "particularly rational" in rejecting counsel, ordered a mental examination. The exam found Defendant to be competent. The trial proceeded with Defendant representing

himself. After conviction, he appealed. He claimed he was denied his 6th Amendment right to counsel during his competency determination.
Holding: The trial court plainly erred in allowing Defendant to waive counsel without representation of an attorney before determining competency. A person choosing self-representation must be competent to do so. When competency is at issue, the 6th Amendment requires that Defendant be represented by counsel whose duty it is to assure that the evidence supporting competency is closely examined. Here, the trial court believed Defendant's competency was in question; it should have appointed counsel at least until that issue was resolved. Nevertheless, a new trial is not required, at least at this stage. Because there is a contemporaneous competency report, case is remanded for a competency hearing with counsel, and finding on whether Defendant was competent. If he was not, he shall receive a new trial.

State ex rel. Koster v. Heagney, No. ED103976 (Mo. App. E.D. June 30, 2016):
(1) NGRI-committed Petitioner was entitled to habeas relief on claim that the notice of NGRI in his case was fatally defective because it omitted the language required by Sec. 552.030.2 that he had "no other defense;"(2) Sec. 552.030.2 does not require that the accused himself sign the notice of NGRI; and (3) the "escape rule" applies to "appeals," not habeas corpus actions, but even assuming that it applies, habeas court did not abuse its discretion in not applying the "escape rule" because its application could leave an unlawfully-committed NGRI defendant incarcerated for life without recourse.
Facts: Habeas petitioner challenged his two separate NGRI commitments on various grounds. Petitioner had escaped from the Department of Mental Health hospital for nine months prior to the habeas petition. The habeas court granted relief. The State sought a writ of certiorari to overturn the habeas court's ruling.
Holding: (1) Sec. 552.030.2 provides that the State may accept a defense of NGRI "if the accused has no other defense and files a written notice to that effect." Here, defense counsel filed a notice, but it omitted the "no other defense" language. Even though the NGRI court, in its commitment order, said the defendant had no other defense, the notice was fatally defective because it lacked the statutorily required language. Thus, the habeas court did not err in granting relief on this claim. But (2) Sec. 552.030.2 does not require the written notice be signed personally by the defendant. Thus, the habeas court erred in granting relief on this basis. Finally, (3) the "escape rule" applies to "appeals," not habeas corpus actions. Even assuming that the "escape rule" applies, however, the habeas court did not abuse its discretion in not applying the "escape rule" because its application could leave an unlawfully-committed NGRI defendant incarcerated for life without recourse. Habeas judgment affirmed in part, reversed in part.

In re King v. State, 2019 WL 345115 (Mo. App. W.D. Jan. 29, 2019):
Holding: (1) In determining whether a person committed as a sexually violent predator is entitled to a merits trial on petition for conditional release, the proper legal standard is whether Petitioner shows by a preponderance of evidence that he no longer suffers from a mental abnormality that makes him likely to engage in acts of sexual violence if released pursuant to the supervised (conditional) conditions specified in Sec. 632.505; the standard is not whether the person presented a risk of committing future acts of sexual violence if released without restrictions; and (2) where circuit court applied wrong legal

standard, case is remanded to circuit court to apply correct standard and weigh evidence under preponderance of evidence standard, Sec. 632.498.4.

State v. Carter, 2018 WL 2407547 (Mo. App. W.D. May 29, 2018):
Holding: Even though Petitioner for conditional release from NGRI commitment was also being held on a separate SVP commitment, Petitioner's NGRI release case was not "moot" because a dually committed person has to start release proceedings somewhere, and not ruling the NGRI release case would deprive Petitioner of any opportunity for eventual release.
Discussion: The trial court dismissed Petitioner's petition for conditional release from the NGRI case on grounds that it was "moot" since, even if the court ordered release, Petitioner would not, in fact, be released since he was also serving a separate sexually violent predator (SVP) commitment. A cause of action is moot when a decision would not have any practical effect upon any existing controversy. But though a favorable ruling would not have resulted in Petitioner's immediate release, it would have afforded him effectual relief, as one of the two concurrent bases for his commitment would have been removed. A dually committed person has to start somewhere in seeking release, and to not rule on the NGRI case would deprive him of any opportunity to secure release someday.

State ex rel. N.N.H. v. Wagner, 2016 WL 6958715 (Mo. App. W.D. Nov. 29, 2016):
Holding: Trial court lacked authority to require transgender Juvenile, who sought a change of name, to undergo mental examination.
Discussion: Although Rule 60.01 and Sec. 510.040 allow a court to order a mental exam if a person's mental condition is "in controversy," this means the party's mental condition must be "directly involved in some material element" of the case; the mental state of a party seeking a name change does not directly relate to any material element of the case. Further, the Rule and statute require the court give notice, which did not occur here.

State ex rel. Koster v. Oxenhandler, 2016 WL 1039446 (Mo. App. W.D. March 15, 2016):
(1) Even though Defendant (Petitioner) had previously been denied habeas relief in another county, Rule 91 does not prohibit a successive habeas petition in a different county where Defendant had been moved; (2) even though the issue on which Defendant obtained habeas relief may not have been pleaded in his petition, Rule 96.01(a) authorizes a court to grant habeas relief "although no petition be presented;" (3) where the trial court ordered an NGRI evaluation before Defendant had filed a notice of intent to rely on NGRI, the trial court erroneously injected the issue of NGRI itself (without having been raised by Defendant) and had no authority to accept the NGRI plea and commit Defendant to DMH; (4) while there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident; (5) although an on-the-record NGRI plea hearing may not be required in every case, it is a "best practice" that is "strongly encouraged" to ensure the plea is knowing and voluntary, to ensure that there is no other defense, and to ensure the defendant

understands the consequences of the plea; (6) the "escape rule" does not apply to Rule 91 proceedings, or does not apply here as a matter of discretion; and (7) the trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination.

Facts: In 2004, Defendant was charged with assault. Subsequently, various DMH reports found him incompetent to proceed. In 2006, DMH found him competent. In April 2007, apparently at the request of the court, DMH also prepared a criminal responsibility report which found that Defendant was NGRI at the time of his offense; the report also stated Defendant's version that the offense was an accident. On July 9, 2007, various bench notes indicate that Defendant filed notice of intent to rely on NGRI that day, and notice that he had no other defense. Also on July 9, 2007, bench notes indicate that the court accepted Defendant's NGRI plea, and committed him to DMH. In 2011, Defendant escaped from DMH in St. Louis; he was soon recaptured. While in St. Louis, Defendant sought habeas relief from his NGRI plea in St. Louis, which was denied. Defendant was transferred to Fulton (Callaway County). He then sought habeas relief from his NGRI plea in Callaway County. The habeas court granted relief on multiple grounds. The habeas court refused to apply the "escape rule." The habeas court also awarded "jail time credit" for all time Defendant spent in DMH. The State appealed.

Holding: (1) As an initial matter, the State argues that Defendant's Callaway petition is precluded because of the decision on the merits in the St. Louis habeas case. However, Rule 91 does not expressly prohibit the filing of successive habeas petitions in lower courts. (2) The State argues that Defendant's claim was not presented in his petition, but Rule 91.06(a) allows granting of habeas relief even without a petition. (3) Although Sec. 552.030 does not require that a NGRI plea be taken in open court on-the-record, and does not require that a Defendant personally sign the notice that he has no other defense, the plea court here violated due process by not following the required order of the statute. The statute requires that *before* a court can accept an NGRI plea, (i) the Defendant must first inject the issue by timely filing a notice of intent to rely on NGRI; (ii) thereafter, the trial court must order a criminal responsibility evaluation; (iii) the defendant must have no other defense *and* must file a written notice to that effect; and (iv) the criminal responsibility evaluation must support the NGRI defense. Here, the responsibility report was not an authorized pretrial evaluation because it was ordered off-the-record *before* Defendant had asserted his NGRI defense. Also, the report did not support the NGRI defense since it contained Defendant's assertion that the crime was an accident, which was in conflict with Defendant's written notice that he had no other defense, thus raising an issue whether Defendant had a defense he was not willing to waive. By requiring Defendant to submit to a criminal responsibility evaluation before he had asserted the NGRI defense, the trial court erroneously injected the defense itself. The court then accepted the NGRI plea on the very day it was asserted – a procedural impossibility if Secs. 552.020.4 and 552.030.3 are followed, since both sections mandate (and only authorize) the preparation of a responsibility report *after* the NGRI defense is timely asserted *by the accused*. Unless the affirmative defense of NGRI is injected by the accused, the trial court has no authority to acquit of NGRI. (4) A defendant can waive the procedural irregularity of a premature responsibility report; however, to preclude later habeas relief, the court and State should make certain that the defendant's knowing, intelligent and voluntary waiver of the procedural irregularity is demonstrated in the

record. While there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve the doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident. (5) Though the appellate court does not decide whether an on-the-record NGRI plea is needed in *every* case, "we *strongly* encourage the practice." An on-the-record inquiry would ensure that the accused's plea is knowing and voluntary, that he has no other defense, and the he understands the consequences of a plea, including that he may be committed to DMH for longer than a prison term. (6) The "escape rule" does not apply to Rule 91 proceedings, but even if it does, it need not be applied here as a matter of discretion; there is no indication that Defendant's escape adversely affected the criminal justice system. (7) The trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination. Judgment setting aside NGRI plea and remanding case for trial affirmed.

*** Kahler v. Kansas, 2020 WL 1325817, ___ U.S. ___ (U.S. March 23, 2020):**
Holding: The Due Process Clause does not require a state to provide an insanity test to allow acquittal of defendants who, due to mental illness, cannot tell right from wrong; States are free to adopt differing tests for insanity as new legal and moral norms, and medical knowledge, evolve; Kansas law provides an insanity test of whether a defendant lacks culpable mental state required as an element of offense, and also allows presentation of any evidence of insanity as a mitigating circumstance for sentencing (which can also lead to commitment to mental hospital under Kansas law).

*** Moore v. Texas, ___ U.S. ___, 139 S.Ct. 666 (U.S. Feb. 19, 2019):**
Holding: Where (1) in *Moore I*, 137 S.Ct. 1039 (2017), the Supreme Court had reversed and remanded a Texas appellate court's determination that Petitioner was not intellectually disabled on grounds that the Texas court had relied on factors that were not medically-based and had overemphasized adaptive strengths instead of deficits, and (2) on remand the Texas appellate court essentially engaged in the same improper analysis of the issue and again found Petitioner was not intellectually disabled, Supreme Court holds that Petitioner is intellectually disabled on the basis of the record.

*** Madison v. Alabama, ___ U.S. ___, 139 S.Ct. 718 (U.S. Feb. 27, 2019):**
Holding: (1) Even though Defendant may not remember his crime due to memory loss from strokes and dementia, that does not preclude execution if he understands why the State is seeking to execute him; and (2) the 8th Amendment may prohibit executing a person who meets the *Ford* and *Panetti* tests due to dementia or another disorder, not just psychotic delusions; the legal standard focuses on whether a mental disorder has a particular *effect*, not the cause of the effect.

* **Dunn v. Madison, ___ U.S. ___, 138 S.Ct. 9 (U.S. Nov. 6, 2017):**
Holding: State court's ruling that Petitioner was not incompetent to be executed merely because he could no longer remember the crime (due to a series of strokes) was not contrary to any prior holding of U.S. Supreme Court, so Petitioner not entitled to habeas relief. Neither *Panetti* nor *Ford* clearly established that a prisoner is incompetent to be

executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case; "[t]he state court did not unreasonably apply *Panetti* and *Ford* when it determined that Madison is competent to be executed because – notwithstanding his memory loss – he recognizes that he will be put to death as punishment for the murder he was found to have committed."

Concurring opinion: Ginsburg, joined by Breyer and Sotomayor, wrote separately to say that the issue of whether a state can execute someone who does not remember the crime is a "substantial question not yet addressed by this Court" and would warrant a "full airing" in an appropriate case. But given the "restraints imposed" by 28 U.S.C. 2254(d), they must defer to the state court on habeas review.

U.S. v. Williams, 2019 WL 10300069 (3d Cir. 2019):

Holding: Where Defendant requests a competency exam, only 10 days is excludable under the Speedy Trial Act for transport of Defendant to the exam; any delay in excess of 10 days is presumed unreasonable and non-excludable.

U.S. v. Watson, 97 Crim. L. Rep. 563 (4th Cir. 7/17/15):

Holding: Gov't cannot involuntarily medicate a Defendant to render him competent for trial if there is not a substantial likelihood that the medication will restore competency.

Battaglia v. Stephens, 2016 WL 3084272 (5th Cir. 2016):

Holding: Capital defendant was entitled to stay of execution to make appointment of federally-funded substitute counsel meaningful; counsel was needed to develop evidence to show Defendant was incompetent.

U.S. v. Bergrin, 102 Crim. L. Rep. 568 (6th Cir. 3/16/18):

Holding: Even though trial court found Defendant incompetent and dismissed criminal charges against him, Defendant can appeal the dismissal (and claim he's competent) because the dismissal may have collateral consequences affecting his right to vote, own a gun, serve on a jury or obtain a driver's license.

Schmid v. McCauley, 2016 WL 3190670 (7th Cir. 2016):

Holding: Where state prisoner suffered from mental problems, this warranted appointment of counsel to determine whether his mental disability equitably tolled the limitations period for filing a federal habeas.

McManus v. Neal, 2015 WL 667466 (7th Cir. 2015):

Holding: State court unreasonably applied federal law in finding that Defendant was competent to stand trial where he had panic attacks and was on several psychotropic medications, one of which eliminated memory.

U.S. v. Kowalczyk, 98 Crim. L. Rep. 142, 2015 WL 6736547 (9th Cir. 11/4/15):

Holding: A criminal Defendant cannot waive his statutory right to be represented by counsel at a competency hearing, because it is illogical to find that a Defendant whose competency is in question can knowingly and intelligently waive their right to counsel.

Trueblood v. Washington State Dept. of Social and Health Services, 2015 WL 1526548 (W.D. Wash. 2015):
Holding: The maximum allowable time of incarceration in jail for Defendants suspected of being incompetent and awaiting competency evaluation and restoration is seven days; because jails cannot provide the environment or type of care such Defendants need, due process does not allow jails to hold them more than seven days.

Roberts v. State, 2016 WL 1072846 (Ark. 2016):
Holding: Defendant was not competent to waive his postconviction rights where both State and defense expert testified that Defendant's psychosis impaired his ability to make rational decisions about waiving rights.

People v. Marquardt, 98 Crim. L. Rep. 372 (Colo. 1/19/16):
Holding: In order to forcibly increase the dose of antipsychotic medication a civilly committed patient is taking, State must meet the same standard required to involuntarily medicate in the first instance.

Dept. of Children and Families v. State, 2015 WL 5245135 (Fla. 2015):
Holding: Defendant who could not be restored to competency was entitled to release, where the Legislature had not established any procedure to involuntarily commit him.

Warren v. State, 2015 WL 6119372 (Ga. 2015):
Holding: Trial court's findings were insufficient to justify forcible, involuntary medication of Defendant to make him competent to stand trial; court failed to specify what medications were to be given, in what dosages, and for what time period.

Sibug v. State, 2015 WL 7571765 (Md. 2015):
Holding: Where Defendant had previously been found incompetent, a judicial finding of competency was required for retrial of Defendant; Defendant was still under previous finding of incompetence, and his testimony and evidence presented at retrial should have raised concerns about competency.

Com. v. Bruneau, 97 Crim. L. Rep. 695 (Mass. 8/27/15):
Holding: Even though Defendant was acquitted based on a verdict of NGRI, he has right to appeal because he is "aggrieved" by a judgment that has harsh consequences.

Hollie v. State, 2015 WL 5608239 (Miss. 2015):
Holding: Where trial court had ordered a competency evaluation for capital Defendant, there was reason to believe such an evaluation was warranted and court should not have accepted Defendant's guilty plea without doing the evaluation.

People v. Quiroz, 198 Cal. Rptr. 923 (Cal. App. 2016):
Holding: Even though the public administrator decided not to initiate guardianship proceedings after Defendant was found permanently incompetent, this did not authorize the trial court to reopen the competency proceedings and hold a new hearing.

People v. Wingfield, 2014 WL 4776991 (Colo. App. 2014):
Holding: Competency hearing is a critical stage at which Defendant has due process right to be present.

Barcroft v. State, 2015 WL 664244 (Ind. App. 2015):
Holding: In murder prosecution, due process prohibited State from using evidence that Defendant asked to consult an attorney to rebut his claim of insanity.

Mays v. State, 2015 WL 9261311 (Tex. App. 2015):
Holding: Defendant was incompetent to be executed where various lay witnesses described him as mentally ill, and experts found him incompetent.

Order of Protection

A.O. v. V.O., 2020 WL 624297 (Mo. App. E.D. Feb. 11, 2020):
Holding: (1) Even though Defendant-ex-Husband repeatedly followed Petitioner-ex-Wife and children for no legitimate purpose in violation of a divorce judgment, the evidence did not support a full order of protection for "stalking," Sec. 455.040, because ex-Wife did not testify she feared a danger of physical harm from ex-Husband's actions, as required by Sec. 455.010(14)(a); but (2) evidence was sufficient to support full order for "harassment" because harassment does not require proof the conduct placed Petitioner in fear of danger or physical harm, Sec. 455.101(1)(d).

S.M.W. v. V.M., 2020 WL 1144865 (Mo. App. E.D. March 10, 2020):
Holding: Even though Petitioner-Guardian who was seeking a full order of protection on behalf of Child testified that Defendant-Neighbor waved a gun during some incident, and Guardian answered "yes" when asked if there were any particular harms or threats from Neighbor, where (1) Child had run away to live with Neighbor for several days, (2) Guardian testified only to "vague feelings and emotions" about how Neighbor was trying to harm her and get Child, (3) Guardian's "yes" answer to harm was conclusory, (4) other evidence was conflicting or unclear, and (5) trial court said it was "not convinced of what happened" during the relevant events, evidence was insufficient to support order of protection for "stalking," Sec. 455.010(14), because there was no evidence of "alarm" that Neighbor intended to harm Child.
Discussion: "Stalking" requires that Defendant's conduct cause "alarm." A plaintiff is required to do more than simply assert a bare answer of "yes" when asked if she was alarmed. Appellate courts will reverse orders of protection if there is no evidence of overt threats of physical harm and no evidence of physical confrontation. Here, without specific details of what happened, Guardian's conclusory "yes" answer to whether she was alarmed is not enough to justify an order of protection. Even assuming Neighbor waved a gun (as required by the standard of review), there wasn't any evidence about whether this happened when Child was around, or what danger or threat this posed to Child. Plaintiffs must provide testimony specifically addressing their fear of physical harm. It appears that Neighbor provided shelter to Child against Guardian's wishes. But

although Neighbor's conduct may amount to parental meddling, it does not rise to the level of causing alarm. Finally, the trial court should not have granted a full order of protection when it acknowledged it didn't have a clear picture of what happened.

N.J.D. v. R.O.D., 2019 WL 3121865 (Mo. App. E.D. July 16, 2019):
Holding: (1) Conclusory testimony by alleged Victim seeking full order of protection that Defendant "sexually assaulted" her using coercion and intoxication does not provide sufficient evidence for the fact-finder to find that a sexual assault occurred, without more details as to what acts actually took place, but (2) the conclusory sexual assault testimony can show context for why Victim was in reasonable fear of Defendant's subsequent conduct (where he repeatedly contacted Victim and had one fight) to support full order of protection for "stalking."

S.H. v. P.B., 2019 WL 4420520 (Mo. App. E.D. September 17, 2019):
Holding: Even though Defendant failed to appear at order of protection hearing and a full order was entered against him, where he timely appealed but no transcript was available of the order of protection hearing, trial court failed to comply with Secs. 478.072 and 512.180.2, which require the court to make a record, and case must be remanded so a proper record can be made.

K.M.R. v. D.G.B II, 2019 WL 4617711 (Mo. App. E.D. Sept. 24, 2019):
Holding: (1) Where Defendant in order of protection case was not served with all pages of the Petition, the trial court lacked personal jurisdiction over Defendant due to improper service under Sec. 455.040.2, which requires that Defendant be served with a copy of the petition, notice of the date for hearing, and any ex parte order of protection; (2) the Return does not show that Defendant was served with the Petition because the Return did not include the Petition or affirmatively state that a full copy was served on Defendant; (3) trial court should have sustained Defendant's motion to quash service since he wasn't properly served; order of protection reversed and case dismissed for lack of personal jurisdiction.

B.J.T. v. D.E.C., 2019 WL 273055 (Mo. App. E.D. Jan. 22, 2019):
Holding: (1) Trial court abused discretion in order of protection case in preventing Witness from testifying on behalf of Petitioner; testimony is only cumulative "when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute;" and (2) trial court erred in imposing a "10 minute rule" on length of witness testimony, because "ten minutes is seldom, if ever, sufficient for a proper adversarial hearing."

C.S.G. v. R.G., 559 S.W.3d 416 (Mo. App. E.D. Oct. 23, 2018):
Holding: (1) Even though trial court may have lacked statutory authority to order Defendant to pay Plaintiff's mortgage in order of protection case, this did not deprive the court of subject-matter jurisdiction and Defendant's only remedy was to pursue a direct appeal; Defendant could not later collaterally attack the order after Plaintiff sought civil contempt and the court sought indirect criminal contempt for failure to pay; (2) on remand, the court is directed to enter a judgment of civil contempt but before ordering a

jail sentence must convince itself of Defendant's ability to pay, or create a non-imprisonment remedy that would allow Defendant to purge himself of the contempt.
Discussion: (1) Defendant claims he cannot be held in contempt because the trial court's order directing him to pay the mortgage was not statutorily authorized. However, this is an impermissible collateral attack on that judgment. Defendant could have taken a direct appeal from the judgment, but did not. A contempt proceeding cannot be used to collaterally attack the judgment. The underlying judgment can only be attacked if it is void for lack of personal or subject matter jurisdiction. Here, Defendant claims only that the trial court lacked statutory authority. But even if true, the trial court had both personal and subject matter jurisdiction. (2) An order of contempt must specify how Defendant can purge himself of the contempt. Inability to pay is an affirmative defense that must be raised by Defendant. However, the coercive purpose of imprisonment for civil contempt is frustrated if Defendant does not have a key to the jailhouse door. Before the trial court can enter a civil contempt order committing Defendant to jail for failure to pay, it must convince itself that Defendant has ability to pay. If the court cannot convince itself that Defendant has ability to pay, the court must fashion a different remedy to allow Defendant to purge himself of contempt.

E.D.H. v. T.J., 2018 WL 4312977 (Mo. App. E.D. Sept. 11, 2018):
Holding: Even though Defendant-Former Girlfriend posted disparaging information and opinions about Petitioner-Former Boyfriend on social media, the evidence was insufficient to support a full order of protection (which ordered Defendant to stop making social media posts about Petitioner) because the social media posts would not have caused fear of physical harm in a reasonable person (necessary for stalking), and Petitioner did not testify he suffered substantial emotional distress (necessary for harassment); the Adult Abuse Act was not intended to prevent harm to a Petitioner's reputation.
Discussion: Petitioner's application for order of protection and testimony was that he needed a protective order to prevent "defamation to my character," that he didn't know what Defendant was "capable of" and "she won't go away!" Defendant claimed she was an advocate for women's issues and discusses her own experiences on social media for that purpose. Petitioner sought an order of protection for "stalking" and "harassment." However, Defendant's conduct would not have caused fear of physical harm in a reasonable person (necessary for stalking). Petitioner's petition and testimony focused on the disparaging nature of Defendant's posts, and his stated fear was harm to his *reputation*. However, such harm is not covered under the Adult Abuse Act. Further, Petitioner did not testify he suffered substantial emotional distress (necessary for harassment). Order of protection reversed.

T.R.P. v. B.B., 2018 WL 3118003 (Mo. App. E.D. June 26, 2018):
Holding: Even though Appellant sent threatening messages to Victim, where Victim testified that he sought an order of protection because the messages were "just ridiculous," evidence was insufficient to support granting a full order of protection because Victim failed to prove he was "alarmed," i.e., placed in fear of danger of physical harm, Sec. 455.040(14)(a), by the messages.

Discussion: The judgment is not supported by substantial evidence because Victim failed to prove that Appellant's actions "alarmed" him. "Alarm" is defined as "to cause fear of danger of physical harm, Sec. 455.010(14)(a). Proof of alarm involves both a subjective and objective component. Victim had to show (1) that he subjectively feared physical harm from Appellant's conduct, and (2) that a reasonable person under similar circumstances would have feared physical harm. Even though Appellant sent messages using curse words, hoping that Victim would catch herpes, saying he would get friends to "f—k you up," and demanding that Victim leave Appellant's "woman alone," Victim testified he only found the messages "just ridiculous" and wanted them to stop. Victim did not testify he was in fear of physical harm. Full order of protection reversed.

K.L.M. v. B.A.G., 532 S.W.3d 706 (Mo. App. E.D. Oct. 10, 2017):
Holding: Even though Defendant, who used date Petitioner's Boyfriend, (1) worked in law enforcement; (2) sent 17-page anonymous letter to Petitioner saying Boyfriend "treats women horribly" and "don't you want someone who will treat you" better; (3) sent a 2-page letter to Petitioner saying "we will walk this journey together" and she "looks forward to many more years of your friendship"; and (4) apparently "hacked into" Petitioner's Facebook page to obtain a photo of Petitioner and used Petitioner's picture as her own, the evidence was insufficient for a full order of protection for stalking, because even though Petitioner was "uncomfortable" by Defendant's actions, the actions would not cause a person to fear physical harm (alarm), as required by Sec. 455.010(14).
Discussion: Alarm contains both a subjective and objective component. The record must show both that Defendant's conduct caused Petitioner to subjectively fear physical harm, and that a reasonable person under the same circumstances would have feared physical harm. Here, there is insufficient evidence that a reasonable person would fear physical harm. Petitioner contends that Defendant's connection to law enforcement supports fear of harm. But Petitioner does not cite any case law that a person is entitled to "heightened alarm" merely because the alleged stalker has some connection to law enforcement.

P.D.J. v. S.S., 2017 WL 6460159 (Mo. App. E.D. Dec. 19, 2017):
Holding: (1) Order of protection based on abuse by "harassment" is available only to victims of domestic violence (household members); people who do not qualify as household members can only seek order of protection on grounds of "stalking"; (2) Adult Abuse Act does not authorize court to award monetary damages for vandalism associated with stalking; remedy is a separate civil suit.
Discussion: Petitioner obtained an order of protection against Defendant for stalking, and the trial court also ordered Defendant to pay $13,000 for vandalizing Petitioner's car as part of the stalking incidents. Sec. 455.050.1 outlines the terms that a court can order as part of a protection order. Payment for damages to personal property is not among the listed terms. While 455.050.1 provides a non-exhaustive list of terms that can be included in a protection order, the section states that an order should include only "such terms as the court reasonably deems necessary to ensure the petitioner's safety." Paying $13,000 in damages for a car was not reasonably necessary to ensure Petitioner's safety. Petitioner's remedy is to file a separate civil suit for damages to her car.

S.N.L. v. A.B., 2017 WL 6816575 (Mo. App. E.D. Dec. 26, 2017):
Holding: (1) Parent can file for protection order on behalf of their Child, and in order to grant order, court does not have to find that *Child* personally was "alarmed" by Defendant's conduct, since children may not themselves perceive danger; but (2) even though Defendant, who was property manager of a subdivision, posted a photo on Facebook of Child driving a golf cart in street with caption, "Busted 8-year-old for texting and driving; some kids never learn" this did not constitute stalking, because it was not a course of conduct (repeated acts) that lacked a legitimate purpose; (3) Sec. 455.504(2) prohibited trial court from assessing GAL costs against Petitioner.
Discussion: (1) Sec. 455.010(14) states that stalking occurs when a person purposely engages in an unwanted course of conduct that causes alarm to another person, *or a person who resides in the same household with the person seeking the protection order*. The latter language allows a Parent to seek a protection order on behalf of their Child. This latter language also exempts the Child from having to establish their own alarm in order for the Parent to obtain the protection order. A Child may be unaware of danger, so cannot establish their own alarm. (2) On the merits, Parent failed to meet burden to obtain full order of protection. Defendant was the property manager of subdivision and had legitimate reason to be in subdivision. Defendant took photo to show his employer that Child was driving in the street. Defendant also thought photo was "funny" so posted it on Facebook. Defendant had no direct contact with Child. This was a single incident. Petitioner failed to show not only fear of danger of physical harm (alarm) but also intent on Defendant's part, lack of legitimate purpose, and repeated acts. Also, the GAL, who was appointed to represent Child's interest, did not believe that the one event of posting a picture on Facebook warranted a protection order.

Austin v. Jarred, 2019 WL 2537437 (Mo. App. S.D. June 20, 2019):
Holding: Even though Defendant-City-Officer (1) repeatedly went to Plaintiff-City-Clerk's adjacent office to make Sunshine Law requests, sometimes in an angry manner; (2) threatened to sue City-Clerk; (3) threatened to arrest City-Clerk on one occasion for not fulfilling Sunshine Law requests; (4) repeatedly drove by City-Clerk's house while on patrol; (5) ran license checks on City-Clerk's boyfriend; and (6) recorded phone calls between City-Clerk and her boss, full order of protection against City-Officer for "stalking" City-Clerk was not supported by sufficient evidence because there was no evidence that City-Clerk reasonably feared physical harm from Officer; Clerk testified that Officer did not physically harm her or threaten harm, and most of Officer's actions had a legitimate purpose, except for the threat to arrest, but stalking requires two or more prohibited actions, Sec. 455.010(14)(b).

Jones v. Standfuss, 2019 WL 6314786 (Mo. App. W.D. Nov. 26, 2019):
Holding: (1) Even though Petitioner for order of protection felt "intimidated" by Defendant-Court-Employee who followed Defendant at courthouse and "stared" at him, trial court erred in entering order of protection because a reasonable person under same circumstances would not have feared physical harm, as required by Sec. 455.010(14); and (2) even though Neighbor constantly called the police on Petitioner and Neighbor yelled obscenities at people who came on Neighbor's property, trial court erred in entering order

of protection against Neighbor because Neighbor's conduct would not cause a reasonable person to be afraid.

L.M.D. v. D.W.D., 2018 WL 1061474 (Mo. App. W.D. Feb. 27, 2018):
Holding: Where (1) Petitioner for order of protection turned around in Defendant's driveway, at which time Defendant "flipped her off," and (2) later, Defendant confronted Petitioner at a restaurant, and told her never to pull into his driveway again or he would blow her head off, the evidence was insufficient to obtain a full order of protection for stalking, because Sec. 455.010(14)(b) requires a course of conduct of two more incidents that cause alarm. Since the original driveway incident was initiated by *Petitioner* when she turned around in Defendant's driveway, it does not count against Defendant. The restaurant incident would count, but one act alone is insufficient to prove stalking.

I.L.L. v. T.L.R., 2017 WL 6453625 (Mo. App. W.D. Dec. 19, 2017):
Holding: Even though Petitioner for full order of protection testified that Defendant sent her "threatening" emails and tried to get her fired from her job, the evidence was insufficient to support entry of a full order of protection where Petitioner had initiated the email exchange; the allegedly threatening emails were not made part of the record; and even if Defendant tried to get Petitioner fired, such action does not provide grounds for a protection order.
Discussion: To obtain a protection order, a Petitioner must show (1) that Defendant engaged in a pattern of conduct of at least two or more incidents; (2) that served no legitimate purpose; (3) that caused Petitioner a fear of danger of physical harm; and (4) that it was reasonable for Petitioner to have a fear of danger of physical harm. Here, the allegedly threatening emails were not admitted into evidence, nor was there any testimony about their content. Further, even assuming Defendant tried to get Petitioner fired, it cannot be said that Defendant's actions might reasonably cause fear of physical harm. Thus, Defendant's actions do not constitute stalking under Sec. 455.010(12).

State v. McGuire, 2020 WL 427326 (Wash. App. 2020):
Holding: Domestic violence no contact order which prohibited Defendant from having any contact with Victim was unconstitutional to extent it limited Defendant's right to parent.

Presence at Trial

State v. Chambers, 2016 WL 503030 (Mo. banc Feb. 9, 2016):
(1) Even though Defendant timely filed his application for change of venue, where he failed to pursue it for nine months and affirmatively told the trial court there were no pending motions in the case until the day before trial, Defendant waived his right to change of venue; and (2) where pro se Defendant voluntarily chose not to attend the trial, he has no 6th Amendment right to be protected from the prejudice that results, but where a pro se Defendant is removed from the courtroom due to disruptive behavior, a different standard may apply, because if the trial continues without counsel, neither Defendant's nor the Gov't's interest will be adequately protected.
Facts: Defendant, through counsel, filed a timely application for change of venue as of right under Rule 32.03. Defendant then changed counsel. For nine months thereafter new counsel, unaware of the venue application, told the court there were no pending motions. After a continuance motion was denied shortly before trial, counsel then discovered the venue application and sought to invoke it the day before trial. The trial court found Defendant waived the venue motion by not bringing it to the court's attention in a timely fashion. Defendant then discharged counsel, and absented himself from the trial.
Holding: (1) Even though Defendant timely filed his change of venue application, a defendant may waive constitutional or statutory rights by implied conduct. Here, Defendant waived his right to change of venue by not pursuing it for nine months, and affirmatively telling the court there were no pending motions. This is true even though the second counsel did not know the motion had been filed; it was defense counsel's responsibility to know the file. Asserting the change of venue the day before trial was an attempt to circumvent the denial of a continuance; Defendant should not be rewarded for that. (2) Regarding whether another of Defendant's claims is preserved for appeal, Defendant is held to the same standard as an attorney, even though he proceeded pro se and absented himself from the trial. Where a pro se Defendant voluntarily absents himself from trial, he has no 6th Amendment right to be protected from the prejudice that may result; that's the case here. A different standard may apply, however, where a pro se defendant is removed from the courtroom for disruptive behavior. There, if the trial continues and if counsel is not appointed, neither the Defendant's nor Gov't's interests may be protected.

Laramore v. Jacobsen, 2020 WL 6733487 (Mo. App. E.D. Nov. 17, 2020):
Holding: (1) Where Petitioner's property was seized by Sheriff during his arrest, the statute of limitations for a replevin action to seek return of the property begins to run three years from the date the property is no longer needed as evidence, under Sec. 516.130(1) for an action against officers; where Petitioner still had a pending postconviction or criminal case where the property may be needed as evidence, the statute of limitations had not yet run; (2) although an inmate has no constitutional right to be present for a civil proceeding, Sec. 491.230 authorizes a writ of habeas corpus ad testificandum where the inmate will be "substantially and irreparably prejudiced" by failure to attend; inmate must petition circuit court for issuance of such a writ and demonstrate necessity to attend; circuit court is not requires to issue writ *sua sponte*.

State v. Hudson, 2020 WL 5160463 (Mo. App. W.D. Sept. 1, 2020):
Holding: (1) Trial court erred in conducting Defendant's sentencing via Polycom over Defendant's objection that he had a right to be personally present, because Sec. 546.550 and Rule 29.07(b)(2) require in-person sentencing, as does due process, and Sec. 561.031.1(6) provides for sentencing by Polycom only upon waiver of in-person appearance by Defendant; new sentencing ordered; and (2) Western District notes in footnote that even though Defendant's case arose before COVID-19, the Missouri Supreme Court has encouraged all courts to use teleconferencing during COVID, but this "does not change applicable statutory provisions," even though the Supreme Court has suspended certain court rules.

State v. Berry, 2016 WL 5888945 (Mo. App. W.D. Oct. 11, 2016):
Even though trial court's oral pronouncement of sentence exceeded that authorized by law, trial court violated Defendant's right to be present for sentencing when it later changed (reduced) the sentence nunc pro tunc without Defendant's presence.
Facts: The trial court orally sentenced Defendant to 30 years, but the maximum authorized by law was 15. However, the written sentence stated (apparently erroneously) 15 years. The State then filed a motion a motion to correct sentence nunc pro tunc, which was granted. Defendant appealed, claiming the court plainly erred in resentencing him to 15 years without him being present.
Holding: The oral pronouncement of sentence is the controlling sentence. A nunc pro tunc order can be used only to correct clerical errors, not to amend a rendered judgment. If the oral pronouncement contains a discrepancy, a trial court can correct it before it is reduced to writing only if the defendant is present. If the defendant is not returned for resentencing, a trial court has authority only to enter the sentence as orally pronounced. Defendant has a due process right to be present and heard at the oral pronouncement. Sentence vacated for resentencing.

People v. Sanchez, 99 Crim. L. Rep. 11 (Cal. App. 3/28/16):
Holding: Where Defendant's case is remanded for resentencing, Defendant has right to be present at the resentencing.

People v. Janis, 2016 WL 2605736 (Colo. App. 2016):
Holding: Plain error resulted when trial court accepted defense counsel's statement that Defendant wanted to leave the courtroom without the court personally advising Defendant about waiving the constitutional right to be present.

People v. Wingfield, 2014 WL 4776991 (Colo. App. 2014):
Holding: Competency hearing is a critical stage at which Defendant has due process right to be present.

Gillespie v. State, 2015 WL 4313591 (Ga. App. 2015):
Holding: Defendant's absence from bench conferences during voir dire where several jurors were excused violated his right to be present at trial.

People v. Burton, 2016 WL 1442053 (N.Y. App. 2016):
Holding: Even though trial court told bailiff, "If defendant speaks again, do what you need to do," Defendant was denied his right to be present at trial where bailiff subsequently removed Defendant; court had not addressed and warned Defendant personally that he'd be removed if he were disruptive.

Morris v. State, 102 Crim. L. Rep. 552 (Tex. App. 2/28/18):
Holding: Defendant's right to be present at trial was violated where he was afraid to return to the courtroom after Judge had ordered a bailiff to use an electric stun belt to shock Defendant for alleged misbehavior in court; appellate court reversed conviction and calls the Judge's actions "barbarism."

Privileges

State ex rel. Becker v. Wood, 2020 WL 6438925 (Mo. banc Nov. 3, 2020):
Writ of prohibition issues to quash trial court order requiring Prosecutor to testify about reason for seeking death penalty, because State seeking death penalty four years after filing initial charge did not show prosecutorial vindictiveness, and trial court's order would require Prosecutor divulge privileged work product as to charging decision.
Facts: State charged Defendant with first degree murder. About three years later, after Defendant rejected plea offers and filed a notice to assert an NGRI defense shortly before trial, a new prosecutor filed notice of intent to seek death penalty. Defendant filed a motion to strike death penalty on grounds of prosecutorial vindictiveness. Trial court ordered Prosecutor to testify about why he was seeking death penalty. Prosecutor sought writ of prohibition.
Holding: The issue is whether defense counsel can call Prosecutor to testify about seeking a particular sentence. The work product doctrine includes an attorney's mental impressions, conclusions, opinions and legal theories, which would include Prosecutor's reasons for seeking death penalty. The mere seeking of death penalty under circumstances here does not show objective evidence of prosecutorial vindictiveness. First-degree murder and capital murder are not different charges. When the State seeks the death penalty, the State is not augmenting the charge or adding a new charge. Vindictiveness usually arises when a prosecutor seeks a greater sentence after a successful appeal and grant of new trial; vindictiveness is rarely found at a pretrial stage. Prosecutors have broad discretion regarding charging, even shortly before trial.

State ex rel. Healea v. Tucker, 545 S.W.3d 348 (Mo. banc May 1, 2018):
Holding: Where the Police Dept. secretly recorded a conversation between Defendant and his attorney at the police station, this violated Defendant's attorney-client privilege and Sixth Amendment rights, but the remedy need not be dismissal; instead, the portions of a master's report which detail questions Defendant asked his attorney should be sealed from public view; the remainder of the master's report can be unsealed since it contains no confidential statements by Defendant.

State ex rel. Malashock v. Jamison, 2016 WL 6441285 (Mo. banc Nov. 1, 2016):
Even though Plaintiff had designated Expert as witness Plaintiff intended to call at trial and the general subject matter of Expert's testimony, where Plaintiff never revealed the Expert's analysis, opinions or conclusions, Rule 56.01 allowed Plaintiff to later rescind the endorsement of Expert; thus, Plaintiff did not irrevocably waive the work-product protections surrounding Expert, and Defendant could not depose Expert.
Facts: Plaintiff designated Expert as a witness expected to testify at trial regarding the "performance and factors" of a vehicle. Later, Plaintiff "de-endorsed" Expert. Defendant then sought to depose Expert. The trial court ordered the deposition on grounds that Plaintiff waived the work-product doctrine by designating Expert as a witness. Plaintiff sought a writ of prohibition.
Holding: An expert's knowledge, opinions and conclusions are the work product of the attorney retaining the expert. The designation of an expert before trial begins the process of waiving work-product, but the waiver is not complete until there has been a "disclosing event," which is the actual disclosure of the expert's opinions and conclusions. Here, Expert's opinions and conclusions were never disclosed. Plaintiff "de-endorsed" Expert before trial without disclosing Expert's opinions and conclusions. Expert is no longer expected to testify at trial. Thus, Plaintiff did not waive the work product doctrine. Writ granted.

State ex rel. Becker v. Lamke, 2019 WL 3294563 (Mo. App. E.D. July 23, 2019):
In child sex case, trial court cannot, *sua sponte*, order pretrial that the State file a memorandum stating the corpus delecti of the charges independent of Defendant's confession, because this would require the State to disclose its privileged work product, opinions, theories, conclusions and mental impressions of the case.
Facts: The trial court, *sua sponte*, ordered the State to file a memorandum stating the corpus delicti of the case. The defense did not request this. The State sought a writ of prohibition. The defense, on appeal, again did not request this memorandum.
Holding: Appellate court notes the unusual posture of this case, since the defense is not requesting the memo at issue. Judge argues his pretrial order was intended to promote a fair and expeditious trial. But the fact that Defendant isn't asking for the memo and isn't contesting corpus delecti indicates that this will not likely be an issue at trial. Meanwhile, the State will suffer irreparable harm if it has to file the memo, because it will require the State to disclose privileged work product, opinions, theories, conclusions and mental impressions of the case. Writ granted.

State v. Tresler, 2017 WL 3996218 (Mo. App. E.D. Sept. 12, 2017):
Where a Defendant is induced to waive her Fifth Amendment right against self-incrimination by a promise of immunity from a Prosecutor, the doctrine of equitable immunity may immunize the testimony or Defendant from prosecution, even if the provisions of Sec. 491.205 were not followed. (But court finds no promise of immunity was made here.)
Facts: Defendant, who was not yet charged with a crime, was subpoenaed by Prosecutor to testify at a preliminary hearing. Her attorney asked Prosecutor if Defendant was a suspect, and Prosecutor said she "was a witness and nothing more and he had no intention

of charging her with any offense." Defendant then testified against various persons. Prosecutor then charged Defendant with also participating in the offense about which she testified. She moved to dismiss on grounds of equitable immunity. The trial court overruled the motion. Defendant was convicted at trial, and appealed.
Holding: The State claims that immunity is recognized in Missouri only where the provisions of Sec. 491.205 are followed, which they were not here. However, the State is wrong. Due process rights are implicated when a governmental promise of immunity, whether authorized by statute or not, induces a defendant to waive her Fifth Amendment rights by testifying or cooperating with the State. The U.S. Supreme Court has held that when evidence of guilt is induced under a promise of immunity, the self-incrimination clause of the Fifth Amendment requires excluding the evidence. And the U.S. Supreme Court has held that where the State induces a defendant to plead guilty based on a false promise, that promise must be fulfilled. Based on these principles, Defendant seeks specific performance of her promise of immunity. The problem with Defendant's claim here, however, is that the Prosecutor never actually promised her immunity. The Prosecutor's statements to defense counsel were not promises of immunity. Thus, the court did not err in denying her motion to dismiss the charges.

State ex rel. Healea v. Tucker, 2017 WL 2451869 (Mo. App. E.D. June 6, 2017):
Holding: (1) Where Police Dept. secretly recorded an attorney-client visit between defense counsel and defendant, this violated the 6th Amendment right to counsel, attorney-client privilege, due process, and 600.048.3, which requires police to provide a private attorney-client visiting place; appellate court grants writ limiting public access to report which contains substance of the attorney-client conversation; (2) Where Attorney General's Office had copy of secretly taped attorney-client conversation for two years before disclosing it, never logged the evidence as is customary, and never explained the non-customary handling of the evidence, there is an appearance of impropriety for Attorney General's Office to continue to prosecute case, and Office is disqualified and Special Prosecutor appointed; Defendant need not show actual prejudice to disqualify the Attorney General's Office; appearance of impropriety is standard; but (3) Defendant's request to exclude all evidence obtained *after* the secret recording is not subject to writ of prohibition; Defendant's remedy is to object to this evidence at trial and pursue issue on direct appeal.

State ex rel. Winker v. Goldman, 2016 WL 1317991 (Mo. App. E.D. April 5, 2016):
(1) Where Defendant-Wife and Husband were originally represented by the same Attorney, but after Husband sought to divorce Wife, Husband divulged attorney-client and work-product information to Prosecutor and Prosecutor actively interviewed Husband to obtain this information, Prosecutor violated Wife's 6th Amendment and due process rights; remedy is to exclude documents Prosecutor wrongly obtained and to disqualify entire Prosecutor's Office, and appoint special prosecutor; (2) although there is a presumption in favor of public access to court documents, the attorney-client privileged and work-product privileged documents must be sealed to protect Wife's 6th Amendment right to counsel.
Facts: Defendant-Wife was charged with murder regarding the death of a child. Subsequently, juvenile proceedings were instituted concerning custody of her and her

Husband's other children. Wife and Husband hired Attorney to represent them in the criminal and juvenile cases. Attorney met numerous times with Wife and Husband. Subsequently, Husband filed for divorce and hired a new counsel for himself. Husband then sent an email to Prosecutor relating his thoughts about Wife, their marriage and information about the pending cases. Prosecutor also interviewed Husband about Wife's strategy, defenses and other privileged information. Wife sought to exclude documents acquired by the Prosecutor from Husband on grounds that this violated the attorney-client privilege and work-product privilege, and also sought to disqualify Prosecutor's Office. The trial court excluded the evidence obtained by Prosecutor, but did not disqualify the entire Prosecutor's Office.

Holding: (1) The 6th Amendment protects conversations between Wife and her defense Attorney. Prosecutor breached Wife's attorney-client privilege during their interview with Husband. The "common interest" doctrine allows parties with a community of interest to preserve the privilege's protection where the parties had joined forces for the purpose of obtaining legal representation. Prosecutor violated Wife's due process rights by violating the attorney-client privilege. Further, the work-product information learned by Prosecutor gives him a tactical advantage, which prejudices Wife. Given that the entire Prosecutor's Office had access to the privileged materials, and that the murder prosecution is on-going, the court cannot neutralize the taint of the attorney-client privilege and due process violations merely by excluding evidence from trial. The entire Prosecutor's Office must be disqualified and a special prosecutor appointed. (2) Although there is a presumption in favor of public access to court documents, here, the court seals the attorney-client privileged information to protect Defendant's 6th Amendment and due process rights.

Roesing v. Director of Revenue, No. WD80585 (Mo. App. W.D. March 13, 2018):
Sec. 577.041.1 does not require that Drivers be given the opportunity to consult with an attorney in private; thus, even though Officer listened in on Driver's attorney-client phone call – after which Driver refused to consent to a breath test – Driver's right to consult with an attorney was not violated and his refusal counts as a valid refusal resulting in license suspension.

Facts: Driver was arrested for DWI. Officer read Driver the implied consent law. Driver asked to call his attorney, and reached him by phone. Driver and attorney asked to speak privately, but Officer said that wasn't possible because all rooms in the jail were audio and video recorded. Driver ended up talking to attorney with Officer standing nearby, listening in. Driver ultimately refused to take a breath test, after consulting with his attorney. At his license suspension hearing, Driver contended his refusal was not valid because he was denied the opportunity to consult with his attorney in private.

Holding: Sec. 577.041.1 provides a statutory right to speak to an attorney before deciding to submit to a breath test. However, there is no constitutional right to speak with an attorney before deciding whether to submit to a breath test. The statute's purpose is solely to provide a reasonable opportunity to contact an attorney. Here, Driver was given that opportunity and, in fact, actually spoke to his attorney. Nothing in the plain language of Sec. 577.041.1 requires that Driver be given the right to confer privately with his attorney. If it is sufficient under the statute to give a person 20 minutes to unsuccessfully contact an attorney, then it is certainly sufficient to give them 20 minutes

to successfully contact an attorney, regardless of whether the ensuing conversation is private or not. Driver argues that a non-private communication risks him making inculpatory statements that could be used against him either in the civil license proceeding or at a criminal trial. But here the State is not seeking to use his statements against him. Moreover, attorney-client privilege can be waived, but such waiver must be voluntary. The privilege that attaches to attorney-client communication after exercising the limited statutory right to contact counsel in Sec. 577.041.1 is not waived merely because a driver is required to involuntarily conduct the conversation in the presence of a police officer. Regardless, the attorney-client privilege implicates whether privileged communications can be admitted at trial. The attorney-client privilege does not implicate whether Driver was afforded the limited statutory right to attempt to contact counsel.
Dissenting opinion: When an arrested driver talks to an attorney, the purpose is to discuss both civil issues regarding a driver's license, and potential criminal charges. An arrested driver has a Fifth Amendment right to consult counsel regarding criminal charges. The most widely accepted understanding of an attorney consultation is that it is done privately, and this is the only definition that makes sense in the context of Sec. 577.041. Sec. 600.048.3 requires police stations and jails to have places available for private consultation with attorneys. It does not make logical sense that the legislature would grant a right to speak privately with an attorney when under suspicion of a crime, but not for those in custody suspected of a crime (DWI) who are also at risk of civil penalties (license suspension).

In re Doe, 100 Crim. L. Rep. 394 (3d Cir. 1/27/17):
Holding: Even though Defendant sent email saying he could use his lawyer's work-product privilege to cover up money laundering, the crime-fraud exception did not apply to make the work-product admissible, since there needed to be an actual act to further a fraud before the exception applied.

U.S. v. Fomichev, 103 Crim. L. Rep. 494 (9th Cir. 8/8/18):
Holding: Marital privilege prevents Gov't from using recording of Defendant-Husband and Wife in immigration marriage fraud case, even though Wife secretly recorded the conversation as part of agreement with Gov't.

Landis v. Tailwind Sports Corp., 97 Crim. L. Rep. 527 (D.D.C. 7/13/15):
Holding: Federal court refuses to order law firm to disclose documents about former client bicyclist Lance Armstrong under the crime fraud exception to attorney-client privilege; even though Armstrong admitted to doping, he wasn't criminally prosecuted.

State v. Expose, 98 Crim. L. Rep. 248, 2015 WL 8343119 (Minn. 12/9/15):
Holding: Even though psychologists have a duty to warn third-parties of threats by patients, there is no exception to the psychologist-patient privilege for terroristic threats that permits psychologist to testify in court; these concepts are not inconsistent since the psychologist can warn a third-party but still be incompetent to testify in court about matters the patient disclosed in confidence.

State v. Rice, 2016 WL 2941118 (Md. 2016):
Holding: Trial court lacked authority to deny State's motion to compel a witness to give immunized testimony.

State v. Bain, 2016 WL 93872 (Neb. 2016):
Holding: Where the State becomes privy to Defendant's confidential trial strategy, a presumption of prejudice to the 6th Amendment right to counsel arises.

Traffanstead v. State, 2019 WL 7242228 (Fla. App. 2019):
Holding: Where Defendant was charged with sexual battery of their Child, Defendant was entitled to obtain Child's psychological assessment records in order to cross-examine Child; in camera review had found that information in records was relevant, and could explain prior incidents of untruthfulness by Child.

People v. Thodos, 2015 WL 5578621 (Ill. App. 2015):
Holding: Even though Defendant's religious advisor was not a pastor of a church or a paid clergy member, where the advisor was accredited by a religious denomination, he was covered by the clergy-penitent privilege, which precluded him from being compelled to testify about Defendant's confession to him.

State v. Judd, 2019 WL 7183215 (Or. App. 2019):
Holding: Psychotherapist privilege between Defendant and Social Worker was abrogated only to the extent Social Worker was statutorily required to be mandatory reporter of elder abuse, where Defendant's statements were made during counseling session.

Com. v. Davis, 2015 WL 4550110 (Pa. Super. 2015):
Holding: The crime-fraud exception to the spousal privilege does not apply in the criminal context; thus, the privilege applied to Defendant's alleged incriminating statements made to his wife about the charged crime.

Probable Cause to Arrest

District of Columbia v. Wesby, ___ U.S. ___, 138 S.Ct. 577 (U.S. Jan. 22, 2018):
Holding: In Sec. 1983 action, Supreme Court reaffirms that whether probable cause to arrest exists is based on an objective totality of circumstances test.

Editor's note: The case is notable for its concurring opinion by Ginsburg, in which she called for reexamination of Supreme Court precedent that an officer's subjective intent should not be considered in deciding whether probable cause exists. "A number of commentators have criticized the path we charted in *Whren v. United States*, 517 U.S. 806 (1996), and follow-on opinions, holding that an arresting officer's state of mind … is irrelevant to the existence of probable cause." "The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection."

State v. Swebilius, 101 Crim. L. Rep. 206 (Conn. 5/30/17):
Holding: Where an arrest warrant was issued 19 days before statute of limitations on crime expired, but police did not serve the warrant until 13 days after the period expired, State had burden to show that delay in executing the arrest warrant was justified to avoid dismissal of case.

Prosecutorial Misconduct & Police Misconduct

In re: Schuessler, 578 S.W.3d 762 (Mo. banc August 13, 2019):
Holding: (1) Where assistant prosecutors were aware of police misconduct by an Officer-friend and covered it up (by among other things, filing a false charge and lying to Prosecutor's Office and law enforcement investigators), prosecutors are suspended for violating Rules 4.1.13(b)(violating legal obligation to engage in conduct reasonably necessary to protect the best interest of their employer-organization (Prosecutor's Office)); 4-8.4(c)(engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and 4-8.4(d)(engaging in conduct prejudicial to administration of justice); and (2) assistant prosecutor violated Rule 4-8.4(g)(which prohibits words or conduct "in representing a client" showing bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation) when she made racist and homophobic remarks about a criminal suspect even though the suspect was not her "client;" a prosecutor is always representing the people of Missouri and the remarks were made in the Prosecutor's Office, during working hours.

State ex rel. Healea v. Tucker, 545 S.W.3d 348 (Mo. banc May 1, 2018):
Holding: Where the Police Dept. secretly recorded a conversation between Defendant and his attorney at the police station, this violated Defendant's attorney-client privilege and Sixth Amendment rights, but the remedy need not be dismissal; instead, the portions of a master's report which detail questions Defendant asked his attorney should be sealed from public view; the remainder of the master's report can be unsealed since it contains no confidential statements by Defendant.

State ex rel. Healea v. Tucker, 2017 WL 2451869 (Mo. App. E.D. June 6, 2017):
Holding: (1) Where Police Dept. secretly recorded an attorney-client visit between defense counsel and defendant, this violated the 6th Amendment right to counsel, attorney-client privilege, due process, and 600.048.3, which requires police to provide a private attorney-client visiting place; appellate court grants writ limiting public access to report which contains substance of the attorney-client conversation; (2) Where Attorney General's Office had copy of secretly taped attorney-client conversation for two years before disclosing it, never logged the evidence as is customary, and never explained the non-customary handling of the evidence, there is an appearance of impropriety for Attorney General's Office to continue to prosecute case, and Office is disqualified and Special Prosecutor appointed; Defendant need not show actual prejudice to disqualify the Attorney General's Office; appearance of impropriety is standard; but (3) Defendant's request to exclude all evidence obtained *after* the secret recording is not subject to writ of

prohibition; Defendant's remedy is to object to this evidence at trial and pursue issue on direct appeal.

State ex rel. Winker v. Goldman, 2016 WL 1317991 (Mo. App. E.D. April 5, 2016):
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Facts: Defendant-Wife was charged with murder regarding the death of a child. Subsequently, juvenile proceedings were instituted concerning custody of her and her Husband's other children. Wife and Husband hired Attorney to represent them in the criminal and juvenile cases. Attorney met numerous times with Wife and Husband. Subsequently, Husband filed for divorce and hired a new counsel for himself. Husband then sent an email to Prosecutor relating his thoughts about Wife, their marriage and information about the pending cases. Prosecutor also interviewed Husband about Wife's strategy, defenses and other privileged information. Wife sought to exclude documents acquired by the Prosecutor from Husband on grounds that this violated the attorney-client privilege and work-product privilege, and also sought to disqualify Prosecutor's Office. The trial court excluded the evidence obtained by Prosecutor, but did not disqualify the entire Prosecutor's Office.
Holding: (1) The 6th Amendment protects conversations between Wife and her defense Attorney. Prosecutor breached Wife's attorney-client privilege during their interview with Husband. The "common interest" doctrine allows parties with a community of interest to preserve the privilege's protection where the parties had joined forces for the purpose of obtaining legal representation. Prosecutor violated Wife's due process rights by violating the attorney-client privilege. Further, the work-product information learned by Prosecutor gives him a tactical advantage, which prejudices Wife. Given that the entire Prosecutor's Office had access to the privileged materials, and that the murder prosecution is on-going, the court cannot neutralize the taint of the attorney-client privilege and due process violations merely by excluding evidence from trial. The entire Prosecutor's Office must be disqualified and a special prosecutor appointed. (2) Although there is a presumption in favor of public access to court documents, here, the court seals the attorney-client privileged information to protect Defendant's 6th Amendment and due process rights.

State v. Marchbanks, 2018 WL 2407605 (Mo. App. W.D. May 29, 2018):
Holding: (1) Even though Defendant was represented by counsel in a drug case and tampering case, and counsel had filed an Assertion of Rights form saying that Defendant was asserting his right to silence, where Officers then questioned Defendant about a murder case while he was in jail, the trial court erred in suppressing those statements because *Miranda* rights cannot be anticipatorily invoked in anticipation of potential

future questioning; and (2) even though the Officers' questioning of Defendant may have violated Rule 4-4.2 (which prohibits lawyers from communicating with represented persons and the Prosecutor was ultimately responsible for the Officers' conduct), Defendant makes no argument that Rule 4-4.2 provides a basis to exclude the statements independent of *Miranda*, so court does not decide that issue.
Discussion: Even though Defendant's *Miranda* claims fails because *Miranda* rights cannot be anticipatorily invoked, "[t]his Court is nonetheless sympathetic to [Defendant's] situation." Officers should have known that Defendant was represented by counsel in both the drug and tampering cases. The Assertion of Rights form was filed with both the jail and on Case.net in the drug and tampering cases. When a party is known to be presented by counsel, that party should only be contacted through their counsel, per Rule 4-4.2. The Prosecutor is responsible for the actions of Officers, even if the Prosecutor didn't actually know that the Officers were going to question Defendant about the murder. There was a responsibility upon the Prosecutor not to sanction or take advantage of statements taken by Officers from a person represented by counsel in the absence of his counsel. However, the case law on this is not based on constitutional protections, and Defendant makes no argument that Rule 4-4.2 may provide a basis to exclude the statements, so we do not reach that issue.

Bartko v. DOJ, 103 Crim. L. Rep. 460 (D.C. Cir. 8/3/18):
Holding: DOJ is not entitled to blanket law enforcement exemption from disclosure under Freedom of Information Act of ethical violations by US Attorney.

Haskell v. Superintendent Greene SCI, 101 Crim. L. Rep. 512 (3d Cir. 8/17/17):
Holding: Prosecutor knowingly presented false testimony and failed to correct it, where Witness testified she didn't expect any benefit from her testimony but Prosecutor knew he has made a deal with her.

U.S. v. Dvorin, 98 Crim. L. Rep. 588 (5th Cir. 3/18/16):
Holding: Even though new Prosecutor team claimed that they were correcting an oversight when they filed additional charges against Defendant after he successfully appealed, this did not overcome a presumption of prosecutorial vindictiveness; to avoid a vindictiveness finding, the Gov't must show something specific happened after trial that justified filing additional charges after a successful appeal.

Long v. Butler, 2015 WL 6500128 (7th Cir. 2015):
Holding: Prosecutor's knowing use of perjured Witness testimony violated *Napue* and warranted habeas relief; state court determination to contrary was unreasonable application of clearly established federal law.

Ariz. State Bar Comm. on Rules of Prof. Conduct, Op. 15-01 (June 2015), 97 Crim. L. Rep. 414: Arizona adopts rule that forbids defense counsel from advising Defendants from entering into plea agreements that waive claims of ineffective counsel, and forbids prosecutors from proposing such deals.

Editor's Note: Missouri Formal Opinion 126 is similar.

In re Neary, 102 Crim. L. Rep. 154 (Ind. 11/6/17):
Holding: Prosecutor disciplined for secretly listening to private attorney-client conversations at police station; this violated (Indiana) professional rules 4.4(b)(using evidence gathering methods that violate third person's legal rights) and 8.4(d)(conduct prejudicial to justice).

State v. Coleman, 2016 WL 765557 (La. 2016):
Holding: Where State gave numerous assurances that its penalty phase evidence would be the same as at a prior trial, State failed to provide notice that its expert had changed his opinion as to who had shot victim.

In re Chavez, 100 Crim. L. Rep. 459 (N.M. 2/6/17):
Holding: Prosecutor violated New Mexico Rule 4.4(a), which prohibits lawyers from using methods to obtain evidence that violate rights of third parties, where Prosecutor issued subpoenas to gather evidence in investigations that were not cases before a grand jury or cases filed in court; Prosecutor used subpoenas to gather cell phone records and medical records for matters that weren't yet pending in court.

Disciplinary Counsel v. Brockler, 98 Crim. L. Rep. 543 (Ohio 2/25/16):
Holding: Prosecutor acted unethically when he used a fake Facebook identity to chat with an alibi witness; Prosecutor's conduct was dishonest, deceitful and a misrepresentation, and violated duty of honesty.

People v. Dekraai, 100 Crim. L. Rep. 186 (Cal. App. 11/22/16):
Holding: Trial judge did not abuse discretion in disqualifying entire Orange County Prosecutor's Office from prosecution of Defendant based on conflict of interest stemming from widespread jail-house snitch scandal involving the prosecutor's office.

State v. Ostler, 2015 WL 8087619 (Idaho App. 2015):
Holding: Presumption of prosecutorial vindictiveness arises when, after Defendant successfully appeals and wins a retrial, Prosecutor charges Defendant with additional charges.

People v. Tyler, 2015 WL 5316879 (Ill. App. 2015):
Holding: Pattern of police misconduct that resulted in coerced confessions was similar to Petitioner's case and warranted evidentiary hearing for Petitioner on his similar police misconduct claim.

N.Y. State Bar Ass'n Comm. on Prof. Ethics Op. 1098 (6/10/16):
Holding: New York ethics committee holds that it is unethical for prosecutors to structure plea bargains that require defendants to give up right to pursue ineffective assistance of counsel claims.

Public Defender

In re: Area 5 Pub. Def. Off. v. Kellogg, 2020 WL 5901195 (Mo. App. W.D. Oct. 6, 2020):
Holding: Sec. 600.063.1 allows a Presiding Judge to discuss and grant relief to all individual attorneys in a Public Defender Office at a caseload conference; Sec. 600.063.1's "not the entire office" language means an "office" itself cannot be used the unit of measurement for excessive caseload, but the caseloads of each individual attorney in an office can be used and considered.

In re: Area 16 Pub. Def. Office III v. Jackson Cnty. Prosecuting Attorney's Office, No. WD82962 (Mo. App. W.D. June 9, 2020):
Holding: (1) The standard of review for Sec. 600.063 caseload conference appeals is abuse of discretion; the Presiding Judge's findings are presumed correct, reviewed for abuse of discretion, and the burden of showing abuse is on the appellant; (2) Sec. 600.063 did not create the power for a Presiding Judge to grant caseload remedies; that power comes from the court's "inherent authority" over its dockets as discussed in *Waters*; Sec. 600.063 regulates the exercise of "inherent authority" which is permissible so long as the statute is not "hostile" to the "inherent power"; (3) District Defender cannot challenge constitutionality of Sec. 600.063 or Sec. 600.062 in a conference proceeding; this should be done via a declaratory judgment action; (4) per Sec. 600.063.6, the Public Defender Commission or Supreme Court can promulgate rules addressing Sec. 600.063's implementation; and (5) on facts presented, trial court did not abuse its discretion in finding that caseloads did not prevent attorneys from providing effective assistance; while some of the procedures the attorneys wanted to use to improve the quality of representation were "worthy goals," Sec. 600.063 speaks only to "effective counsel" which "need not be perfect."

Public Trial

State ex rel. Winker v. Goldman, 2016 WL 1317991 (Mo. App. E.D. April 5, 2016):
(1) Where Defendant-Wife and Husband were originally represented by the same Attorney, but after Husband sought to divorce Wife, Husband divulged attorney-client and work-product information to Prosecutor and Prosecutor actively interviewed Husband to obtain this information, Prosecutor violated Wife's 6th Amendment and due process rights; remedy is to exclude documents Prosecutor wrongly obtained and to disqualify entire Prosecutor's Office, and appoint special prosecutor; (2) although there is a presumption in favor of public access to court documents, the attorney-client privileged and work-product privileged documents must be sealed to protect Wife's 6th Amendment right to counsel.
Facts: Defendant-Wife was charged with murder regarding the death of a child. Subsequently, juvenile proceedings were instituted concerning custody of her and her Husband's other children. Wife and Husband hired Attorney to represent them in the criminal and juvenile cases. Attorney met numerous times with Wife and Husband. Subsequently, Husband filed for divorce and hired a new counsel for himself. Husband

then sent an email to Prosecutor relating his thoughts about Wife, their marriage and information about the pending cases. Prosecutor also interviewed Husband about Wife's strategy, defenses and other privileged information. Wife sought to exclude documents acquired by the Prosecutor from Husband on grounds that this violated the attorney-client privilege and work-product privilege, and also sought to disqualify Prosecutor's Office. The trial court excluded the evidence obtained by Prosecutor, but did not disqualify the entire Prosecutor's Office.
Holding: (1) The 6th Amendment protects conversations between Wife and her defense Attorney. Prosecutor breached Wife's attorney-client privilege during their interview with Husband. The "common interest" doctrine allows parties with a community of interest to preserve the privilege's protection where the parties had joined forces for the purpose of obtaining legal representation. Prosecutor violated Wife's due process rights by violating the attorney-client privilege. Further, the work-product information learned by Prosecutor gives him a tactical advantage, which prejudices Wife. Given that the entire Prosecutor's Office had access to the privileged materials, and that the murder prosecution is on-going, the court cannot neutralize the taint of the attorney-client privilege and due process violations merely by excluding evidence from trial. The entire Prosecutor's Office must be disqualified and a special prosecutor appointed. (2) Although there is a presumption in favor of public access to court documents, here, the court seals the attorney-client privileged information to protect Defendant's 6th Amendment and due process rights.

*** Weaver v. Mass., ___ U.S. ___, 137 S.Ct. 1899 (U.S. June 22, 2017):**
Holding: In the context of an ineffective assistance of counsel claim for failing to object to closure of a courtroom during voir dire, a defendant must demonstrate prejudice to receive a new trial, even though the courtroom closure was "structural error." Prejudice in this context means either a reasonable probability of a different outcome, or that the particular violation was so serious as to render the trial fundamentally unfair. Here, the courtroom was closed due to lack of enough seating for the public, but there was no showing of specific harm from the closure, such as misconduct by the judge or prosecutor during the closure. (Court notes that if courtroom closure is objected to and raised on direct appeal, automatic reversal is still generally required regardless of any actual effect on the trial's outcome.)

Mitchell v. State, 2019 WL 1070835 (Ark. 2019):
Holding: Closure of courtroom for witness' testimony on mere allegation of witness intimidation violated Defendant's right to public trial; there was no record that witness was actually intimidated or by whom.

U.S. v. Negron-Sostre, 2015 WL 3898794 (1st Cir. 2015):
Holding: Closure of courtroom during voir dire was plain, structural error.

U.S. v. Simmons, 2015 WL 4774969 (6th Cir. 2015):
Holding: Defendant's 6th Amendment right to public trial was violated when court excluded three co-defendants from courtroom during a witness' testimony without making any factual findings to support the exclusion; the Gov't argued the presence of

the three co-defendants might make the witness uncomfortable or feel intimidated, but the court did not make required findings.

Com. v. Jones, 97 Crim. L. Rep. 736 (Mass. 9/21/15):
Holding: "Rape shield" hearing to determine if Victim's past sexual history is admissible cannot automatically be closed to the public; court must balance the factors of *Waller v. Georgia*, 467 U.S. 39 (1984) for whether proceedings can be closed.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

Hamilton v. State, 2020 WL 2029272 (Mo. banc April 28, 2020):
Where (1) before Bazell Movant pleaded guilty to felony stealing, Sec. 570.030, and received a suspended imposition of sentence, but (2) after Bazell Movant's probation was revoked and she received a 5-year sentence, Movant was entitled to Rule 24.035 relief because Bazell applied "forward" to her and Rule 24.035 allows claims that a sentence exceeds the maximum authorized by law.
Facts: In 2012, Movant pleaded guilty to felony stealing and eventually received an SIS. In 2016, *Bazell* was decided, effectively making the offense a misdemeanor. In 2017, Movant's probation was revoked and she was sentenced to 5-years. She filed a 24.035 motion challenging her sentence. The motion court denied relief on grounds that Movant should have raised this claim in a direct appeal.
Holding: The Supreme Court previously held in *Windeknecht* that *Bazell* applies to cases "pending on direct appeal" and to cases going "forward." Because Movant received an SIS, there was no conviction or final judgment until sentence was entered – which was after *Bazell*. Since *Bazell* had already been decided at the time Movant was sentenced, Movant's case is a "forward" application of *Bazell*. To the extent that the language in prior opinions is unclear, the Court "reiterates that, in stating *Bazell* applies forward, it meant that *Bazell* applies to all cases that were not yet final when *Bazell* was announced, even if already filed, tried, or subject to a plea, so long as sentence had not been entered when *Bazell* was decided, as well as to cases on direct appeal." Reversed and remanded for misdemeanor sentencing.

Lemasters v. State, 2020 WL 2029271 (Mo. banc April 28, 2020):
Where (1) Defendant/Movant's sentence and judgment stated he had been convicted of two counts, when he actually had only been convicted of Count I; (2) Defendant/Movant took a direct appeal of the two counts; (3) the appellate court "affirmed" conviction on Count I but remanded with directions to "vacate" Count II (the erroneous count); (4) the trial court made a docket entry stating only "affirmed;" and (4) Movant filed his pro se 29.15 motion 97 days after the mandate on direct appeal, the 29.15 motion is premature – not untimely -- because there was no "final judgment" in the criminal case since the trial court did not strictly follow the appellate mandate to vacate Count II; (2) this is true even though the trial court discovered its error in the sentence and judgment, and sua sponte corrected it before the appellate court ruled in the direct appeal.
Facts: Defendant was convicted at jury trial of Count I. The State dismissed Count II. The written sentence and judgment erroneously stated Defendant had been convicted of

both Count I and II. While the direct appeal was pending, the trial court, *sua sponte*, discovered the error in the written sentence and corrected it, but no one told the appellate court. On direct appeal, the appellate court "affirmed" Count I, and remanded with directions to vacate Count II. The trial court then made a docket entry saying only "Affirmed." Defendant/Movant then filed a *pro se* 29.15 motion 97 days after the mandate – beyond the permissible 90 days. Movant argued an exception to timeliness, which the motion court found and ultimately denied relief on the merits. Movant appealed.

Holding: The immediate issue on appeal is whether the *pro se* motion is timely filed. Movant now asserts a new theory, for the first time on appeal, as to why his motion is premature, not untimely. The State argues this is waived because not raised below. But that doesn't end the inquiry here, because there's no final judgment. When an appellate court gives specific direction to a trial court on remand, the trial court cannot deviate from the appellate court's direction. Here, contrary to the appellate court's remand direction, the trial court did *not* vacate Count II on remand. This may have been because the trial court had already fixed the error, but strict compliance with the appellate court's direction was still required. Given the trial court's failure to strictly comply with the appellate direction, no "new judgment" has yet been entered here. Further, a judgment of conviction that resolves fewer than all counts is not "final." Thus, Movant's motion is prematurely filed. The motion will be deemed filed after final judgment is entered, and when the time for filing commences under Rule 29.15(b).

State ex rel. Jonas v. Minor, 2020 WL 3529366 (Mo. banc June 30, 2020):

(1) Petitioners (Defendants) can challenge the erroneous calculation of their probation discharge date with accrual of Earned Compliance Credits (ECC's) in habeas corpus; (2) even though courts generally defer to the Division of P&P to calculate the discharge date, this is not a "rubberstamp"; where the Division improperly calculated the date, and Petitioner was revoked after he should have been discharged, habeas relief is granted; and (3) even though the Division did not give the court 60 days' notice of the date of final discharge as required by Sec. 217.703.10, failure to give notice cannot extend the date of discharge.

Facts: In 2012, Petitioner pled guilty to a felony; received an SES; and was ordered to pay restitution (among other conditions). Various field violation reports and motions to suspend were filed 2013, though probation was ultimately continued. One of those reports said Petitioner's discharge date (with ECC's) was April 15, 2015. In June 2015, a report was filed showing Petitioner still owed restitution. The State filed to suspend and revoke for failure to pay, but withdrew that motion in November 2015, when Petitioner completed paying restitution. In January 2016, a field violation report was filed. That report said Petitioner had paid his restitution, and had a discharge date with ECC's of March 15, 2016. In February 2016, the State filed to suspend and revoke for other violations of probation. In May 2017, the court revoked and ordered his 7-year sentence executed. He filed a writ of habeas corpus.

Holding: (1) Petitioner can challenge the calculation of his discharge date in habeas corpus. Even though Sec. 217.703.8 says that the award of ECC's cannot be raised in "any motion for postconviction relief," a habeas action is *not* a motion for "postconviction relief." (2) Petitioner accrued sufficient ECC's to be discharged once he

paid his restitution. This Court generally defers to the division of probation and parole to calculate ECC's. But this Court does not "rubberstamp" the division's calculation when it is improperly calculated. Here, the division failed to include any ECC's in its June 2015 report even though Petitioner was in "compliance" at that time. Although Petitioner could not be discharged until he paid his restitution, he finished paying in November 2015. At that point, Petitioner had accrued enough ECC's to be discharged, and should have been discharged. (3) Even though the division failed to give the court 60 days' notice of the date of final discharge as required by Sec. 217.703.10, the failure to give notice is not controlling, because the division's failure to act will not extend the date of discharge. Once restitution was completed and Petitioner accrued all his ECC's, the court was divested of authority to revoke. Defendant discharged.

State ex rel. Kelly v. Inman, 2020 WL 203148 (Mo. banc Jan. 14, 2020):
(1) Where trial court, in the same order, found Defendant incompetent to proceed and accepted an NGRI plea, the court exceeded its authority under Sec. 552.020, because a court cannot accept a plea while a Defendant is incompetent; and (2) habeas corpus is the proper procedure to remedy this violation because Defendant could not do a direct appeal (since an NGRI plea is an "acquittal") and cannot pursue a Rule 24.035 action (since he was not "convicted").
Facts: In 1991, trial court entered an order finding Defendant incompetent to proceed under Sec. 552.020 because he could not understand the proceedings or assist counsel, and simultaneously accepting an NGRI plea because he did not understand the wrongfulness of his crime or was incapable of conforming his conduct to the requirements of law. Decades later, Defendant filed a habeas corpus action in the county where he was being held, seeking to set aside his NGRI plea.
Holding: (1) Sec. 552.020.8 provides that if a court determines that a defendant is incompetent, it must suspend the proceedings until a defendant is restored to competency. The trial court did not suspend the proceedings. Instead, the trial court accepted an NGRI plea; acquitted Defendant; and committed him to the Department of Mental Health. By accepting the NGRI plea despite finding him incompetent to proceed, the court violated Defendant's due process rights. The remedy is to put him back in the position he would have been if he had not pleaded NGRI, so the court vacates the NGRI plea and orders an updated competency evaluation. (2) The State argues Defendant's claim is procedurally barred because he didn't file a direct appeal. But Defendant could not have done a direct appeal because he was acquitted as a result of the NGRI plea, and he could not do a Rule 24.035 action because he was not "convicted." Habeas is the proper remedy.

Hicklin v. Schmitt, 2020 WL 6881220 (Mo. banc Nov. 24, 2020):
Holding: (1) Even though Petitioner was convicted of first-degree murder and sentenced to life-without-parole when she was a Juvenile, Missouri has complied with *Miller* and *Montgomery* by granting parole-eligibility after 25 years, and allowing Parole Board to determine whether such Juveniles should be released, Sec. 558.047.1(1); *Montgomery* allowed States discretion whether to grant new sentencing hearings to such Juveniles or grant parole-eligibility, and Missouri chose the latter; and (2) challenges to the constitutionality of statutes are brought as a declaratory judgment action, but attacks

on validity of sentence should be brought in habeas corpus; to the extent Petitioner seeks a judgment about the constitutionality of the first degree murder statute, Sec. 558.047, and their application to her, declaratory judgment is proper; declaratory judgment is also proper to determine when Petitioner is eligible for parole under applicable statutes, and to challenge what process a parole hearing must use to comply with relevant statutes.

In the Interest of D.C.M. v. Pemiscot County Juvenile Office, 578 S.W.3d 776 (Mo. banc Aug. 13, 2019):
Holding: (1) Even though Juvenile turned 18 and was released from supervision while appeal of his adjudication (juvenile conviction) was pending, the case is not moot since his juvenile adjudication could be used against him in any later adult proceeding, and there is a stigma that flows from the judgment against him; (2) Juveniles have right to effective assistance of counsel but no statute or case provides a mechanism to raise such a claim, so Court holds that (a) if the claim can be adjudicated from the direct appeal record, court will resolve the claim on direct appeal, but (b) if the claim requires an evidentiary hearing (which will be likely for claims of failure to investigate or prepare, or pursue particular defenses or witnesses), case will be remanded to juvenile court for evidentiary hearing; and (3) if counsel is found ineffective, Juvenile will receive a new adjudication hearing.

Latham v. State, 2018 WL 4326406 (Mo. banc Sept. 11, 2018):
(1) A statement in lieu of amended motion must be filed within the time limit for filing an amended motion to avoid a presumption of abandonment; (2) if postconviction counsel failed to act on Movant's behalf by failing to file any amended motion or statement in lieu, a motion court should appoint new counsel and allow new counsel time to file an amended or statement; (3) if postconviction counsel acted on Movant's behalf but did so untimely, the court should treat the late statement as timely filed; but (4) where Movant timely filed a "reply" to the late statement, the motion court must determine whether Movant's initial pro se motion could have been made legally sufficient by amendment and whether there were other grounds for relief that could have been pleaded, and if so, the court must direct postconviction counsel to file an amended motion.
Facts: Movant timely filed a *pro se* 24.035 motion. Counsel then filed a late statement in lieu of amended motion. Three days later, Movant filed a "reply," although he did not name it as such. After the motion court denied relief on the merits, Movant appealed.
Holding: The filing of the statement in lieu of amended motion late creates a presumption of abandonment. Cases to the contrary should no longer be followed. A statement in lieu of amended motion must be filed within the time for filing an amended motion in order to ensure that counsel has fulfilled their responsibilities under the Rule, and to allow Movant to file a timely reply to a statement in lieu. Rule 24.035(e) gives movants 10 days after a statement in lieu to file a reply. Here, Movant filed a reply within three days of the statement in lieu. Although Movant did not denominate his motion a "reply" – he called it a pro se amended motion -- the Court will treat it as a "reply." The reply listed various new claims of ineffective assistance of plea counsel. Here, the case must be remanded for an abandonment inquiry because of the late statement in lieu. The question then becomes remedy. Several possibilities may arise in these situations. If postconviction counsel fails to act on a movant's behalf by failing to

file any amended motion or statement in lieu, a motion court should appoint new counsel and allow new counsel time to file an amended or statement. If postconviction counsel acted on a movant's behalf but did so untimely, the court should treat the late statement (or amended) as timely filed. But where a movant timely files a "reply" to the statement in lieu, the motion court must determine whether the movant's initial *pro se* motion could have been made legally sufficient by amendment and whether there were other grounds for relief that could have been pleaded, and if so, the court must direct postconviction counsel to file an amended motion.

State ex rel. Hawley v. Midkiff, 534 S.W.3d 604 (Mo. banc April 3, 2018):
Holding: Even though Petitioner was held in Jackson County Jail waiting to testify in a case when he filed his habeas corpus petition under Rule 91 in Jackson County, where he was also serving a DOC sentence and was returned to DeKalb County, venue must be transferred to DeKalb County, because Petitioner was always in the legal "custody" of DOC even when he was in Jackson County Jail; Rule 91.02(a) provides that the petition shall be filed in "the county in which the person is held in custody;" and the named Respondent must be the Warden, Rule 91.04(a)(1), who can effectuate a change in Petitioner's custody as directed by the habeas court.
Discussion: The term "custody" is not limited to actual physical incarceration. Missouri statutes provide that a person in the custody of DOC remains in its custody, even when the person is temporarily outside the physical custody of the department. Similarly, persons on house arrest or parole are in the legal "custody" of DOC. Thus, when Petitioner filed his petition while detained in Jackson County, he was nonetheless in the custody of DOC.

Ryan v. State, 2018 WL 2311275 (Mo. banc May 22, 2018):
Holding: (1) "Group guilty pleas" are discouraged and may be a relevant factor in determining if a plea is voluntary, but the mere fact that a plea was taken in a "group" does not, *per se*, render the plea involuntary; (2) to the extent that a Movant wants a court to consider the relevance of a "group plea" as to voluntariness or so as to require an evidentiary hearing, a "group plea" issue must be pleaded in an amended motion.

Watson v. State, 2018 WL 415049 (Mo. banc Jan. 16, 2018):
Holding: Where counsel in 29.15 case requested a 45-day extension of time "from the date of filing" of the extension request, which the motion court granted, this was not an implicit granting of an "additional" 30 days authorized under 29.15, but operated only as granting 45 days from the "date of filing" of the extension motion (which was less than the "additional" 30 days that could have been requested). Amended motion filed later than 45 days was untimely and case remanded for abandonment hearing.

State ex rel. Fite v. Johnson, 530 S.W.3d 508 (Mo. banc Oct. 31, 2017):
Even though a court has jurisdiction to hear a post-sentencing Rule 29.07(d) motion to withdraw a guilty plea, such motion cannot be used to provide an independent basis for reviewing a claim that should have been raised in a timely Rule 24.035 motion; thus, after time for filing 24.035 motion had expired, trial court erred in allowing Defendant to withdraw his guilty plea under Rule 29.07(d) to felony stealing due to Bazell.

Facts: In 2013, Defendant pleaded guilty to felony stealing under Sec. 570.030.3. He did not file a Rule 24.035 motion. After *Bazell*, he filed a Rule 29.07(d) motion to withdraw his guilty plea. The trial court granted relief. The State sought a writ of prohibition.
Holding: A criminal judgment becomes final when sentence is entered. However, Rule 29.07(d) provides for a post-sentence civil matter; thus, the trial court had jurisdiction to hear the 29.07(d) motion. However, the motion should have been denied because Rule 24.035 provides the "exclusive procedure" to seek relief for the claims enumerated in that Rule, one of which is that a sentence is in excess of the maximum authorized by law. Rule 29.07(d) does not provide an independent basis for reviewing procedurally defaulted Rule 24.035 claims for postconviction relief. Writ granted.

Bearden v. State, 530 S.W.3d 504 (Mo. banc Oct. 31, 2017):
Holding: Time for filing an amended 24.035 motion begins when a "complete transcript consisting of the guilty plea and sentencing," Rule 24.035(g), is filed, not when a later probation revocation transcript is filed; amended motion was untimely and case must be remanded for abandonment hearing.
Discussion: Movant (who had received an SES and probation, which was later revoked) contends that the probation revocation transcript is part of his sentencing, so the time for the amended motion did not begin until it was filed later. Because the judgment in Movant's criminal case was final when the sentence was entered, the subsequent civil action to revoke probation is not part of the previous sentencing hearing. Rule 24.035(g) expressly defines "complete transcript" as the "guilty plea and sentencing hearing."

State ex rel. Zahnd v. Van Amburg, 533 S.W.3d 227 (Mo. banc Nov. 21, 2017):
Even though Petitioner had an SES in a stealing case potentially affected by Bazell, the SES sentence was final when imposed and trial court lacked authority to amend it later; Rule 29.12(b) allows a trial court to correct plain errors only before imposing sentence.
Facts: In 2015, Petitioner was convicted of felony stealing under Sec. 570.030.3. He received an SES. After *Bazell*, he filed a motion under Rule 29.12(b) to reduce his conviction to a misdemeanor. The trial court sustained the motion. The State sought a writ of prohibition.
Holding: A judgment in a criminal case becomes final when sentence is imposed. A trial court loses jurisdiction after that. Rule 29.12(b) allows plain errors affecting substantial rights to be considered in the discretion of the trial court. But the Rule presupposes that the criminal case is still pending in the trial court. The Rule provides a mechanism to correct plain errors only *before* imposing sentence. An SES is a final judgment. The trial court lacked authority to change the conviction and sentence after the SES was entered. Cases such as *State v. Morris*, 719 S.W.2d 761 (Mo. banc 1986), which hold that a sentence contrary to law is not a final judgment, are overruled. Writ granted.

Propst v. State, 2017 WL 6460101 (Mo. banc Dec. 19, 2017):
Holding: Where (1) 24.035 Movant was personally unaware that he had any valid claims for postconviction relief until a Public Defender approached him; (2) Public Defender had prepared a postconviction motion for Movant to sign, which was signed on

the last day for timely filing; but (3) Public Defender then miscalculated the filing deadline and filed the motion one day late, the "third-party interference" exception to timeliness did not apply to excuse the late filing because Movant personally had not done all he could do to prepare and file his motion on time.
Discussion: *Price v. State*, 422 S.W.3d 292 (Mo. banc 2014), held that where a Movant relies on a private counsel to prepare and file their 24.035 motion, the third-party interference exception does not apply. Movant claims his case is like *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008), where a Movant gave this pro se motion to a Public Defender who then filed it late, and the Court excused the untimeliness. "The relevant issue is not whether a private counsel or public defender is representing a movant but rather whether the movant's efforts to effectuate a timely filing were frustrated by an intervening party." Here, the actions of the Public Defender were not the cause of Movant's motion being late. Movant, not being aware of any valid claims, did not prepare his own motion or do all he reasonably could do to file a motion on time. Thus, *Price* controls.

Hall v. State, 2017 WL 4001706 (Mo. banc Sept. 12, 2017):
Even though Movant's pro se and amended 24.035 motions stated a DOC delivery date that made her motions look timely filed (if counted from the delivery date but not the earlier sentencing date), where Movant presented no evidence to prove the delivery date but the State did not object to timeliness, case will be remanded for hearing on timeliness of pro se motion.
Facts: Movant was sentenced on Nov. 6, 2012. She filed a pro se and amended 24.035 motion that stated she was delivered to DOC on March 5, 2013. But at her evidentiary hearing, Movant presented no evidence to prove this delivery date, and the State did not object to timeliness. Her motion is timely if her delivery date was March 5, 2013, but untimely, if it was November 6, 2012.
Holding: Movant has the burden of pleading *and* proving facts showing her motion was timely filed. Here, Movant met the first requirement, but not the second. It does not follow, however, that appellate court must dismiss her motion. Movant alleged facts which – if true – would show that her motion was timely filed. Also, the State, in the motion court, did not object to timeliness. Under these facts, Movant's case should be remanded for a hearing on timeliness.

Gittemeier v. State, 527 S.W.3d 64 (Mo. banc Sept. 12, 2017):
(1) The "abandonment doctrine" does not apply to privately retained counsel; thus, where privately retained counsel filed Movant's amended motion more than 90 days after the Public Defender had originally been appointed, only the pro se motion could be considered; and (2) motion court could not vacate appointment of the Public Defender and restart the clock for private counsel to file an amended motion.
Facts: Movant filed a pro se 29.15 motion. The court appointed the Public Defender. Eight days before an amended motion was due, the Public Defender filed a motion to withdraw and rescind appointment because Movant had hired private counsel. The motion court granted this, and private counsel entered the next day. The motion court granted private counsel 60 days to file an amended motion, which private counsel did.

Holding: Rule 29.15's time limits cannot be extended by the motion court beyond what the Rule allows. The withdrawal of the Public Defender and appointment of a new attorney does not affect the time limit for filing an amended motion. The time limit began when the Public Defender was first appointed. The origins of the abandonment doctrine show that it was intended to provide a remedy only for lack of action by *appointed* counsel. The doctrine represents a balancing between Missouri's refusal to recognize claims of ineffective assistance of postconviction counsel and the problem of *appointed* counsel failing to act under Rule 29.15(e). The abandonment doctrine does not apply to privately retained counsel.

State ex rel. Fleming v. Mo. Bd. Probation and Parole, 515 S.W.3d 224 (Mo. banc April 4, 2017):

(1) Where Defendant claimed he could not pay all his court costs due to unemployment and mental health issues, but court revoked his probation for failure to pay without determining whether he had the ability to pay and had willfully failed to pay, the revocation violated due process; and (2) habeas relief is available to a person on parole because that is a restraint on liberty.

Facts: (1) Defendant was placed on probation and ordered to pay about $4,000 in court costs (about $3,700 of which were jail board bills). Defendant repeatedly had trouble paying due to unemployment and mental health problems. However, Defendant made periodic small payments. Eventually, revocation was sought due to failure to pay. At the time of the revocation hearing, Defendant had paid about $1,000 but still owed $3,000. Defendant claimed he could not be revoked because he couldn't afford to pay the remaining costs. The court revoked his probation on grounds that he had not paid. He sought a writ of habeas corpus.

Holding: *Bearden v. Georgia*, 461 U.S. 660 (1983), generally prohibits a court from revoking probation solely because of inability to pay. *Bearden* requires that a court inquire as to whether a defendant has the ability to pay, and if so, whether defendant willfully refused to pay. *Bearden* also requires a court to consider alternatives to incarceration where defendant cannot pay. Although the court here said people should not "be sent to prison because they can't pay their court costs," the court did not comply with the requirements of *Bearden*. The court revoked solely because costs weren't paid. The court made no findings about inability to pay or willfulness. Thus, the revocation was invalid. However, while the habeas case was pending, Defendant was released on parole. Thus, the court imposes as a remedy that the State elect either to have a new revocation hearing within 60 days or discharge Defendant. (2) On a procedural matter, the majority finds that habeas proceedings may be brought by someone on parole because that is a restraint of liberty. Actual confinement is not required.

Dissenting opinion: Judge Fischer would hold that habeas corpus is limited to persons who are physically confined by the State. Since Defendant had been released on parole, he would hold that habeas relief is not available and the case is moot.

Creighton v. State, 520 S.W.3d 416 (Mo. banc April 25, 2017):

Holding: (1) Where 29.15 court "notified" the Public Defender that a pro se postconviction had been filed, this was not an "appointment" triggering Rule 29.15(g)'s time limit for filing an amended motion; the time limit was triggered by counsel's later

entry of appearance; and (2) where motion court denied relief on pro se claims on grounds they were "illegible," judgment is reversed because record shows they are legible.

Hopkins v. State, 519 S.W.3d 433 (Mo. banc April 25, 2017):
Holding: Where 29.15 court "notified" Public Defender that a pro se 29.15 motion had been filed and counsel later entered an appearance, the "notification" was not an "appointment," so counsel's amended motion was due 90 days from the later entry date.

Watson v. State, 2017 WL 1629372 (Mo. banc May 2, 2017):
(1) Where a judge at sentencing affirmatively misinforms Defendant-Movant about the deadline for filing a pro se postconviction motion under 29.15 (or 24.035), this can excuse the untimely filing; and (2) Movant was entitled to evidentiary hearing on claim that trial counsel was ineffective in not seeking lesser-included offense instruction for nested lesser, where counsel conceded guilt on the lesser.
Facts: Defendant-Movant was convicted at trial of first degree robbery. A contested fact at trial was whether Defendant-Movant displayed a gun during the robbery. At sentencing, trial judge told Defendant-Movant he must file a pro se 29.15 motion within 180 days after his delivery to the DOC. In fact, the time for filing would be 90 days after a mandate on direct appeal. In any event, Defendant was ultimately sent to the Dept. of Mental Health, not DOC. Defendant-Movant's conviction was affirmed on direct appeal and a mandate issued. Defendant filed his pro se 29.15 motion more than 90 days later. He claimed his motion should be considered timely because he relied on the trial judge's advice as to when his motion was due, and he hadn't been delivered to DOC.
Holding: (1) A trial court is not required to tell defendants the deadline for filing an amended motion. There is a difference between failing to inform and *mis*informing Where a court misinforms defendants about critical information upon which the defendants had a right to rely, they are entitled to a remedy. This case presents a new, limited exception to the timeliness requirements. The untimeliness is excused because the trial judge misinformed Defendant-Movant about the deadline. To the extent *Talley v. State*, 399, S.W.3d 872 (Mo. App. E.D. 2013) holds otherwise, it should no longer be followed. (2) The differential element between first and second degree robbery here was whether Defendant displayed or threatened use of a gun. Second degree robbery is a nested lesser offense of first degree robbery because it is impossible to commit the greater without necessarily committing the lesser. The trial court would have been required to give the lesser if counsel had requested it, since determining the facts was for the jury. The State argues counsel was using an "all-or-nothing" defense as a matter of strategy. Counsel can choose that as a matter of strategy, but other cases have granted an evidentiary hearing to determine if that's what counsel, in fact, did. Here, counsel did not argue Defendant was entirely innocent. Counsel conceded Defendant was guilty of second degree robbery. The record does not refute Defendant-Movant's claim of ineffectiveness for failing to request the lesser. Remanded for evidentiary hearing.

State ex rel. Hawley v. Heagney, 2017 WL 2119351 (Mo. banc May 16, 2017):
Holding: Nothing in Sec. 552.030.2 requires a defendant personally to sign a notice of intent to rely on defense of NGRI; habeas court erred in vacating NGRI plea on grounds that petitioner had not personally signed the notice of intent to rely on defense of NGRI filed by defense counsel.
Concurring opinion: Concurring opinion says relief should not have been granted by St. Louis City judge in any event because after habeas case was filed in St. Louis, Petitioner was moved to DMH in Callaway County; as a result, Petitioner's habeas petition named the wrong Respondent (the St. Louis DMH hospital head rather than the Fulton DMH hospital head) and also venue should have been in Callaway County under Rule 91.02(a) because that is where Petitioner was held. St. Louis City judge had no authority to grant relief.

McKay v. State, 2017 WL 2774621 (Mo. banc June 27, 2017):
Holding: Where (1) appellate court "affirmed in part and remanded in part" for a hearing on whether Defendant was denied a speedy trial: (2) Movant filed 29.15 motion regarding "affirmed" convictions; (3) Movant ultimately was denied relief on "affirmed" convictions by motion court and on subsequent appeal; and (4) after Movant was later denied relief on "remanded" speedy trial claim and subsequent appeal, he filed a second 29.15 motion (within 90 days of that appellate mandate) alleging ineffective assistance regarding the speedy trial remand, the second motion was not a prohibited "successive" motion because the first 29.15 motion was premature on these unusual facts. The appellate court should not have "affirmed in part and remanded part," but either reversed all the convictions or held the case pending remand (because the speedy trial issue would affect all the convictions), in which case there would have been only one mandate followed by one 29.15 motion. For future reference, where a premature 24.035 or 29.15 motion is filed, it should be held pending the time for filing of a postconviction motion. (Revised Rules 24.035 and 29.15 effective Jan. 1, 2018, provide for this.)
Discussion: Because Rule 29.15 allows only a single postconviction motion, it is vital that a Movant not be misled into filing his motion prematurely and thereby lose the ability to seek postconviction relief of a still-pending claim through partial affirmance of a judgment. An appellate court cannot "affirm in part" a conviction it is remanding for further hearing and possible vacation. A review of the opinion shows the appellate court did not, in fact, "affirm in part" but instead rejected all claims other than the speedy trial claim. But the speedy trial claim related to *all* convictions. The appellate court should have either reversed all the convictions, or held the case pending a remand (and appeal back to the appellate court). Then there would have been only one mandate, following which a single 29.15 motion could have been filed.

Mercer v. State, 2017 WL 986109 (Mo. banc March 14, 2017):
(1) Where Petitioner filed a motion under Sec. 547.035 claiming that DNA testing would prove actual innocence, trial court erred in dismissing the motion by docket entry without entering findings of fact and conclusions of law to allow meaningful appellate review; (2) the 12-month window for seeking late notice of appeal under Rule 30.03 applies to Sec. 547.035 motions, not the shorter 6-month window for civil cases under Rule 81.07(a); (3) even though the trial court's docket entry was not denominated a "judgment," it was

appealable because Rule 74.01(a)'s requirement for use of the word "judgment" does not apply to postconviction cases.
Facts: In October 2013, Petitioner filed a motion for postconviction DNA testing under Sec. 547.035. In April 2014, the trial court dismissed the motion by docket entry which said the motion was "overruled and denied." In August 2014, Petitioner wrote the trial court a letter saying that the court had failed to issue required findings. In March 2015, Petitioner filed a 30.03 motion seeking late notice of appeal, which the Southern District granted.
Holding: As an initial matter, the 12-month window for seeking a late notice of appeal (Rule 30.03) rather than the 6-month window for a civil case (Rule 81.07(a)) applies to postconviction cases, so there is jurisdiction for the appeal under Rule 30.03. Also, even though the docket entry was not denominated a "judgment," as required by Rule 74.01(a), that Rule is inapplicable to postconviction cases because it would delay processing of postconviction claims. Rule 78.07(c) requires a petitioner who claims error relating to the failure to make findings to bring this to the attention of the trial court, but here, Petitioner did that by sending his letter telling the trial court it had to make findings. Sec. 547.035 requires findings sufficient for meaningful appellate review. Reversed and remanded for findings.

Green v. State, 2016 WL 4236156 (Mo. banc Aug. 9, 2016):
Holding: (1) Where Movant's pro se 29.15 claims were attached to his amended motion, but the motion court expressly ruled only on the amended motion claims, the judgment is not final under Rule 74.01(b) for purposes of appeal because there was not an adjudication of all claims; (2) Rule 78.07(c) applies to postconviction motions, but even though Movant did not file a 78.07(c) motion to correct the "form or language" of the judgment regarding the omitted claims, 78.07(c) is inapplicable here because there is a difference between an error with the "form or language" of an adjudicated claim, and the failure to adjudicate the claim itself (as here); and (3) even though Rule 73.01(c) provides that "all fact issues upon which no specific findings were issued shall be considered as having been found in accordance with the result reached," this Rule is inapplicable here because there is a difference between "fact issues" and unadjudicated claims (as here). Appeal dismissed.

Bonds v. State, 2020 WL 5524529 (Mo. App. E.D. Sept. 15, 2020):
Holding: Even though Movant's pro se Rule 24.035 motion was untimely filed, the court was required to appoint counsel under Rule 24.035(e) to determine if an applicable exception to timeliness applied.

Randolph v. State, 2020 WL 5524203 (Mo. App. E.D. Sept. 15, 2020):
Holding: Even though Movant's *pro se* 24.035 motion was facially untimely, Rule 24.035(e) requires court to appoint counsel because Movant may be unaware of an applicable exception to timeliness in the absence of the expertise of postconviction counsel, who can plead an exception in an amended motion.

Jackson v. State, 2020 WL 1682885 (Mo. App. E.D. April 7, 2020):

Holding: Where (1) Movant's *pro se* 24.035 motion appeared to be facially untimely because his delivery date was unclear, and (2) postconviction counsel did not state in the amended motion facts showing the motion was timely (or that an exception to timeliness applied) and did not prove at a hearing that the motion was timely filed (or that an exception applied), postconviction appeal and case are dismissed with prejudice, because Movant had burden to plead and prove timeliness (or an exception). This is true even though issue wasn't raised until the appeal, because compliance with the time limits of Rule 24.035 cannot be waived. Remanded with directions to dismiss with prejudice.

State v. Johnson, 2020 WL 2028265 (Mo. App. E.D. April 28, 2020):
Holding: (1) A Rule 29.07(d) motion to withdraw a guilty plea cannot be used to attack the validity of a probation order or revocation of probation; the manner to challenge conditions of probation or revocation of probations is by an extraordinary writ; and (2) while a challenge to the voluntariness of a guilty plea *can* provide a basis to withdraw the plea under Rule 29.07(d) when the motion is filed *before* sentencing, *after* sentencing Rule 24.035 "kicks in" and provides the exclusive means to challenge the conviction and sentence on its enumerated grounds, including voluntariness.

Williams v. State, 2020 WL 2529532 (Mo. App. E.D. May 19, 2020):
(1) Even though Public Defender began representation in Rule 29.15 case and had not yet been granted leave to withdraw, where Private Counsel entered the case and failed to file an amended motion on time, there is no abandonment because the abandonment doctrine does not apply to private counsel; (2) even though Private Counsel later withdrew from case and case returned to Public Defender, Public Defender could not file an amended motion because there had been no abandonment; but (3) where Public Defender failed to appear at evidentiary hearing, court clearly erred in dismissing case for failure to prosecute, because Rule 29.15(j) requires court issue Findings.
Facts: Movant was originally represented by Public Defender, who requested an extension of time to file an amended motion. However, before any amended motion was filed, Movant retained Private Counsel. Private Counsel entered the case but never filed an amended motion. Then, after the time expired for filing an amended, Private Counsel withdrew from case. The court then reappointed the Public Defender and granted time to file an amended motion. Public Defender then filed an amended motion. When an evidentiary hearing was set, Public Defender failed to appear. Court dismissed case for failure to prosecute.
Holding: (1) The amended motion filed in this case wasn't timely, and there was no abandonment that can deem it timely. The Supreme Court has previously held that the abandonment doctrine does not apply to private counsel. Thus, even though Public Defender had not yet been granted leave to withdraw at the time Private Counsel failed to file an amended motion, Movant was being represented by Private Counsel at that time, and cannot claim abandonment. Movant chose to hire Private Counsel and – like all civil litigants – thereby assumed the risk of Private Counsel's actions. (2) Even though Private Counsel later withdrew and the case returned to Public Defender, the time for filing a timely amended motion had already passed. Movant cannot use abandonment to remedy this. But (3) where Public Defender failed to appear for the evidentiary hearing, court erred in dismissing the case. Rule 29.15(j) requires the court to issue Findings.

Mitchell v. State, 2020 WL 3422154 (Mo. App. E.D. June 23, 2020):
Holding: (1) Where 24.035 Movant did not plead his legal excuse (third-party interference) for the untimeliness of his *pro se* motion in his amended motion, the issue was waived; (2) the failure to plead the legal excuse was not "abandonment" by postconviction counsel; abandonment occurs only where counsel takes no action on Movant's case, is aware of the need to file an amended motion but fails to file one timely, or prevents Movant from timely filing an original *pro se* motion.

Brown v. State, 2020 WL 114686 (Mo. App. E.D. March 10, 2020):
Holding: (1) Where Defendant/Movant, who received suspended imposition of sentence (SIS) and was on probation, filed a Rule 24.035 motion, motion court did not err in dismissing it without prejudice, because an SIS is neither a conviction nor sentence, so Movant lacks standing to file; (2) since 24.035 applies only to "convictions" and "sentences," Movant's motion is not "premature" under the Rule and need not be held in abeyance; but (3) a later 24.035 motion filed after a sentence is imposed (if that ever occurs) will not be "successive." Court also notes that, independent of 24.035, persons who receive an SIS may challenge their guilty plea via an extraordinary writ.
Discussion: Movant argues that the motion court should not have dismissed her motion without prejudice, but held it in abeyance as "premature." An SIS is not a conviction or sentence. Because a person with an SIS may never have a conviction or sentence, such person does not have standing to file a 24.035 motion. The plain language of 24.035 applies only to a "conviction" or "sentence imposed." We agree that a "premature" motion must be held in "abeyance," but Movant's motion is not premature under the meaning of the Rule because Movant lacks standing to file the motion at this time. If Movant ever has her sentence executed, she will be able to file a new 24.035 motion in the future, and such a motion will not be "successive." A dismissal without prejudice does not trigger 24.035's ban on "successive" motions. *Pro se* litigants should not be penalized for attempting to assert their rights promptly, albeit too early as here. Court also notes that, independent of Rule 24.035, a person who receives an SIS may challenge their guilty plea via an extraordinary writ.

Rogers v. State, 2020 WL 6139863 (Mo. App. E.D. Oct. 20, 2020):
Holding: Where the motion court issued Findings on only three of Movant's four Rule 24.035 claims, there is no "final judgment" for purposes of appeal because not all claims were disposed of; case dismissed and remanded with directions to rule on all claims.

Williams v. State, 2020 WL 7214146 (Mo. App. E.D. Dec. 8, 2020):
Holding: Ineffective assistance of counsel at a probation revocation hearing is not cognizable under Rule 24.035; proper remedy is habeas corpus.

Harding v. State, 2020 WL 7702249 (Mo. App. E.D. Dec. 29, 2020):
Holding: Even though constitutional claims must generally be raised on direct appeal, where 29.15 Movant was unaware of alleged *Brady* violation during the direct appeal and only discovered it during the postconviction case, fundamental fairness require that it be

allowed to be considered in postconviction case (but claim fails on merits because non-disclosed information not material).

Gatling v. State, 2019 WL 5558489 (Mo. App. E.D. Oct. 29, 2019):
Holding: Where Movant was delivered to DOC for a CODS program, that delivery triggered the 180-day time limit for filing his 24.035 motion; his later filing after his probation was revoked was untimely.

Tresler v. State, 2019 WL 6704881 (Mo. App. E.D. Dec. 10, 2019):
Holding: (1) Where 29.15 Movant raised four claims, but motion court only ruled on three of them, there is no final judgment so appeal must be dismissed; and (2) Movant was not required to file a Rule 78.07(c) motion to preserve the non-decided claim, because such a motion is required only where a motion court explicitly denies a claim without required findings; here, the motion court simply ignored the claim altogether.
Discussion: The State argues Movant was required to file a Rule 78.07(c) motion to preserve the motion court's failure to rule on his claim. But such a motion is required only where a court explicitly denies a claim but without the required findings. When that happens, the Movant must ask the motion court to amend the judgment to include findings in order to preserve the claim for appeal. Here, however, the court's findings contain no acknowledgment or mention of the non-decided claim. This means there is no final judgment. Case dismissed for lack of final judgment.

State v. Johnson, 2019 WL 7157665 (Mo. App. E.D. Dec. 24, 2019):
Holding: Where (1) Defendant was convicted of murder in 1995 and exhausted all appeals, but (2) in 2019, Prosecutor's "Conviction Integrity Unit" filed a motion for new trial alleging that Defendant was actually innocent, various *Brady* violations and other claims to set aside the conviction, the motion was untimely and there is no statutory right to appeal such an untimely motion; thus Eastern District must dismiss appeal. But Eastern District transfers case to Missouri Supreme Court to decide questions of general interest and importance such as whether and to what extent a duly elected Prosecutor can correct prior wrongful convictions, and the procedures for doing so.

Hernandez v. State, 2019 WL 3121857 (Mo. App. E.D. July 16, 2019):
Holding: (1) Movant's claim that his probation was improperly revoked because he didn't receive proper notice of the violation is not cognizable in a 24.035 proceeding; the proper remedy is state habeas corpus; but (2) a claim that counsel was ineffective during a probation revocation might be cognizable, at least where counsel waived the revocation hearing.

Marks v. State, 2019 WL 4021826 (Mo. App. E.D. Aug. 27, 2019):
Holding: Where (1) Movant was convicted of one count and sentenced and delivered to DOC on that count, but (2) received an SES on a second count and did not file a Rule 24.035 motion on that count until he was revoked three years later, his motion was untimely because not filed within 180 days of his initial delivery to the DOC on the first count; where there are multiple convictions and sentences in the same judgment, Rule 24.035 requires the motion be filed within 180 days of the initial sentence and challenge

all convictions and sentences. But (3) Movant may file a state habeas corpus action under Rule 91 to bring a claim that could not have been known to him in an earlier 24.035 motion.

Giles v. State, 572 S.W.3d 137 (Mo. App. E.D. April 16, 2019):
Holding: Motion court clearly erred in failing to appoint counsel for indigent Movant, because Rule 29.15(e) makes appointment of counsel mandatory.

Bergner v. State, 2019 WL 923750 (Mo. App. E.D. Feb. 26, 2019):
Holding: Where motion court erroneously told Movant that his sentence to DOC under the CODS program, Sec. 559.036.4, would not start the time for filing a Rule 24.035 motion (even though it did), Movant's later untimely filing of his motion after he was delivered to DOC for a second time when his probation was revoked is excused, because an untimely motion will be excused where a court misinforms a movant about the correct deadline.

Wilson v. State, 2019 WL 923598 (Mo. App. E.D. Feb. 26, 2019):
Holding: Even though (1) the motion court should have granted an evidentiary hearing to 24.035 Movant on his claim that plea counsel was ineffective in advising him he would receive 3-years' credit for an Illinois sentence (when such credit was not legally available under Missouri law), and (2) the motion court should not have granted relief in the absence of a hearing, where the motion court nevertheless reduced Movant's sentence by three years to account for the Illinois sentence, Movant suffered no prejudice on his claim that his plea was involuntary.

Trams v. State, 2018 WL 3733433 (Mo. App. E.D. Aug. 7, 2018):
Holding: A claim that a trial court lacked authority to revoke probation because the probationary term had previously ended is cognizable in a Rule 24.035 action; this is an exception to the general rule that an attack on a probation ruling does not constitute an attack on a sentence, and thus, is not cognizable under Rule 24.035.

Durant v. State, 2018 WL 4320533 (Mo. App. E.D. Sept. 11, 2018):
Holding: Even though Rule 24.035 relief is normally not available for a probation revocation hearing, Movant can challenge the effectiveness of his counsel at the sentencing proceeding when the Movant waived a hearing on the probation revocation and admitted violations; such claims are premised on the sentencing hearing that immediately follows the probation revocation.

Miley v. State, 2018 WL 4568557 (Mo. App. E.D. Sept. 25, 2018):
Holding: The 180-day time limit for filing a *pro s*e Rule 24.035 motion began when Defendant was delivered to the DOC in 2015 for a 120-day CODS program under Sec. 559.036, not when his probation was later revoked in 2016 and he was re-delivered to DOC; thus, his motion filed in 2016 was untimely.

Editor's Note: The new, current version of 24.035 provides that the 180-day time limit begins to run from the date of *sentencing*; the DOC delivery date is no longer relevant.

Jeffcott v. State, 2018 WL 2012099 (Mo. App. E.D. May 1, 2018):
Holding: (1) Where for some months between April 2000 and December 2001 hand-to-genital contact did not constitute deviate sexual intercourse (necessary for first-degree sodomy), counsel's advice to Movant to plead guilty to first-degree statutory sodomy was ineffective and Movant was prejudiced, but the motion court did not clearly err in choosing as a remedy to vacate the sodomy convictions and instate convictions and sentences for the lesser-included offense of first-degree child molestation (rather than allow withdrawal of the pleas); (2) where Movant pleaded guilty to incest during a time period when deviate sexual intercourse (necessary for incest) did not include hand-to-genital contact, counsel was ineffective in advising a guilty plea to an offense that was not a crime and Movant was prejudiced; remedy is to vacate that guilty plea because there is no applicable lesser-included offense for incest.
Discussion: Even though Movant contends he would not have pleaded guilty to the sodomy counts if he had known about the hand-to-genital contact issue, the motion court found this testimony not credible, where Movant had entered a blind, non-binding plea, which included many other counts. The choice of remedy was for the motion court. A person can be convicted of a lesser-included offense. Thus, the motion court did not clearly err in imposing as a remedy convictions and sentences for the lesser-included offense of first-degree child molestation.

Bastain v. State, 560 S.W.3d 894 (Mo. App. E.D. Oct. 9, 2018):
Holding: Even though Movant's *pro se* 24.035 motion (Form 40) stated he was delivered to DOC on a certain date (which would make his motion timely), where no evidence was presented to prove this was the actual date of delivery, Movant failed to meet his burden to prove timeliness; but where State did not contest timeliness, case is remanded to motion court to determine whether *pro se* motion was timely.

McAllister v. State, 561 S.W.3d 492 (Mo. App. E.D. Nov. 20, 2018):
Holding: Where Movant's amended 29.15 motion raised four claims on which the motion court failed to issue findings, there is no final judgment disposing of all claims, and the appeal must be dismissed.

Conn v. State, 564 S.W.3d 386 (Mo. App. E.D. Nov. 27, 2018):
Holding: Where Movant's 24.035 motion asserted three claims, but the court failed to issue Findings on one of the claims, there is no "final judgment" because the Findings did not resolve all claims and issues, so the appeal must be dismissed.

Leigh v. State, 2018 WL 2409262 (Mo. App. E.D. May 29, 2018):
Holding: Even though Movant completed a 120-day shock program in DOC, where he filed his *pro se* 24.035 motion within 180 days of that initial delivery to DOC, the motion court should not have dismissed it on grounds that delivery to a DOC 120-day program is not the result of an underlying conviction and sentence; that delivery to DOC started the time for filing a *pro se* motion (Form 40).
Discussion: Delivery to DOC for a 120-day program constitutes "delivery" under Rule 24.035, thus triggering the time limit for filing a *pro se* motion (Form 40). The motion

court viewed this delivery as a probation condition, and thus, that it did not start the time limit for filing a *pro se* motion, but the motion court's interpretation of Rule 24.035 is clearly erroneous.

Welch v. State, 2018 WL 3117904 (Mo. App. E.D. June 26, 2018):
Holding: Even though Sec. 559.115.8 provides that a defendant convicted of first-degree statutory rape or first degree statutory sodomy is not eligible for a 120-day program under 559.115.3 and Movant said at sentencing that he was satisfied with his plea counsel, Movant was entitled to remand for Findings on his claim that plea counsel misadvised him into believing he could receive a 120-day program, because the motion court must issue Findings on all issues, Rule 24.035(j), and the plea court itself had said it was possible Movant could get probation.

Maguire v. State, 2017 WL 4364474 (Mo. App. E.D. Oct. 3, 2017):
Holding: (1) Time for filing amended 29.15 motion began when counsel was first appointed, and even though Movant later hired private counsel, motion court had no authority to "rescind" appointment of appointed counsel (Public Defender) and grant private counsel additional time to file amended motion beyond original time limit when Public Defender was first appointed; (2) private counsel's amended motion filed beyond original time limit was untimely and cannot be considered; (3) Movant cannot use "abandonment doctrine" to have amended motion be deemed timely because "abandonment doctrine" does not apply to privately-retained counsel under *Gittemeier*; and (4) motion court can consider timely-filed *pro se* motion, but because motion court did not issue Findings on all *pro se* claims, the judgment is not final and appeal must be dismissed.

Emory v. State, 2017 WL 4896786 (Mo. App. E.D. Oct. 31, 2017):
Holding: Even though the motion court discussed a portion of Movant's Rule 29.15 claim in its Findings, where the court did not rule on a second part of the claim, there is no final judgment and the appeal must be dismissed.
Discussion: A final judgment which disposes of all claims in the motion is a prerequisite for appeal. When a motion court fails to acknowledge, discuss, adjudicate or dispose of all claims, the judgment is not final and the appeal must be dismissed. Although the motion court denied the motion "on all grounds," the appellate court has limited the application of broad denials to claims specifically addressed in the judgment.

Milner v. State, 2017 WL 5580219 (Mo. App. E.D. Nov. 21, 2017):
Holding: Where Movant's 24.035 counsel filed a motion stating that the late filing of the amended motion was the fault of counsel, motion court clearly erred in denying the late filing on grounds that Movant "fail[ed] to act" and "dither[ed] about" without granting Movant an evidentiary hearing on the abandonment issue; case remanded for hearing on abandonment.

State v. Wilson, 527 S.W.3d 908 (Mo. App. E.D. Sept. 12, 2017):
Holding: (1) A post-sentencing Rule 29.07(d) motion to withdraw guilty plea is appealable; and (2) 29.07(d) motion can allege that defendant suffered "manifest injustice" due to ineffective assistance of plea counsel.

Geyer v. State, 2017 WL 4248398 (Mo. App. E.D. Sept. 26, 2017):
Holding: Even though Movant at his evidentiary hearing did not present any evidence as to why his pro se 24.035 motion was filed 185 days after his plea, where Movant alleged both in his pro se motion and amended 24.035 motion that he was delivered to DOC after the date of his plea (so that his pro se motion was, in fact, timely) and the State did not raise any objection to timeliness in the motion court, case is remanded for a hearing on the timeliness of the pro se motion pursuant to *Hall v. State*, No. SC96079 (Mo. banc Sept. 12, 2017).

Jones v. State, 519 S.W.3d 879 (Mo. App. E.D. May 9, 2017):
Holding: Where (1) Movant timely filed a pro se 29.15 motion; (2) later, public defender entered an appearance (without an "appointment"), requested a 30-day extension of time, and filed an amended motion within that time, the amended motion is timely because *Creighton* (Mo. banc April 25, 2017) holds that the time for filing an amended motion for a public defender who has not been appointed but who enters an appearance runs from the time of entry.

Norman v. State, 509 S.W.3d 846 (Mo. App. E.D. Jan. 24, 2017):
Holding: (1) Where 29.15 motion court never ruled on counsel's request for an extension of time to file amended motion, the amended motion was untimely and case must be remanded for abandonment hearing; and (2) even though counsel requested more than one extension of time to file amended motion, a motion court can grant only *one* extension of time under Rule 29.15(g).

Murphy v. State, 2017 WL 588184 (Mo. App. E.D. Feb. 14, 2017):
Holding: Because plain error review is not available in Rule 24.035 cases, appellate court cannot review Movant's claim, not raised in his amended motion, that his felony stealing conviction is contrary to *Bazell*.

Langhans v. State, 2016 WL 6082059 (Mo. App. E.D. Oct. 18, 2016):
Holding: Where (1) 24.035 Movant received a 120-day treatment sentence on Count I and an SES on Count II; (2) Movant served 120-days on Count I and was released; but (3) Movant later had his probation revoked on Count I and Count II, and filed a Form 40 regarding both, the Form 40 was untimely regarding both Counts because all convictions in a single judgment must be challenged within 180 days of delivery to the DOC on any one of the Counts.
Discussion: The issue is whether Movant's delivery to DOC on Count I also initiated the 180-day time limit for filing a pro se Rule 24.035 motion on Count II. *Swallow v. State*, 398 S.W.3d 1 (Mo. banc 2013), held that when a Movant is delivered to DOC, Rule 24.035 requires he file his motion within 180 days for all sentences imposed, whether

executed or not. To hold otherwise would promote delay and allow for possible multiple, inconsistent 24.035 judgments.

Watson v. State, 2016 WL 6236630 (Mo. App. E.D. Oct. 25, 2016):
(1) 29.15 Movant was entitled evidentiary hearing on claim that counsel was ineffective for misadvising him about what the State would have to prove for first-degree robbery and the law on accomplice liability, which caused him to reject a 10-year plea offer; (2) even though Movant was charged and convicted of multiple offenses in addition to robbery, he pleaded prejudice properly because his motion stated he would have been sentenced to 10 years rather than the 18 total he received; (3) even though Movant did not plead that the State would not have withdrawn the offer or that the trial court would have accepted it, omitting these is not fatal because these can be established at an evidentiary hearing; (4) in order to ensure that claims are decided accurately, courts should err on the side of having evidentiary hearings to allow Movants an opportunity to present evidence.
Discussion: The motion court found Movant failed to allege prejudice because he did not specifically allege the plea offer applied to all charges. But the motion as a whole implies that the offer did, because it says Movant would have been sentenced to 10 years, instead of the 18 total that he received for all charges.

Turner v. State, 2016 WL 6440407 (Mo. App. E.D. Nov. 1, 2016):
Holding: (1) Under Rule 44.01(a), the time for filing a pro se Rule 24.035 motion began on the day after Movant was delivered to the DOC (i.e., the day after counts as day "number 1"), since the day of actual delivery is not included under 44.01(a); and (2) where the deadline day for filing (180th day) fell on a Saturday and the following Monday was a federal holiday, the motion was due on Tuesday pursuant to Rule 44.01(a).

Goetz v. State, 2016 WL 6871543 (Mo. App. E.D. Nov. 22, 2016):
Holding: Where 29.15 court's judgment completely failed to discuss one of the claims, the judgment is not final and appeal must be dismissed.
Discussion: *Green v. State*, 494 S.W.3d 525 (Mo. banc 2016), held that when a motion court fails in its judgment to acknowledge, discuss or adjudicate all claims, the judgment is not final. Nor does there need to be a motion under Rule 78.07(c) to correct this, because that rule only addresses errors in the "form or language" of the judgment, and failing to dispose of or adjudicate a claim is not a mere error of form.

Thomas v. State, 2016 WL 7388624 (Mo. App. E.D. Dec. 20, 2016):
Even though 24.035 court purported to "vacate and reappoint" the public defender due to a conflict of interest, the court had no authority to do this; the time for filing an amended motion ran from the prior date that counsel was appointed and a transcript filed.
Facts: Movant timely filed a pro se 24.035 motion. Counsel was appointed on May 12, 2015. On July 7, transcripts were filed, making an amended motion due October 5. In late September, the motion court vacated and reappointed the public defender due to a conflict of interest, and granted another 30-day extension. New counsel filed an amended on Dec. 28.

Holding: Contrary to the impression the court and public defender appear to have been under, the transfer of a PCR case from one public defender to another due to conflict of interest does not affect the time limits for filing an amended motion. Nor did the rescission of an original appointment order and a new order of appointment restart the time periods or otherwise relieve the public defender of its duties. The grant of another extension of time was clearly prohibited by the Rule. The amended motion remained due Oct. 5. Case remanded for abandonment hearing.

Conaway v. State, 2016 WL 7388595 (Mo. App. E.D. Dec. 20, 2016):
Even though 29.15 motion court purported to "re-appoint" the Public Defender due to a conflict of interest and granted another 30 days to file an amended motion, the court had no authority to do this; the time for filing the amended motion ran from the earlier valid appointment date.
Facts: In 2014, Movant filed a premature Rule 29.15 motion. The court appointed counsel in 2014. Movant subsequently filed a late notice of appeal and had a direct appeal. The mandate issued on June 19, 2015. On August 19, the court "re-appointed" the public defender due to a conflict of interest and granted an additional 30 days for an amended motion. Replacement counsel entered on September 1, and filed an amended on November 16.
Holding: The 90-day clock for filing an amended began when the mandate issued on direct appeal. Thus, the deadline for filing was September 17. A motion court can grant only one extension of time. We acknowledge the hardship of today's ruling given the Public Defender's crushing caseload and resultant emergencies assailing its lawyers on a daily basis. Replacement counsel here had just two weeks to prepare an amended motion in addition to her existing workload. The motion court's extension was well-intended, but as a matter of law, the extension was beyond the court's authority to grant. Case remanded for an abandonment hearing.

Wilson v. State, 2016 WL 4362129 (Mo. App. E.D. Aug. 16, 2016):
Holding: Even though first public defender withdrew from case and 29.15 court granted second public defender a second extension of time to file an amended motion, Rule 29.15(g) authorizes only one extension of time for a total time of not more than 90 days from appointment of the original (first) public defender; the amended motion was untimely, and case must be remanded for abandonment hearing.

Watson v. State, 2016 WL 4761436 (Mo. App. E.D. Sept. 13, 2016):
Holding: Movant was entitled to evidentiary hearing where Movant's 29.15 motion alleged that trial counsel ineffectively advised him regarding the State's plea offer of 10 years for robbery (which caused him to forgo the offer and proceed to trial), this stated a claim which was not refuted by the record even though the motion did not specifically state that the 10-year offer applied to the additional charges besides the robbery; the motion as a whole made clear that the 10-year offer applied to all charges because it stated that Movant "would have been sentenced to 10 years instead of 18 years," which he received at trial; further, the benefit of the doubt regarding the motion's language should favor Movant.

Propst v. State, 2016 WL 5030353 (Mo. App. E.D. Sept. 20, 2016):
Where Public Defender told 24.035 Movant that Public Defender would file his Form 40 for him and Movant signed a Form 40 for Public Defender to file, but Public Defender then filed it late, motion should be deemed timely filed under third-party active interference doctrine; Movant had done all he could by giving Form 40 to Public Defender within time for filing it.
Facts: After Movant's probation was revoked, a Public Defender met with Movant, told him he had claims for postconviction relief, and provided Movant a completed Form 40 for him to sign. Movant signed it and gave it to Public Defender, who said he would file it. However, Public Defender then filed it late. The motion court dismissed the case as untimely.
Holding: The "abandonment doctrine" does not apply here because it applies to late-filed *amended* motions only. Instead, the "active interference doctrine" applies. Where an inmate prepares his initial Form 40 and does all he can reasonably do to ensure it is filed on time, the late filing can be excused if caused solely from the active interference of a third party beyond inmate's control. Here, inmate singed a Form 40 prepared by the Public Defender and relied on the Public Defender to timely file it, but Public Defender failed to do so. Court cautions that while it is applying the active interference doctrine here, it may not do so every time the Public Defender voluntarily injects itself into a postconviction case and agrees to file a Form 40 for a movant.

McKay v. State, No. ED103549 (Mo. App. E.D. June 28, 2016):
Holding: Where (1) Movant was convicted at trial and had a direct appeal, which resulted in his case being affirmed in part and remanded for a hearing (remand hearing) on a speedy trial/UMDDL issue; (2) Movant had a 29.15 case regarding the "affirmed" portion of his case at the same time that his "remand hearing" was going on; (3) Movant's 29.15 case and "remand hearing" were denied; (4) Movant appealed the 29.15 denial and "remand hearing" denial, and lost; and (5) within 90 days of this mandate, Movant timely filed another 29.15 motion alleging claims of ineffective assistance of counsel at the "remand hearing" and in the second direct appeal, this new 29.15 motion was not a prohibited "successive" motion because it concerned matters that could not have been raised in the first 29.15 case because the "remand hearing" and second direct appeal had not happened yet.

Watson v. State, 2016 WL 720689 (Mo. App. E.D. Feb. 23, 2016):
Even though judge at sentencing told Defendant/Movant that he had 180 days after delivery to DOC to file a Rule 29.15 motion but did not tell him that the time limit was 90 days after a mandate on appeal, this did not excuse a pro se Form 40 filed more than a year after the mandate.
Facts: Defendant/Movant was convicted at a trial. At sentencing, the judge told Movant his postconviction motion would be due 180 days after delivery to the DOC. Movant had a direct appeal. Movant filed his pro se Form 40 more than a year after the mandate. Movant claimed that his motion should be deemed timely because the judge had not informed him of the 90-days-after-mandate time limit at sentencing.
Holding: The sentencing judge correctly informed Movant of the time limit for a pro se 29.15 motion if there was not a direct appeal, but did not inform Movant of the time limit

if there was a direct appeal. Movant characterizes the judge's partial advice as "third party interference," which can excuse a late filing in some instances. To qualify for third-party interference, however, a Movant must have made initial efforts to comply with the time limits within those time limits. Here, Movant did nothing to timely file his motion. He is not free of responsibility in failing to attempt a timely filing. There is no case law supporting Movant's claim that the sentencing court's partially informing him of the time limits constitutes active interference by a third party. Appeal dismissed for untimely pro se motion.

Hannon v. State, 2016 WL 1085644 (Mo. App. E.D. March 15, 2016):
(1) Trial counsel was ineffective in failing to investigate school records which would have shown that Victim was in school at time of alleged sex crime, not at home where crime allegedly occurred; and (2) even though appellate court on direct appeal had determined that the school records were not newly-discovered evidence which warranted a new trial because they were not likely to have changed the outcome, the Strickland prejudice standard is not outcome-determinative, but considers whether confidence in the verdict is undermined; Movant satisfied the Strickland standard.
Facts: Movant was convicted at trial of a child sex offense alleged to have occurred at Victim's home "on or about October 3." All of the trial witnesses testified that Oct. 3 was the date of the offense because Victim's Mother suffered a drug overdose the next day. At sentencing, Movant complained that his trial counsel had not obtained school records showing Victim was in school on Oct. 3, not at home. On direct appeal, Movant sought a remand on the basis of "newly-discovered" evidence, i.e., the school records, which showed Victim was in school on Oct. 3. The appellate court held that the school records were not likely to have changed the result of the trial. The appellate court also held that the crime was charged as occurring "*on or about*" Oct. 3, and that testimony in child sex cases often contains variations, contradictions and lapses in memory. Movant subsequently filed a 29.15 motion, which alleged counsel was ineffective in failing to investigate the school records. The motion court granted relief. The motion court found trial counsel's explanation as to why he did not obtain the records to be incredible. The State appealed.
Holding: The standard of review requires the appellate court to defer to the motion court's credibility finding regarding trial counsel. The motion court found counsel did nothing to investigate the school records. Strategic decisions can only be made after thorough investigation of the facts. The State argues that because the appellate court denied a new trial on direct appeal based on the school records claim, Movant cannot "relitigate" this issue as ineffective assistance of counsel. However, the issue raised on direct appeal was different than the issue of counsel's ineffectiveness. The issue now is not counsel's failure to impeach with the records, but counsel's inability to reasonably determine whether or not to impeach with the school records (because counsel did not obtain them). Even though the appellate court on direct appeal held that the school records were "not likely to produce a different result," the *Strickland* standard of prejudice is different. *Strickland* prejudice is not outcome-determinative, but is whether confidence in the fairness of the proceedings is undermined. Here, all of the State's witnesses were certain that the crime took place on Oct. 3. The school records directly

refuted this testimony by showing that Victim was in school, not home, that day. New trial ordered.

State ex rel. Costello v. Goldman, 2016 WL 1230407 (Mo. App. E.D. March 29, 2016):

Even though Movant was originally charged with two offenses in one case number, where he ultimately had two different trials and direct appeals, the motion court should not have filed his pro se 29.15 motions "together," but should have recognized that they were two different cases, and treated them as such.

Facts: Movant was charged with robbery and murder in one case. However, at his trial, he was found guilty of robbery, but the jury could not reach a verdict on the murder charge. He was convicted of murder at a later trial. Because he had two trials, he also had two direct appeals. The robbery appeal was completed first. Movant timely filed a pro se 29.15 motion, and counsel filed a timely amended. The murder appeal was completed second. When Movant filed his pro se 29.15 motion after the murder appeal, however, the motion court filed it in the robbery case, and regarded it as duplicative and untimely. Movant sought a writ of mandamus to require the motion court to remove his Form 40 regarding the murder case from the robbery file, and treat it as a timely-filed, separate case.

Holding: A writ is necessary here to compel the motion court to perform its obligations under Rule 29.15. The "murder case" Form 40 clearly showed that Movant was seeking relief from his murder conviction, even though the term "murder" was not used; however, Movant used the correct appellate case number and correct date of affirmance on direct appeal for the murder case. The motion court's failure to recognize that this was a Form 40 regarding the murder case caused the motion to be mishandled from the outset. The motion court was required to appoint counsel in this case. Appellate court rejects the State's argument that Movant's "robbery case" counsel had an obligation, sua sponte, to amend the pro se motion in the murder case. Writ issues to order motion court to remove the "murder case" Form 40 from the "robbery case," to open a new postconviction case regarding the murder, and to appoint counsel.

McNabb v. State, 2020 WL 4217765 (Mo. App. S.D. July 23, 2020):

Holding: Even though the trial judge did not advise Movant of the time for filing a 29.15 motion, this is not a recognized exception to deem an untimely motion "timely" filed; although giving misadvice (incorrect advice) is a recognized exception, giving no advice is not.

McDaniel v. State, 2020 WL 4499567 (Mo. App. S.D. Aug. 5, 2020):

Holding: (1) Even though 29.15 Movant claimed that his *pro se* motion was filed late because he was incarcerated out of state and didn't have access to a Form 40, this is not a recognized excuse for late filing; (2) even though Movant claimed that he didn't have a true direct appeal because his appeal was dismissed largely on procedural grounds, his initial *pro se* motion was still due within 90 days of the issuance of the mandate on direct appeal; (3) even though Movant claimed that the inactions of his privately retained counsel regarding failure to timely file an initial 29.15 motion constituted third-party interference, they do not where Movant never prepared a *pro se* motion and, thus, never

did all he could do to ensure it was filed on time; just like any other civil litigant who retains counsel, Movant bound himself to the actions of his counsel (including counsel's failure to act).

Hicks v. State, 2020 WL 1503237 (Mo. App. S.D. March 30, 2020):
Holding: 29.15 Movant failed to preserve for appellate review his claim that motion court entered insufficient findings, where Movant filed a generic Rule 78.07(c) motion in motion court which merely stated that court did not address all issues, without specifying which issues.
Discussion: Movant filed a 78.07(c) motion stating that the court's findings did "not address all issues presented in the amended motion without ambiguity and in sufficient detail to allow meaningful review on appeal." This generic allegation does not point to any specific finding in the judgment that is alleged to be deficient or to any specific issue for which findings are allegedly lacking. This generic allegation brings no claim of error to the motion court's attention for potential correction. This generic allegation could be asserted verbatim in any motion to amend judgment without regard to specific issues in the case. This would defeat the purpose of Rule 78.07(c) and nullify it.

Finley v. State, 2019 WL 6711461 (Mo. App. S.D. Dec. 10, 2019):
Holding: Where (1) motion court denied Movant's 29.15 motion on grounds that motion court did not believe Movant's testimony that trial counsel had told him he could not be convicted of a greater offense and, instead, believed counsel's testimony otherwise; (2) the appellate court affirmed; but (3) after the affirmance, Movant found a letter from trial counsel that wasn't available during the postconviction case and which supported Movant's testimony that he had been misadvised, Movant was entitled to recall of the 29.15 appellate mandate to present this newly discovered evidence.
Discussion: After the 29.15 proceedings were over, Movant obtained his Public Defender file and found a letter from his trial counsel telling him that he couldn't be convicted of the greater offense. This letter was not in the file when postconviction counsel was representing him; there was evidence that it was missing during that time. This letter supports Movant's 29.15 testimony and contradicts trial counsel's 29.15 testimony. If postconviction counsel had had this letter, he could have impeached trial counsel with it. Giving incorrect advice about the maximum penalty would be ineffective. Mandate is withdrawn, and case remanded to motion court to allow Movant to present this newly available evidence.

Barajas v. State, 565 S.W.3d 760 (Mo. App. S.D. Jan. 16, 2019):
Holding: Where motion court granted relief under Rule 24.035 on a claim that was not pleaded, this was clearly erroneous claims that are not pleaded are waived.

Martin v. State, 2019 WL 761705 (Mo. App. S.D. Feb. 21, 2019):
Holding: A claim that there is no "factual basis" for a plea under Rule 24.02(e) is no longer cognizable in a Rule 24.035 case; rather, the claim must be that the guilty plea was not knowing and voluntary because the Movant did not understand the elements of the crime she was admitting.

Discussion: Rule 24.035 Movant claims on appeal that there is no factual basis for her plea as required by Rule 24.02(e). However, *Booker v. State*, 552 S.W.3d 522 (Mo. banc 2018), held that a sufficient factual basis is not constitutionally required. *Booker* held that Missouri courts had confused the concept of "factual basis" with "knowing and voluntary plea." The essential inquiry in a 24.035 case is whether a guilty plea was knowing and voluntary. While a sufficient factual basis can be an important factor in a voluntariness determination, whether a plea is knowing and voluntary is determined from the record as a whole. Rather than claim insufficient factual basis, a Movant should claim that her plea was unknowing and involuntary because she did not understand the elements of the crime she was admitting.

Sanders v. State, 564 S.W.3d 380 (Mo. App. S.D. Nov. 26, 2018):
Holding: Where (1) the issue in Movant's 29.15 case was whether trial counsel was ineffective in not objecting to the jury instructions in a multiple-act child sex case on grounds that the instructions did not sufficiently distinguish each charged act, and (2) trial counsel had expressed some strategic reasons for not objecting, the motion court's Finding that it was "compelled," as a matter of law, to find counsel ineffective under *Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016)(which held that a Movant might be prejudiced when counsel fails to object in a similar situation), was clearly erroneous; *Hoeber* did not bind all fact-finders in all circumstances as a matter of law; case remanded for Findings on whether counsel's choices "objectively reasonable."

Hounihan v. State, 2018 WL 6258890 (Mo. App. S.D. Nov. 27, 2018):
Holding: Where motion court denied Movant's 29.15 claim that appellate counsel was ineffective in not raising that the evidence was insufficient to convict of driving while revoked as a class D felony (as opposed to a misdemeanor), the motion court clearly erred in denying the claim on grounds that postconviction counsel was the "first to notice" the issue; case remanded for Findings as to whether appellate counsel's failure to raise the issue was "objectively reasonable" – appellate counsel's subjective intent aside.

Amsden v. State, No. SD35341 (Mo. App. S.D. Dec. 21, 2018):
Holding: (1) The civil rules do not recognize a "Motion to Reconsider," but Rule 75.01 allows a motion court to "vacate, reopen, amend or modify" a judgment within 30 days of its entry and an inaptly-named "Motion to Reconsider" shall be treated as an authorized Rule 75.01 motion; (2) where within 30 days of entry of 24.035 judgment a Prosecutor filed a "Motion to Reconsider" and the motion court heard argument and "took the matter under advisement," the motion court had authority to issue a new judgment denying 24.035 relief more than 90 days later because the "taking under advisement," in effect, had vacated the prior judgment granting relief.

Haynes v. State, 2018 WL 3342685 (Mo. App. S.D. July 9, 2018):
Holding: Even though the motion court granted Movant's *pro se* 24.035 motion which asked for relief to order DOC to run Movant's sentences concurrently (as he had been actually sentenced), the motion court clearly erred in deciding the case without appointing counsel; appointment of counsel is mandatory under Rule 24.035(e) to ensure that Movant has pleaded all possible claims.

State ex rel. Hawley v. Beger, 2018 WL 1755482 (Mo. App. S.D. April 12, 2018):
Holding: Where Highway Patrol failed to disclose exculpatory and impeaching gunshot residue test to either Prosecutor or Defense Counsel prior to trial, habeas court did not exceed its authority in vacating conviction and ordering new trial for Petitioner, because court's judgment was supported by the evidence.
Discussion: The State claims that Petitioner should have raised this claim on direct appeal or in a Rule 29.15 case, even though the State admits the evidence was not disclosed until after both. Given the State's admission that it failed to disclose this evidence, the State's argument that Petitioner should have discovered the undisclosed evidence in time to raise it on direct appeal or in 29.15 is repugnant. There is no basis to charge Petitioner with having known about this evidence when it wasn't known by the Prosecutor or Defense Counsel due to the Highway Patrol's failure to disclose. The State argued that Petitioner wasn't prejudiced by the failure to disclose because he cannot show that he would have been acquitted. But it was enough to show a reasonable probability of a different result, i.e., that the nondisclosure undermines confidence in trial's outcome. The question is not whether Petitioner would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Hewitt v. State, 2018 WL 2213653 (Mo. App. S.D. May 15, 2018):
(1) Where a motion court finds that counsel abandoned a Movant, the court must appoint new counsel and grant new counsel time allowed by Rules 24.035 and 29.15 to file a new amended motion or statement in lieu; (2) the motion court cannot find abandonment and then deem an untimely amended timely-filed.
Facts: In *Hewitt I*, the appellate court found that the amended motion filed by postconviction counsel was untimely, and remanded for an abandonment hearing. On remand, the motion court found that counsel had abandoned Movant, but apparently then deemed the amended motion timely filed, and re-issued its original Findings denying relief on the merits. Movant appealed.
Holding: The motion court failed to follow the mandate of *Hewitt I*, which held that the court was to conduct an abandonment hearing than then take further action "consistent with [that] outcome." This meant that if the motion court found abandonment, it was required to (1) appoint new counsel for Movant, for purposes of filing a new amended 24.035 motion or statement in lieu, and (2) order that newly appointed counsel have 60 days from the time of counsel's appointment to file the amended motion or statement in lieu.

Stark v. State, 2018 WL 2731401 (Mo. App. S.D. June 7, 2018):
(1) Where Movant waived counsel in the mistaken belief that he was not eligible for a Public Defender, the waiver was not knowing, intelligent and voluntary; and (2) even though Rule 24.035 applies only to felony convictions, where (a) the motion granted relief on both felony and misdemeanor convictions but (b) the State failed to object to the misdemeanor relief in the motion court, the State failed to preserve that issue for appeal, and the grant of misdemeanor relief did not constitute plain error (manifest injustice).

Facts: Movant (Defendant) had been convicted of various felonies and misdemeanors. Before his guilty plea, he applied for Public Defender services but was rejected because he made too much money and rejected in the mistaken belief that he was charged with misdemeanors only. A local court rule prohibited the Public Defender from accepting misdemeanor clients without court approval. Movant later reapplied for Public Defender services after he lost his job, but the Public Defender did not review his second application. Movant was not informed he could appeal the Public Defender's rejection. Movant, in the mistaken belief that he wasn't eligible for a Public Defender, then told the judge that he did not want to retain private counsel or apply for the Public Defender, and signed a waiver of counsel form. He was not informed by the judge of the possibility of consecutive sentencing before his plea, although the Prosecutor said he informed Movant of this. Movant pleaded guilty, and received the maximum sentences possible, with all time to run consecutively. Later, he filed a 24.035 motion, which contended his plea was involuntary because he had not voluntarily waived counsel. The motion court vacated his convictions. The State appealed.
Holding: (1) The State contends that the motion court erroneously granted relief on the irrelevant factor of the Public Defender's mistake in rejecting Movant. However, the motion court found Movant's testimony that he did not know he was eligible for appointed counsel to be credible. When Movant signed the waiver of counsel form, he had no reason to believe he was eligible for a Public Defender, since he had been rejected already. Waiver of counsel is knowing and intelligent only if the Defendant knows he has the right to appointed counsel if he cannot afford one. Movant was prejudiced by lack of counsel since he received the maximum sentences. (2) Even though Rule 24.035 applies only to felony convictions, the State did not object in the motion court that the court lacked authority to grant relief on the misdemeanors, too. The lack of objection failed to preserve the issue for appeal. Granting relief on the misdemeanors does not constitute plain error (manifest injustice) here.

Hicks v. State, 2018 WL 3120817 (Mo. App. S.D. June 26, 2018):
Holding: (1) Where 29.15 Movant's amended motion raised 8 claims for relief, but the motion court issued no findings regarding two of the claims, the appeal must be dismissed because the judgment is not final; (2) even though Movant did not file a motion to amend judgment under Rule 78.07(c), there is a difference between the sufficiency of the motion court's findings on a particular claim, and whether there is a final judgment.

Bryan v. State, 536 S.W.3d 808 (Mo. App. S.D. Jan. 26, 2018):
Holding: Where 29.15 Movant raised 18 claims of ineffective assistance of counsel, but the motion court did not issue Findings on all of them, there is no final judgment, and appeal must be dismissed; a final judgment resolving all claims is a prerequisite for appeal.

Duke v. State, 2018 WL 774020 (Mo. App. S.D. Feb. 8, 2018):
Holding: Where motion court grants 30-day extension to file amended 29.15 motion, the time for calculating the due date is 90 continuous days from the date counsel was appointed (after the direct appeal mandate), unless the last day (90th day) is a Saturday,

Sunday or legal holiday, in which case the amended motion is due on the next business day; if the 60th day from appointment of counsel is a Saturday, Sunday or legal holiday, the time limit is *not* calculated by moving the 60th day to the next business day and then adding 30 days to that.

Sanders v. State, 531 S.W.3d 82 (Mo. App. S.D. Oct. 18, 2017):
(1) Rule 24.035 Movant lacks standing to appeal a judgment which vacated his conviction and sentence for stealing, because – having been granted one of the types of relief authorized by Rule 24.035(j) – he is not an "aggrieved" party under Sec. 512.020(5), which allows only "aggrieved" parties to appeal; (2) motion court has discretion to choose which remedy to impose under Rule 24.035.
Facts: Movant pleaded a *Bazell* claim in his 24.035 motion, claiming that his conviction for felony stealing under Sec. 570.030.3 should be a misdemeanor. The motion court granted relief by vacating the conviction and sentence (which would allow him to be tried for something else). Movant wanted the motion court only to reduce his conviction to a misdemeanor. Movant appealed.
Holding: Sec. 512.020(5) provides a right to appeal to an "aggrieved" party. A party cannot appeal from a judgment wholly in his favor, but can appeal from a judgment which gives only part of the relief he seeks. Rule 24.035(j) provides four remedies to which a Movant is entitled: (1) vacate and set aside the judgment, or (2) resentence Movant, or (3) order a new trial, or (4) correct the judgment and sentence as appropriate. The type of relief chosen is within the motion court's discretion, and the court does not commit error merely by choosing one of the four possible remedies. Because Movant is not an "aggrieved" party, he lacks standing to appeal. Appeal dismissed.

Pate v. State, 2017 WL 4856782 (Mo. App. S.D. Oct. 27, 2017):
Holding: Where (1) Rule 29.15 motion court granted relief; (2) Prosecutor filed a "motion to vacate judgment" within 30 days thereafter; and (3) the motion court granted the motion to vacate within 76 days thereafter, the court had authority to vacate its prior judgment (and later enter a new judgment denying relief), because Rule 75.01 allows a motion court to retain control over its judgments for 30 days, and the filing of the "motion to vacate" is treated as an authorized motion for new trial, which, under Rule 81.05(a)(2)(A), allowed the motion court up to 90 days from the time the motion was filed to rule on it.

Prine v. State, 527 S.W.3d 930 (Mo. App. S.D. Sept. 25, 2017):
Holding: (1) Where Public Defender counsel who had entered appearance in 29.15 case moved to withdraw one day before amended motion was due on grounds of conflict of interest; and (2) motion court granted the motion and purported to allow an additional 90 days for new Public Defender counsel to file an amended motion, the amended motion filed by new counsel was untimely, and case must be remanded for abandonment hearing. The motion court's appointment of second postconviction counsel did not "restart" the amended motion clock; the date of the first appointment controls.

Wadlow v. State, 518 S.W.3d 872 (Mo. App. S.D. May 9, 2017):
(1) Counsel was ineffective in child sex trial in failing to strike juror who said she could not be "fair" because she had a young granddaughter, and (2) even though Defendant knew of biased juror on direct appeal, postconviction claim is cognizable because it deals with ineffective assistance.
Facts: During voir dire in child sex case, juror said she could not be "fair" because she had a granddaughter. Later, juror did not respond to general questions to panel as to whether they would find it difficult to rule in favor of an older person over a child, and whether they would fail to follow the law. Trial counsel testified he could not recall a strategy reason for failing to strike juror, but there "could" have been one.
Holding: Generally, improper jury selection claims are not cognizable in postconviction because the issue can be raised on direct appeal, but here, Movant is raising a claim of ineffective counsel, which is cognizable. Juror showed clear bias. Even though juror was silent as to some rehabilitative questions, this does not cure the clear expression of bias, and her ability to follow the law does not fix her difficulty in resolving *factual* disputes in the case. Counsel's lack of memory or that there "could" have been a strategic reason for not striking juror does not constitute an acceptable explanation for failing to strike clearly biased juror.

Hewitt v. State, 2017 WL 587292 (Mo. App. S.D. Feb. 14, 2017):
Where counsel had been appointed, time limit for filing amended 24.035 motion began to run when guilty plea and sentencing transcript was filed, not when the probation revocation hearing transcript was filed later; amended motion was untimely and case remanded for abandonment hearing.
Facts: Movant pleaded guilty and received an SES. Later, his probation was revoked and he was sent to DOC. He filed a 24.035 motion. In July 2013, counsel was appointed. In April 2014, the guilty plea and sentencing hearing were filed. In April 2015, the probation revocation hearing transcript was filed. Counsel filed an amended motion within 90 days of the filing of the probation revocation transcript.
Holding: The date for filing an amended motion began to run when the transcript of the plea and sentencing was filed, not when the probation revocation transcript was filed. Movant contends that he did not have a "complete" transcript until the probation revocation transcript was filed. However, Movant's sentencing was complete when he received his SES. Even though the Rule 29.07 inquiry about effectiveness of counsel did not occur until probation was revoked, this inquiry is not required at the conclusion of final sentencing with an SES. Case remanded for abandonment hearing.

Latham v. State, 2017 WL 677809 (Mo. App. S.D. Feb. 21, 2017):
Holding: Where, after the deadline for an amended 24.035 motion had expired, counsel filed a "statement in lieu of amended motion" under Rule 24.035(e) and three days later, Movant filed a pro se amended motion, the pro se amended motion would not be treated as an authorized "reply" to the statement in lieu under Rule 24.035(e), but as an untimely amended motion which must be dismissed.
Discussion: There is no deadline for filing a "statement in lieu of amended motion" and one can be filed after the time for an amended motion has expired. Rule 24.035(e) allows movants to file a "reply" to a statement in lieu within 10 days after the statement is filed.

Although Movant contends that his pro se amended motion should be considered a "reply," this cannot be allowed because it would conflict with the mandatory time limits of Rule 24.035(g) for filing an amended motion. Pro se amended motion must be dismissed as untimely.

Kasparie v. State, 2016 WL 5845841 (Mo. App. S.D. Oct. 6, 2016):
Holding: Where motion court denied Movant's timely-filed pro se 29.15 motion without appointing counsel, case is reversed and remanded for appointment of counsel because 29.15(e) mandates such appointment.

Hall v. State, 2016 WL 6651442 (Mo. App. S.D. Nov. 10, 2016):
Holding: Where the record on appeal showed that Movant was sentenced on November 5, but did not file her pro se 24.035 motion until June 19 (more than 180 days after sentencing), Movant failed to prove that her pro se motion was timely filed, and case must be dismissed as untimely. This is true even though Movant alleged in both her pro se and amended motions that she was delivered to the DOC on March 5, which would have made her June 19 pro se motion timely.
Discussion: A movant has the burden of proving that her pro se postconviction motion is timely-filed. Here, the record on appeal is devoid of any evidence that she was delivered to DOC on March 5, as she alleges, rather than the date of sentencing, which was the earlier November. It was Movant's burden to plead and prove her delivery date. Judgment vacated and remanded to with directions to dismiss motion as untimely-filed.

Campbell v. State, 2016 WL 6945700 (Mo. App. S.D. Nov. 28, 2016):
Holding: Where postconviction counsel files a statement in lieu of amended motion, there is no abandonment; by investigating the case and filing a statement complying with Rule 29.15(e), counsel does not abandon a Movant.

Galbreath v. State, 2016 WL 3974566 (Mo. App. S.D. July 25, 2016):
Even though prior 29.15 counsel had filed a statement in lieu of amended motion, where new 29.15 counsel filed a motion for abandonment, the motion court granted it, and new 29.15 counsel was allowed to file an amended motion, State waived claim on appeal that the motion court should not have found abandonment and allowed the amended motion, because State did not object on these grounds in the motion court.
Facts: Movant timely filed a pro se 29.15 motion, and later, counsel timely filed a statement in lieu of amended motion. Subsequently, new counsel entered the case. New counsel filed a motion to find abandonment and allow an amended motion, which the motion court sustained. Counsel filed an amended motion. The State did not object in the motion court. The court heard the case and issued a ruling on the merits.
Holding: The State claims on appeal that the motion court erred in finding abandonment and allowing the filing of the amended motion. However, a party should not be allowed on appeal to claim error on the part of the motion court when the party did not raise the issue below and give the motion court an opportunity to rule on the issue. "To label the state's posture in the motion court as waiver, acquiescence, estoppel, invited error, or Rule 78.09 violation yields the same result: we will not now address these complaints for the first time on appeal."

State v. Hamilton, 2020 WL 3697774 (Mo. App. W.D. July 7, 2020):
Holding: Even though Rule 29.07(d) may grant broader relief to allow withdrawal of a guilty plea before sentencing, once sentencing has taken place, then a Rule 29.07(d) motion is allowed only if it raises grounds for relief other than those enumerated in Rule 24.035.

State v. Bellamy, 2020 WL 4590109 (Mo. App. W.D. Aug. 11, 2020):
Holding: Even though Movant titled his motion seeking relief from his sentence a "motion for relief under Rule 74.06(b)(4)," where (1) the claims could have been raised in a Rule 24.035 motion, and (2) Movant had a prior 24.035 case, the "Rule 74.06" motion was a prohibited successive postconviction motion.

State v. Wolf, 2020 WL 1680956 (Mo. App. W.D. April 7, 2020):
Holding: Rule 29.07(d) relief to withdraw guilty plea is available after sentencing and remand to DOC *only if* the motion raises grounds for relief other than those enumerated in Rule 24.035; claims that could have been raised under 24.035 are procedurally defaulted and time-barred. But 29.07(d) provides broader relief *before* sentence is imposed or where imposition of sentence is suspended.

Gilkey v. State, 2020 WL 2027320 (Mo. App. W.D. April 28, 2020);
Holding: Where 29.15 motion court denied Movant's facially untimely *pro se* motion when appointed counsel still had approximately 30 days left to file a timely amended motion, judgment is reversed and remanded to allow counsel 30 days to file an amended motion which might allege an exception to timelines, or a statement in lieu that no amended motion is needed; counsel may also seek an extension as allowed under 29.15.
Discussion: The parties agree that the motion court's denial of relief was erroneous and the case must be remanded for further proceedings, but disagree as to the nature of the further proceedings. Movant argues the case should be remanded for filing of an amended motion. The State argues the motion court's erroneous action in prematurely denying relief operated as a rescission of the appointment of counsel, and the case should be remanded for reappointment, or alternatively, an abandonment hearing. Court determines appropriate remedy is to remand for motion court to allow appointed counsel 30 days to file an amended motion or statement in lieu.

State ex rel. Schmitt v. Green, 2020 WL 2027317 (Mo. App. W.D. April 28, 2020):
(1) Habeas relief granted where State failed to disclose fingerprint report which would have shown that another person's fingerprints were at crime scene other than those of Petitioner (Defendant) and Victim. This is true even though another fingerprint report was disclosed which showed none of the prints at the scene belonged to Petitioner. The undisclosed report would have been forensic evidence that a different person was at the scene; supported Petitioner's actual innocence defense; and impeached Officer's false testimony that only Victim's prints were found at scene. (2) County Prosecutor's Office (not Attorney General) is authorized party to decide whether to retry or release Petitioner.

Facts: In 1998, Petitioner was convicted at trial of first degree assault and ACA, and sentenced to 50 years. Victim came home at night and found an intruder -- a young, African-American male, who ultimately shot Victim and fled. Police gathered latent fingerprints from where the intruder had entered. At first, the only identification Victim could make of the intruder was that he was a young, African American male. However, by the time of the preliminary hearing and after some prompting at a lineup and apparently reviewing police reports, Victim positively identified Petitioner. Officer at trial gave testimony leading to the conclusion that only Victim's fingerprints were at the house. Another Officer testified Petitioner confessed, but Officer "destroyed" his notes before anyone saw them. There was no recording or writing of the confession. Other witnesses testified Petitioner had a gun the day of the shooting. Petitioner's trial defense was actual innocence. After his direct appeal and postconviction case were denied, Petitioner made a Sunshine Law request for records, and discovered an undisclosed police report showing an unidentified person's fingerprints at the scene. A habeas court granted relief for the *Brady* violation. The State sought a writ of certiorari.
Holding: (1) In order to overcome his default for not raising his *Brady* claim on direct appeal or in postconviction, Petitioner must show either (1) the claim involves manifest injustice because newly discovered evidence makes it more likely than not that no reasonable juror would have convicted (a gateway innocence claim), or (2) that an objective factor external to the defense impeded his ability to comply with the procedural rules for review of claims, and which has resulted in actual and substantive prejudice infecting his entire trial with constitutional error (a gateway cause and prejudice claim). Here, the habeas court found a gateway cause and prejudice claim. The State claims that Petitioner had enough information at trial to have known there must be an undisclosed fingerprint report. But nothing in Officer's testimony at trial would have suggested that there was any police report that identified a fingerprint other than Victim's. Further, Officer's testimony was false, because there was, in fact, an undisclosed police report that fingerprints of an unidentified person were found. The State's reliance on false trial testimony to argue that Petitioner should have known of the undisclosed report "borders on the incredulous." Petitioner was prejudiced because the undisclosed report would have supported his actual innocence defense by allowing him to argue that a "third party" (not him) was at the scene. This evidence is exculpatory and far more persuasive than simply arguing that Petitioner was innocent because his prints were not found at the scene. (2) Petitioner must be released unless State chooses not to retry him within 10 days. The County Prosecutor's Office is the Office to make the decision.

Morehead v. State, 610 S.W.3d 365 (Mo. App. W.D. Oct. 6, 2020):
Holding: Under prior version of Rule 24.035 where time limits began when Movant was "delivered" to DOC, Movant's pro se 24.035 motion was untimely where not filed within 180 days of delivery to DOC for a CODS program.

Payne v. State, 2020 WL 6878128 (Mo. App. W.D. Nov. 24, 2020):
Holding: Even though the post-July 1, 2017, Rule 24.035(b) creates a "mailbox rule" making the date of mailing by U.S. mail the date of filing, this "mailbox rule" does not apply to pro se 24.035 motions filed under the pre-July 1, 2017 Rule; thus, where, in

January 2017, Movant filed his pro se motion 184 days after delivery to DOC, the motion was untimely, even though the motion was postmarked before the 180th day.

Kirk v. State, 2019 WL 6851446 (Mo. App. W.D. Dec. 17, 2019):
Holding: Where (1) circuit clerk's office did not keep the envelope in which Movant mailed her pro se 24.035 motion as required by Rule 24.035(c); (2) Movant testified she mailed her motion before the deadline; and (3) her motion was filed only two days late, the clerk's failure to comply with Rule 24.035(c) was "active interference" which deprived Movant of proof that she mailed her motion on time (which would have made it timely under the "mailbox rule" of 24.035(b)), so her motion should be deemed timely.
Discussion: The obvious reason 24.035(c) requires a clerk to keep the envelope is to prove when it was postmarked. If it was postmarked before the due date, then it is timely filed under the "mailbox rule" of 24.035(b). Here, however, the clerk did not keep the envelope. This deprived Movant of proof that she mailed her motion on time. Given that her motion was received only two days late, it's possible that Movant, in fact, placed her motion in the mail on time, as she testified. Under these circumstances, her motion should be deemed timely.

Muhammad v. State, 2019 WL 3083164 (Mo. App. W.D. July 16, 2019):
Holding: Even though Movant's retained direct appeal counsel told Movant the wrong time limit for filing his pro se Rule 29.15 motion, the untimely filing is not excused under the third-party interference doctrine because Movant hired the attorney and is bound by the attorney's actions.

Clunie v. State, 2019 WL 4022039 (Mo. App. W.D. Aug. 27, 2019):
Holding: Where motion court denied indigent Movant's timely pro se 29.15 motion without appointing counsel on grounds that Movant was "not entitled to relief as a matter of law," motion court clearly erred in failing to appoint counsel as required by Rule 29.15(e).

Stewart v. State, 2019 WL 1522905 (Mo. App. W.D. April 9, 2019):
Holding: Even though Movant's *pro se* 29.15 motion was facially defective in not sufficiently alleging facts or claims, postconviction counsel did not abandon Movant by filing a statement in lieu of amended motion which set forth the review of the case which counsel made; just because counsel cannot find valid claims does not equate to abandonment.
Discussion: Movant contends that postconviction counsel abandoned him by filing a statement in lieu of amended motion stating there were not additional claims to be asserted, when the *pro se* motion failed to plead sufficient facts or claims. The statement in lieu stated that counsel had reviewed the case before filing the statement in lieu. Most postconviction cases do not have valid claims. Just because a movant files a *pro se* motion does not mean that counsel will be able to find valid claims. Counsel has an ethical duty not to raise invalid claims. Just because counsel cannot find valid claims does not equate to abandonment. Movant does not on appeal allege any additional claims that could have been raised. Movant argues that because the Missouri Supreme Court has disallowed the *Anders* procedure, postconviction counsel should not be able to use

statements in lieu rather than filing a motion to withdraw. But Movant's postconviction counsel was not proceeding under *Anders*. Denial of postconviction relief affirmed.
Concurring opinion: Judge Ahuja would favor a rule requiring an abandonment hearing when the *pro se* motion fails to assert any claim for relief or any facts to support a claim, and counsel files a statement in lieu asserting no additional claims or facts.

Coy v. State, 2019 WL 2650243 (Mo. App. W.D. June 28, 2019):
Holding: Even though Movant's 24.035 pro se motion was filed late, motion court erred in denying motion without appointing counsel because an attorney may be able to plead an exception to timeliness (of which Movant may be unaware) in an amended motion.

Bishop v. State, 566 S.W.3d 269 (Mo. App. W.D. Jan. 29, 2019):
Holding: (1) Where motion court dismissed Movant's *pro se* 24.035 motion without appointing counsel, this violated Rule 24.035(e) which requires appointment of counsel; (2) even though Movant answered "yes" on his pro se motion as to whether he was seeking to proceed in forma pauperis, but did not write anything in the forma pauperis affidavit, where he had been represented by the Public Defender at his guilty plea, it was clear from the record that he was indigent and counsel should have been appointed; and (3) even though motion court dismissed Movant's case "without prejudice" and this would usually be non-appealable, where a dismissal has the effect of terminating the litigation (which this did), the dismissal is appealable.

Washington-Bey v. State, 2019 WL 659684 (Mo. App. W.D. Feb. 19, 2019):
Holding: Where a motion court had dismissed Movant's timely-filed 29.15 motion in 2005 without appointing counsel, the motion court erred in ruling that it did not have "jurisdiction" to hear Movant's abandonment claim filed in 2018; a motion court in which an original postconviction motion was timely-filed has jurisdiction to later reopen those proceedings to address abandonment.

State v. Doolin, 2019 WL 1245234 (Mo. App. W.D. March 19, 2019):
A Rule 29.07(d) motion to withdraw a guilty plea after a final conviction and sentence is appealable where Defendant never had Rule 24.035 relief available to him; here, Defendant can appeal the denial of his motion to withdraw guilty plea to a misdemeanor, because Rule 24.035 did not provide a vehicle to challenge misdemeanor conviction.
Facts: Defendant pleaded guilty to a misdemeanor sex offense and was sentenced to six months in jail. Later, he filed a 29.07(d) motion to withdraw his plea, alleging he was misadvised by plea counsel concerning sex offender registration. The trial court denied the motion. Defendant appealed.
Holding: 29.07(d) provides, in relevant part, "to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." The State contends a denial of a 29.07(d) motion is not a final judgment and, thus, is not appealable. But the State relies on a case where a defendant sought to withdraw a plea following an SIS; thus, no final sentence was ever entered in that case, so there was no final judgment. Here, Defendant was sentenced, so he had a final judgment. The State argues that a 29.07(d) denial is not appealable in light of *State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. banc 2017), which held that 29.07(d)

cannot be used to raise procedurally defaulted claims that could have been raised in a timely 24.035 motion. Here, however, Defendant never had Rule 24.035 relief available since he pleaded guilty to a misdemeanor, and 24.035 applies only to felonies. Thus, Defendant's claim is not procedurally barred, and appeal is proper. (But Defendant did not prevail on the merits of the claim.)

Williams v. State, 548 S.W.3d 275 (Mo. App. W.D. Oct. 9, 2018):
Holding: Even though claims of prosecutorial misconduct usually must be raised on direct appeal and not in a postconviction case under Rule 29.15, such claims can be raised in a Rule 24.035 case because direct appeals after guilty pleas are limited to claims involving subject-matter jurisdiction or the sufficiency of the indictment or information; thus, there is no opportunity to raise prosecutorial misconduct on direct appeal after a guilty plea, unlike after a trial.

Perkins v. State, 2018 WL 5795536 (Mo. App. W.D. November 6, 2018):
(1) Even though Movant's original pro se motion (Form 40) said "to be amended by counsel" for claims, and counsel later filed a timely statement in lieu of amended motion that alleged no claims, this did not create a presumption of abandonment and there was no need for an abandonment inquiry; and (2) even though, within 10 days of counsel having filed the statement in lieu, Movant filed a pro se amended motion alleging claims, this was not the Reply authorized by Rule 24.035(e), because it did not expressly "respond to" counsel's statements made in the statement in lieu; this pro se motion was an untimely amended motion, and could not be considered.
Facts: Movant filed a timely *pro se* motion (Form 40) which listed as claims "to be amended by appointed counsel." On the last day for filing an amended motion, counsel filed a statement in lieu, stating that counsel had investigated the case and found no additional facts or claims than those alleged in the *pro se* motion. Within 10 days later, Movant filed his own *pro se* amended motion, alleging claims.
Holding: (1) Movant claims that an abandonment inquiry is required because the original Form 40 asserted no claims, and neither did the statement in lieu. However, that is immaterial to whether appointed counsel complied with his duties under Rule 24.035(e). Appointed counsel stated in the statement in lieu that he had investigated the case and that there were no claims to be raised. The statement in lieu is not deficient merely because the Form 40 asserted no claims. (2) Rule 24.035(e) allows a Movant to file a Reply to a statement in lieu. But a Reply must expressly respond to the statement in lieu. Here, Movant filed his own *pro se* amended motion, which did not discuss the statement in lieu at all. This amended motion cannot be considered because it is untimely. The time for filing an amended motion expired on the 90th day (the day counsel filed the statement in lieu).

Naylor v. State, 2018 WL 6047971 (Mo. App. W.D. Nov. 20, 2018):
Holding: Motion court must appoint counsel even in untimely 24.035 case, because Movant himself may be unaware of applicable exception to timeliness, which could be pleaded in an amended motion filed by counsel.
Discussion: A Movant may proceed in an untimely 24.035 case if he alleges and proves a recognized exception to the time limits. Movant's counsel may raise an exception for

the first time in an amended motion, because Movant himself may be unaware of an applicable exception. A court's failure to appoint counsel under 24.035(e) deprives Movant of his opportunity to allege and prove timeliness.

State v. Backues, 2018 WL 6047973 (Mo. App. W.D. Nov. 20, 2018):
Holding: Even though the Court of Appeals has numerous opinions exercising jurisdiction over appeals from the denial of motions to withdraw guilty pleas under Rule 29.07(d) when the motions were filed after defendant's sentencing, Western District questions whether these opinions are still valid in light of *State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. banc 2017)(holding that Rule 29.07 does not apply to post-sentencing claims that should be raised under Rule 24.035).

Jamison v. State, 2018 WL 6611477 (Mo. App. W.D. Dec. 18, 2018):
Holding: Even though Movant's pro se 24.035 motion was filed late, motion court is required to appoint counsel and allow for the filing of an amended motion (which might allege a recognized exception to timeliness).
Discussion: Rule 24.035(e) requires appointment of counsel for indigent movants. The Rule does not distinguish between timely and untimely filed motions. The Rule does not include the word "timely."

Hill v. Mo. Dept. of Corrections, 2018 WL 6611875 (Mo. App. W.D. Dec. 18, 2018):
Holding: (1) Even though the 2003 amendment to the 85% rule, Secs. 556.061 and 558.019, provided that first-degree assault on a law enforcement officer was a "dangerous felony" for offenses "occurring on or after August 28, 2003," Defendant's conviction for first-degree assault on law enforcement officer that occurred in 2000 was subject to the 85% rule, because "assault in the first degree" was covered by the 85% rule in 2000, and Defendant's offense is simply a type of "assault in the first degree; (2) there is no "retroactive" application of the 2003 amendments to Defendant because the law in 2000 allowed the 85% rule to be applied to this offense since it is a type of "assault in the first degree;" and (3) even though Defendant claims that his guilty plea was involuntary because he was misinformed by his plea counsel about his parole eligibility, this cannot be raised in a declaratory judgment action because another potential remedy exists to Defendant, which is a habeas corpus proceeding.

Butler v. State, 2018 WL 3232627 (Mo. App. W.D. July 3, 2018):
Holding: Where Movant did not raise as an issue in his Rule 29.15 amended motion that there is a clerical error in the sentence and judgment, this cannot be reviewed on appeal or remanded to circuit court to correct because Rule 29.15 does not allow for plain error review (disagreeing with Eastern District opinion that remanded in similar situation for correction of clerical error); but Movant can file a *nunc pro tunc* motion directly in the circuit court to correct the clerical error.

Perkins v. State, 2018 WL 2720913 (Mo. App. W.D. Aug. 7, 2018):
Holding: A "reply" filed in response to a statement in lieu of amended motion under Rule 24.035(e) gives a Movant the opportunity to put facts on the record that could trigger an independent abandonment inquiry.

State v. Rall, 2018 WL 3846420 (Mo. App. W.D. Aug. 14, 2018):
Holding: (1) Rule 29.12(b) does not provide an independent mechanism to challenge a felony stealing conviction from 2011 under *Bazell*, because the Rule does not provide a post-sentence procedure; Rule 29.12(b) presupposes that the criminal case is still pending before the circuit court and provides a mechanism for a circuit court to consider plain errors *before* imposing sentence, i.e., while it still has jurisdiction in the criminal case; and (2) even though Sec. 27.050 states that the attorney general "shall…represent the state in all appeals to which the state is a party other than misdemeanors," the statute does not *preclude* the attorney general from representing the state in misdemeanors if the attorney general chooses to do so.

State v. Knox, 2018 WL 2921996 (Mo. App. W.D. June 12, 2018):
Holding: Where after a guilty plea but *before* sentencing Defendant filed a motion under Rule 29.07(d) to withdraw his guilty plea (which was denied and Defendant was then sentenced), Defendant may direct appeal, because Defendant is appealing the final judgment and sentence, raising the denial of the 29.07(d) motion as an allegation of error.
Discussion: The State erroneously contends that a denial of a 29.07(d) motion is not appealable. The State confuses the procedural posture of the cases it cites. Once a defendant enters a guilty plea, he may seek to withdraw the plea *before* sentencing under Rule 29.07(d) and *after* sentencing *only* under Rule 24.035. This case is procedurally a direct appeal from the final judgment which incorporates allegations of error in the court's ruling on the 29.07(d) motion.

Jackson v. State, 2018 WL 501596 (Mo. App. W.D. Jan. 23, 2018):
Holding: Claim of juror misconduct is cognizable in 29.15 action where the factual basis for the misconduct claim is not discovered until after trial, but amended motion must explain the timing of the discovery of the information (post-trial) and resulting inability to have raised the claim on direct appeal.

Harshman v. State, 2018 WL 606024 (Mo. App. W.D. Jan. 30, 2018):
Holding: Where 24.035 motion court's Findings ruled only on Movant's amended motion claims and not his attached pro se claims (which were permissible to attach to an amended motion prior to Jan. 1, 2017), the judgment is not final, and the appeal must be dismissed; a final judgment disposing of all claims is a prerequisite to appeal.

Gates v. State, 2018 WL 605249 (Mo. App. W.D. Jan. 30, 2018):
Holding: Even though 24.035 Movant claimed on appeal that motion court – as the remedy for his *Bazell* claim regarding his felony stealing conviction under 570.030 – should have reduced his conviction to a misdemeanor rather than vacated his guilty plea, where – while his appeal was pending -- Movant pleaded guilty to receiving stolen property in his underling criminal case, his appeal as to 24.035 remedy was moot.

Discussion: Movant's guilty plea to the amended charge of receiving stolen property makes it impossible to grant the requested relief of resentencing as a misdemeanor on the original charge. Any opinion we might issue as to the motion court's authority to vacate the original guilty plea when that remedy was not sought by Movant would have no practical effect, since Movant has voluntarily agreed to an alternative resolution of his criminal case by pleading guilty to receiving stolen property. Appeal dismissed as moot.

Fields v. State, 2018 WL 1061592 (Mo. App. W.D. Feb. 27, 2018):
(1) Even though incarcerated Rule 29.15 Movant filed her pro se motion four years late, where she alleged that before it was originally due, she mailed her motion to her direct appeal attorney, who promised to file it for her but did not, these facts, if true, would allow Movant to use "third-party interference" doctrine to excuse the untimely filing because did all she could do to file her motion on time; and (2) even though Movant waited a long time to discover that her motion was never filed, her lack of diligence does not defeat a "third-party interference" claim.
Facts: Movant was incarcerated. Her *pro se* Rule 29.15 motion was due in 2013. Because Movant was experiencing some problems with the prison mail, her direct appeal attorney told her to mail her pro se motion to him, and he would file it. Movant mailed her motion before the deadline, but the attorney apparently never filed it. When Movant filed a *pro se* motion four years later, she sought to use the "third-party interference" doctrine to excuse the untimeliness. The motion court dismissed as untimely.
Holding: (1) Movant's alleged facts, if proven, would be sufficient to invoke the "third-party interference" exception to timeliness. By preparing her motion and sending it to counsel within the original time limit, incarcerated Movant took all steps she could within the time limitations to see that her motion was filed on time. (2) Even though Movant did not act diligently thereafter to find out what happened to her motion, the length of the inmate's tardiness is irrelevant, because once the original deadline was missed, Movant "completely waived" her 29.15 rights, absent an exception to timeliness. Nothing Movant did after the original deadline could have cured the "complete waiver" which occurred. Other cases have allowed an inmate to claim "third-party interference" more than 15 years after an initial *pro se* motion was dismissed as untimely. Case remanded for hearing on "third-party interference."

Carter v. State, 2018 WL 1061688 (Mo. App. W.D. Feb. 27, 2018):
Holding: Where (1) 24.035 counsel was appointed June 3 and requested a 30-day extension of time to file an amended motion, but the record does not reflect that the court ever ruled on the extension request, and (2) the guilty plea and sentencing transcript was filed on July 22, the amended motion was due 60 days after July 22, and the motion filed afterwards was untimely; case remanded for abandonment hearing.

Watson v. State, 2018 WL 1061729 (Mo. App. W.D. Feb. 27, 2018):
Holding: (1) Even though 24.035 motion court dismissed motion by docket entry which was not signed by judge, an order disposing of a 24.035 or 29.15 motion need not be denominated a "judgment" or signed by judge to be "final" for appeal; (2) even though the motion court did not issue Findings, and summarily denied the timely-filed Rule 78.07(c) motion requesting Findings (which would be error), appellate court will not

reverse for Findings because Movant has not raised this issue on appeal; and (3) even though a claim that a sentence is "in excess of the maximum authorized by law" is procedurally cognizable under 24.035, Movant cannot prevail on his timely-filed 24.035 claim that his stealing conviction violated *Bazell* because *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017), held that *Bazell* "applies prospectively only, except in those cases pending on direct appeal."

Strickland v. State, 2017 WL 2332754 (Mo. App. W.D. May 30, 2017):
Holding: (1) Where Rule 24.035 allowed pro se claims to be physically attached to an amended motion, and pursuant to a local e-filing rule, counsel uploaded the pro se claims as an attachment to the amended motion and the amended motion expressly incorporated those claims, the contemporaneous uploading of the amended motion and attachment is the functional equivalent of physically attaching the pro se claims; and (2) where motion court failed to rule on the pro se claims, appeal is dismissed for want of a final judgment under Rule 74.01(b).

Editor's note: Amended Rule 24.035(g), effective Jan. 1, 2017, now prohibits incorporation of pro se claims by attachment.

Shoate v. State, 2017 WL 2778059 (Mo. App. W.D. June 27, 2017):
Holding: Where (1) 24.035 Movant's amended motion raised various claims regarding sentencing and the prayer for relief requested vacating the sentences (among other relief); and (2) the motion court vacated the sentences and ordered resentencing, the appeal must be dismissed because Movant is not an "aggrieved or injured party," which is a necessary prerequisite for appeal; this is true even though Movant apparently wanted the motion court to impose concurrent sentences as the remedy, rather than vacate the sentences for resentencing. Movant received the relief he requested in his amended motion.
Discussion: Movant argues the relief granted was too broad. The right to appeal is purely statutory. One must be an "aggrieved or injured party" in order to appeal. Here, Movant's amended motion requested, among other relief, vacation of his sentences. The motion court ultimately vacated the sentences (though on somewhat different grounds that Movant sought), so Movant got what he requested. He cannot appeal from a judgment in his favor. Movant's real concern is that he will receive a longer sentence on re-sentencing, and seeks by appealing to place a limitation on the court's discretion at resentencing. But Movant cannot complain about receiving the relief he requested in his amended motion. The speculative possibility that Movant might receive a longer sentence does not make him an aggrieved party for appeal.

In re: Lincoln v. Cassady, 2016 WL 588944 (Mo. App. W.D. Oct. 11, 2016):
Missouri does not recognize a freestanding claim of actual innocence in habeas corpus except in death penalty cases due to Sec. 565.035.3, which requires review of the strength of the evidence in death penalty cases.
Facts: Petitioner was convicted of manslaughter in 1983 based on Child's shaky identification testimony and a pubic hair at the scene that allegedly "matched" Petitioner. In 2005, DNA testing showed that the hair was not Petitioner's, but the appellate court did not grant relief under the DNA statute, Sec. 547.037, because the DNA testing did not establish "actual innocence," in that the hair was not the "determinative factor" in

Petitioner's conviction; rather, the Child's identification was. In 2015, Child recanted her identification testimony, and said she had been pressured into identifying Petitioner. Petitioner filed a state habeas corpus action alleging, among other claims, a "freestanding" claim of actual innocence.
Holding: The Missouri Supreme Court recognized a freestanding claim of actual innocence in the death penalty case of *State ex rel. Amrine v. Roper*, 103 S.W.3d 541 (Mo. banc 2003). The basis of *Amrine* is that executing an innocent person is manifestly unjust, and that Sec. 565.035.3 (regarding death penalty proportionality review) requires a review of the strength of the evidence in death penalty cases. *Amrine* did not broadly recognize a freestanding claim of actual innocence in non-death penalty cases. Here, Petitioner had a constitutionally adequate trial. Petitioner contends that the continued incarceration of an innocent person violates due process, but the Missouri Supreme Court has not yet found such a right. Further, even if new evidence clearly and convincingly establishes actual innocence, that is not alone sufficient to establish manifest injustice. Habeas relief must be limited in order to avoid unending challenges to final convictions. Habeas relief denied.

Larsen v. Union Pacific Railroad Co., 2016 WL 4480770 (Mo. App. W.D. Aug. 23, 2016):
Holding: Rule 78.08's plain error provision can be used to raise issue of Juror nondisclosure after time for filing New Trial Motion has expired.

Gray v. State, 2016 WL 4538084 (Mo. App. W.D. Aug. 30, 2016):
(1) Where Defendant had completed a prior sentence and was no longer detained on it (but was seeking to set it aside because it was being used to enhance a federal charge), Rule 29.07(d) might be available to correct manifest injustice (but there was no manifest injustice here); (2) denial of Rule 29.07(d) motions are appealable where filed after sentencing.
Discussion: (1) Rule 29.07(d) does not have a time limit on when a guilty plea can be withdrawn after sentence to correct manifest injustice. However, Rule 29.07(d) is not a substitute for Rule 24.035 or Rule 91 habeas corpus. If a defendant raises claims that could have been raised in a Rule 24.035 motion, the claims are generally waived unless Rule 91 habeas relief is available. Here, Defendant is not eligible for habeas relief because he has completed his sentence. It is "not at all clear" that 29.07(d) relief is not available to prevent manifest injustice where a defendant has completed a sentence and is no longer detained. However, here the claims raised do not result in manifest injustice. (2) The State argues a Rule 29.07(d) motion is not appealable, but this Court has previously held that they are appealable where filed after sentencing.

In re Kory v. Gray, 2016 WL 66504 (Mo. App. W.D. Jan. 5, 2016):
(1) Even though State dismissed prior felony charges and filed a new information charging Incident Crime as a misdemeanor, where Defendant had been held in jail for 532 days on prior felony informations or complaints regarding the same Incident Crime, Defendant was entitled to 532 days jail time credit under 558.031.1, since all the service of jail time was related to the misdemeanor; (2) it would be futile for habeas petitioner

(Defendant) to file his habeas petition in lower court where judge had already denied him jail time credit, so Defendant has good cause to file directly in appellate court.
Facts: In 2014, Defendant was charged with a felony and incarcerated in jail for a Criminal Incident. In Summer 2015, the State dismissed the information but filed a new felony complaint the same day about Incident. In December 2015, the State dismissed the complaint and filed an amended information charging Incident as a misdemeanor. Defendant pleaded guilty and was sentenced to one year in county jail. The trial court refused to grant him jail time credit. He filed a writ of habeas corpus.
Holding: (1) Sec. 558.031.1 does not apply only to felony convictions or confinement in DOC; it applies to any confinement following conviction. 558.031.1 provides that a person shall receive jail time credit when the prior time in custody is "related to" the offense. Time is custody is "related to" a sentence if the inmate could have been free from custody absent the charge. Here, Defendant would have been free from custody absent the earlier 2014 information and 2015 complaint about same Incident. The successive charges filed by a single prosecuting entity on the same nuclear of facts resulted in time in custody that was "related to" the ultimate offense of conviction. **(2)** Rule 91.02(a) provides that a habeas petition shall be filed in the circuit court unless good cause is shown to file first in higher court. Here, Defendant would have had to file his petition in circuit court in front of same judge who denied him jail time credit. This would be futile. Thus, Defendant has good cause to file directly in appellate court. Habeas granted.

State ex rel. Royal v. Norman, 2016 WL 215236 (Mo. App. W.D. Jan. 29, 2016):
Habeas relief granted reducing conviction from felony to misdemeanor, where Defendant had pleaded guilty to tampering with a victim in an underlying misdemeanor case; Sec. 575.270.3 makes witness tampering a felony only if the underlying case is a felony.
Facts: Defendant pleaded guilty to third degree domestic assault, a misdemeanor. Later, he was charged with the Class C felony of tampering with a victim, involving the victim from the misdemeanor case. He was ultimately sentenced to seven years for victim tampering. He sought a writ of habeas corpus.
Holding: Sec. 575.270.3 provides that witness tampering "is a class C felony if the original charge is a felony. Otherwise, tampering … is a class A misdemeanor." Imposition of a sentence beyond that permitted by the applicable statute may be raised via habeas corpus. Here, his sentence exceeds that permitted by Sec. 575.270.3. The lower court is ordered to amend the conviction to a misdemeanor and sentence accordingly.

State ex rel. Koster v. Oxenhandler, 2016 WL 1039446 (Mo. App. W.D. March 15, 2016):
(1) Even though Defendant (Petitioner) had previously been denied habeas relief in another county, Rule 91 does not prohibit a successive habeas petition in a different county where Defendant had been moved; (2) even though the issue on which Defendant obtained habeas relief may not have been pleaded in his petition, Rule 96.01(a) authorizes a court to grant habeas relief "although no petition be presented;" (3) where the trial court ordered an NGRI evaluation before Defendant had filed a notice of intent to rely on NGRI, the trial court erroneously injected the issue of NGRI itself (without

having been raised by Defendant) and had no authority to accept the NGRI plea and commit Defendant to DMH; (4) while there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident; (5) although an on-the-record NGRI plea hearing may not be required in every case, it is a "best practice" that is "strongly encouraged" to ensure the plea is knowing and voluntary, to ensure that there is no other defense, and to ensure the defendant understands the consequences of the plea; (6) the "escape rule" does not apply to Rule 91 proceedings, or does not apply here as a matter of discretion; and (7) the trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination.

Facts: In 2004, Defendant was charged with assault. Subsequently, various DMH reports found him incompetent to proceed. In 2006, DMH found him competent. In April 2007, apparently at the request of the court, DMH also prepared a criminal responsibility report which found that Defendant was NGRI at the time of his offense; the report also stated Defendant's version that the offense was an accident. On July 9, 2007, various bench notes indicate that Defendant filed notice of intent to rely on NGRI that day, and notice that he had no other defense. Also on July 9, 2007, bench notes indicate that the court accepted Defendant's NGRI plea, and committed him to DMH. In 2011, Defendant escaped from DMH in St. Louis; he was soon recaptured. While in St. Louis, Defendant sought habeas relief from his NGRI plea in St. Louis, which was denied. Defendant was transferred to Fulton (Callaway County). He then sought habeas relief from his NGRI plea in Callaway County. The habeas court granted relief on multiple grounds. The habeas court refused to apply the "escape rule." The habeas court also awarded "jail time credit" for all time Defendant spent in DMH. The State appealed.

Holding: (1) As an initial matter, the State argues that Defendant's Callaway petition is precluded because of the decision on the merits in the St. Louis habeas case. However, Rule 91 does not expressly prohibit the filing of successive habeas petitions in lower courts. (2) The State argues that Defendant's claim was not presented in his petition, but Rule 91.06(a) allows granting of habeas relief even without a petition. (3) Although Sec. 552.030 does not require that a NGRI plea be taken in open court on-the-record, and does not require that a Defendant personally sign the notice that he has no other defense, the plea court here violated due process by not following the required order of the statute. The statute requires that *before* a court can accept an NGRI plea, (i) the Defendant must first inject the issue by timely filing a notice of intent to rely on NGRI; (ii) thereafter, the trial court must order a criminal responsibility evaluation; (iii) the defendant must have no other defense *and* must file a written notice to that effect; and (iv) the criminal responsibility evaluation must support the NGRI defense. Here, the responsibility report was not an authorized pretrial evaluation because it was ordered off-the-record *before* Defendant had asserted his NGRI defense. Also, the report did not support the NGRI defense since it contained Defendant's assertion that the crime was an accident, which was in conflict with Defendant's written notice that he had no other defense, thus raising an issue whether Defendant had a defense he was not willing to waive. By requiring Defendant to submit to a criminal responsibility evaluation before he had asserted the NGRI defense, the trial court erroneously injected the defense itself. The court then

accepted the NGRI plea on the very day it was asserted – a procedural impossibility if Secs. 552.020.4 and 552.030.3 are followed, since both sections mandate (and only authorize) the preparation of a responsibility report *after* the NGRI defense is timely asserted *by the accused*. Unless the affirmative defense of NGRI is injected by the accused, the trial court has no authority to acquit of NGRI. (4) A defendant can waive the procedural irregularity of a premature responsibility report; however, to preclude later habeas relief, the court and State should make certain that the defendant's knowing, intelligent and voluntary waiver of the procedural irregularity is demonstrated in the record. While there is no general requirement under Sec. 552.030 that an NGRI plea be on-the-record, an on-the-record inquiry was necessary here to resolve the doubt created by the conflict between Defendant's assertion that he had no other defense, and the NGRI report itself wherein Defendant claimed the crime was an accident. (5) Though the appellate court does not decide whether an on-the-record NGRI plea is needed in *every* case, "we *strongly* encourage the practice." An on-the-record inquiry would ensure that the accused's plea is knowing and voluntary, that he has no other defense, and the he understands the consequences of a plea, including that he may be committed to DMH for longer than a prison term. (6) The "escape rule" does not apply to Rule 91 proceedings, but even if it does, it need not be applied here as a matter of discretion; there is no indication that Defendant's escape adversely affected the criminal justice system. (7) The trial court was without authority to award "jail time credit," since Sec. 558.031 makes that an administrative matter, not one for judicial determination. Judgment setting aside NGRI plea and remanding case for trial affirmed.

*** Banister v. Davis, ___ U.S. ___, 140 S.Ct. 1698 (U.S. June 1, 2020):**
Holding: A timely Rule 59(e) motion filed after a habeas judgment to alter or amend that judgment prior to appeal is not a prohibited successive or second habeas petition.

* **Shinn v. Kayer, ___ U.S. ___, 141 S.Ct. 517 (U.S. Dec. 14, 2020):**
Holding: Under AEDPA, 9th Circuit impermissibly substituted its own judgment for State court's and was not deferential to State court judgment (which denied claim that death penalty counsel was ineffective in failing to investigate mitigation), where fair-minded jurists could disagree as to whether *Strickland* standard was met; AEDPA precludes granting relief on any claim adjudicated in State court on the merits unless the adjudication resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law as decided by U.S. Supreme Court.

* **Wilson v. Sellers, ___ U.S. ___, 138 S.Ct. 1188 (U.S. April 17, 2018):**
Holding: A federal habeas court reviewing an unexplained state high court decision for reasonableness should 'look through' the unexplained decision to the last state court decision that did offer a rationale.

*** Sexton v. Beaudreaux, ___ U.S. ___, 138 S.Ct. 2555 (U.S. June 28, 2018):**
Holding: (1) Ninth Circuit, on federal habeas review, failed to sufficiently defer to state court ruling denying ineffective counsel claim; (2) when a state court summarily denies a claim, the federal court must determine what arguments or theories could have supported the state court's decision, and then ask whether it is possible fair-minded jurists could

disagree with them; if such disagreement is possible, then the petitioner's claim must be denied.

* **Tharpe v. Sellers, ___ U.S. ___, 138 S.Ct. 545 (U.S. Jan. 8, 2018):**
Holding: Even though state court had determined that habeas Petitioner (who was black) failed to present clear and convincing evidence that allegedly racist Juror's presence on the jury had prejudiced him, where Petitioner presented an affidavit from Juror in which Juror made racist remarks about blacks and Petitioner (but denied that his views affected his verdict), lower court erred in denying a certificate of appealability because jurists of reason could debate whether Petitioner has shown by clear and convincing evidence that the state court's factual determination finding no prejudice was wrong.

*** Jenkins v. Hutton, ___ U.S. ___, 137 S.Ct. 1769 (U.S. June 19, 2017):**
Holding: Habeas court misapplied standard of review under *Sawyer v. Whitley* for determining if defaulted claim can be considered in federal habeas. *Sawyer* requires a habeas petitioner show that but for a constitutional error (regarding the defaulted claim), no reasonable juror would have found him eligible for the death penalty. The habeas court instead considered whether the alleged error might have affected the jury's verdict.

*** Davila v. Davis, ___ U.S. ___, 137 S.Ct. 2058 (U.S. June 26, 2017):**
Holding: *Martinez v. Ryan*, which allows some procedurally defaulted habeas corpus claims to be heard if state postconviction counsel was ineffective in failing to raise them, does not extend to provide cause to excuse the procedural default of ineffective assistance of appellate counsel claims. *Martinez* was concerned with the unique importance of protecting a defendant's trial rights, particularly the right to effective trial counsel.

*** Johnson v. Lee, ___ U.S. ___, 136 S.Ct. 1802 (U.S. May 31, 2016):**
Holding: State rule, which procedurally defaults claims raised for the first time in collateral review that could have been raised on direct appeal, bars federal habeas review of those claims; federal habeas courts should refuse to hear claims defaulted in state court pursuant to an independent and adequate state procedural ground.

* **Welch v. U.S., ___ U.S. ___, 136 S.Ct. 1257 (U.S. April 18, 2016):**
Holding: *Johnson v. U.S.*, which held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, is retroactive to cases on collateral review.

* **Woods v. Etherton, ___ U.S. ___, 136 S.Ct. 1149 (U.S. April 4, 2016):**
Holding: Sixth Circuit applied incorrect standard of review of federal habeas claims in granting habeas relief; AEDPA permits relief only if a state court's decision is "contrary to, or involved an unreasonable application of, clearly established federal law," as determined by the U.S. Supreme Court; here, the Sixth Circuit held, in part, that a Confrontation Clause violation occurred when police officers at trial had been permitted to repeatedly testify about an anonymous tip – the repetition showing that the tip was offered for its truth, not merely background information; no U.S. Supreme Court case had so held; furthermore, AEDPA requires that federal habeas courts be "doubly deferential"

on a claim of ineffective assistance of counsel for failing to appeal the alleged Confrontation Clause violation.

*** Kernan v. Hinojosa, ___ U.S. ___, 136 S.Ct. 1603 (U.S. May 16, 2016):**
Holding: Where (1) a state lower court denied a habeas claim on grounds that it was filed in the wrong court (improper venue) and (2) the state supreme court subsequently denied a writ of habeas corpus summarily without explanation, the federal courts were not allowed to "look through" the state supreme court opinion to the lower court opinion and determine that since it was not an opinion "on the merits," AEDPA deference did not apply. While there is a presumption that when the last state court is silent as to a procedural default, then it was applying the same procedural default as the last reasoned state opinion, that presumption can be rebutted; here, the presumption was rebutted because the state supreme court would have had proper venue. Therefore, the state supreme court must have denied the claim "on the merits," and AEDPA deference applies.

Fernandez v. Capra, 916 F.3d 215 (2d Cir. 2019):
Holding: State court unreasonably determined that Witness' recantation wasn't credible; state court said Witness was "trying too hard to be convincing" and placed too much emphasis on the delay in recantation, but Witness explained how he feared getting in trouble with law.

Carranza v. U.S., 97 Crim. L. Rep. 559 (2d Cir. 7/21/15):
Holding: Even though Defendant had a prior habeas petition denied on the merits, his second petition was not a prohibited "successive" one under 2255(h), where the second petition did not seek to set aside his conviction or sentence, but only sought reinstatement of his direct appeal, which had been dismissed allegedly because direct appeal was ineffective in failing to file a brief.

Lewis v. Conn. Com'r of Corrections, 2015 WL 3823858 (2d Cir. 2015):
Holding: State court unreasonably applied federal law in holding that Defendant was required to exercise due diligence to discover *Brady* evidence which the State withheld; here, State failed to disclose that its chief witness had previously repeatedly denied knowledge of the murder, that police had coached the witness about the details of the murder, and that police had induced witness to testify falsely to secure his release from custody.

Gonzalez v. U.S., 2015 WL 40385552 (2d Cir. 2015):
Holding: The one-year period for filing a habeas petition began to run only when district court entered a revised restitution order on remand from the Court of Appeals' opinion affirming the conviction and sentence but remanding for recalculation of restitution.

Satterfield v. Dist. Atty. Philadelphia, 101 Crim. L. Rep. 658 (3d Cir. 9/26/17):
Holding: Where Petitioner's habeas was denied as untimely before the U.S. Supreme Court's decision in *McQuiggin v. Perkins* (regarding timeliness of actual innocence

claims), Petitioner would be granted relief under Rule 60(b)(6) and be able to proceed to further review.

U.S. v. Peppers. 103 Crim. L. Rep. 19 (3d Cir. 8/13/18):
Holding: Petitioner can file a second habeas petition to challenge his sentence after U.S. Supreme Court's ruling finding definition of "violent felony" to be unconstitutionally vague.

Reeves v. Fayette SCI, 103 Crim. L. Rep. 408 (3d Cir. 7/23/18):
Holding: Petitioner can file late habeas petition if the evidence meets the standard of "actual innocence," and the evidence may qualify as "new" if trial counsel was ineffective in failing to investigate or present the evidence.

In re Com.'s Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia, 2015 WL 3634888 (3d Cir. 2015):
Holding: Proceedings brought by State to disqualify federal public defender from representing persons in state postconviction proceedings was preempted by federal law, regardless of whether the public defender was authorized to use Criminal Justice Act grants for state postconviction.

Washington v. Sec'y Pa. Dept. of Corrections, 97 Crim. L. Rep. 691 (3d Cir. 9/1/15):
Holding: State court unreasonably applied federal law in refusing to look beyond the four corners of a nontestifying co-defendant's redacted confession in determining whether Confrontation Clause was violated.

Han Tak Lee v. Houtzdale, 2015 WL 4925993 (3d Cir. 2015):
Holding: Petitioner was entitled to habeas relief where his conviction was based on fire-science (arson) and gas-chromatography evidence that was later discredited in the scientific community.

Woodfolk v. Maynard, 101 Crim. L. Rep. 204 (4th Cir. 5/23/17):
Holding: Petitioner showed "exceptional circumstances" to overcome procedural default to federal habeas.

U.S. v. Wheeler, 103 Crim. L. Rep. 11 (4th Cir. 3/28/18):
Holding: Where there is a retroactive change in circuit law that potentially lowers prisoners' minimum sentences, the prisoners may seek federal habeas relief under the "savings clause" where normal habeas relief is no longer available.

Fontanez v. O'Brien, 98 Crim. L Rep. 226 (4th Cir. 12/2/15):
Holding: Petitioner could challenge via federal habeas the way the Bureau of Prisons took money from his inmate account to pay court-ordered restitution; the payments qualified as a challenge to "execution" of sentence for purposes of 28 USC 2241.

Hatfield v. Osborne, 2015 WL 9213859 (5th Cir. 2015):
Holding: Even though Defendant's habeas petition began under Sec. 2241 because he was pretrial (in that he had been held without a valid state court judgment for 30 years), where he was finally tried in state court, he was in custody pursuant to a state court judgment, so Sec. 2254 applied.

In re Chase, 98 Crim. L. Rep. 123 (5th Cir. 10/26/15):
Holding: Even though Petitioner's pre-*Atkins* petition alleged that counsel was ineffective in failing to raise certain intellectual disability claims, Petitioner was not precluded from filing a second post-*Atkins* petition to allege he cannot be executed due to intellectual disability; the pre-*Atkins* petition was not the same claim.

Braden v. U.S., 2016 WL 909357 (6th Cir. 2016):
Holding: Defendant's pro se petition to vacate was not superseded by amended petition filed by counsel where the amended petition stated that it supplemented the pro se claims and did not abrogate them; thus, court was required to consider the pro se claims, too.

King v. Morgan, 98 Crim. L. Rep. 223, 2015 WL 7729363 (6th Cir. 12/1/15):
Holding: Where Petitioner had previously filed a habeas petition in which he won sentencing relief and was resentenced, he could file a new habeas petition from the resentencing which attacked the underlying conviction, even though these claims could have been raised in the first habeas petition; the new petition is not a prohibited "second or successive" under AEDPA, because when a successful petition leads to a new judgment, the first petition that follows the new judgment is not "second or successive," even if it raises claims that could have been raised in the first petition.

In re Caldwell, 2019 WL 1087329 (6th Cir. 2019):
Holding: Where Defendant had two different convictions and sentences on the same day, and previously filed a habeas case regarding Conviction No. 1, his later habeas petition regarding Conviction No. 2 was not a prohibited "successive" petition because the convictions being challenged in each habeas case are separate.

Schmid v. McCauley, 2016 WL 3190670 (7th Cir. 2016):
Holding: Where state prisoner suffered from mental problems, this warranted appointment of counsel to determine whether his mental disability equitably tolled the limitations period for filing a federal habeas.

Donelson v. Pfister, 98 Crim. L. Rep. 421 (7th Cir. 1/28/16):
Holding: Where state court had denied postconviction relief because Defendant had not torn off part of a required postconviction form along a "dotted line" as indicated on the form, this was a ruling that carried "bureaucratic concerns" to an "unreasonable extreme," and was not an adequate and independent state ground to bar seeking federal habeas relief.

Jason v. Clements, 97 Crim. L. Rep. 690 (7th Cir. 9/8/15):
Holding: (1) Forfeiture by wrongdoing exception requires that Defendant kill victim to prevent her from testifying; thus, even though Wife-Victim wrote letter saying Husband-Defendant wanted to kill her, admission of letter violated Confrontation Clause since Husband did not kill Wife to prevent her from testifying; (2) state court unreasonably applied federal law in deciding admission of letter was harmless because State's evidence was sufficient to convict without it; harmless error analysis requires consideration of the defense evidence, too, and how the verdict was impacted by admission of the letter.

Ramirez v. U.S., 2015 WL 5011965 (7th Cir. 2015):
Holding: Defendant was abandoned by postconviction counsel who missed deadline to appeal the denial of his motion to vacate.

Turner v. Baker, 912 F.3d 1236 (9th Cir. 2019):
Holding: Amended sentencing judgment constituted a new judgment under state law, so Petitioner's habeas petition after that judgment was not a prohibited successive petition under AEDPA.

Clayton v. Biter, 101 Crim. L. Rep. 575 (9th Cir. 2/21/17):
Holding: Where California law makes a denial of a sentence reduction the equivalent of a "new sentence," the federal habeas rule against "second or successive" petitions doesn't bar a new petition regarding the "new sentence."

Henry v. Spearman, 103 Crim. L. Rep. 460 (9th Cir. 8/6/18):
Holding: Petitioner can file second habeas petition to challenge sentencing enhancement under state law that may be unconstitutionally vague under U.S. Supreme Court's "violent felony" cases.

Washington v. Ryan, 99 Crim. L. Rep. 622 (9th Cir. 8/15/16):
Holding: Even though death penalty defense counsel filed notice of appeal one day late, appellate court allows this to be corrected under Rule 60(b) by ordering district court to vacate and reenter judgment so the appeal could be considered timely; this relief was warranted because both defendant's co-defendants' had received relief from their death sentences, and tremendous disparity would result if defendant's death sentence were denied review.

Goodrum v. Busby, 2016 WL 3201489 (9th Cir. 2016):
Holding: The principle that a new pro se habeas petition filed while another petition is pending should be deemed a motion to amend the petition, as opposed to a prohibited successive motion, applies to filings in the district court and court of appeals, as well; thus, a second pro se filing in the court of appeals would be construed as a motion to amend the first petition.

Gimenez v. Ochoa, 99 Crim. L. Rep. 182 (9th Cir. 5/9/16):
Holding: Petitioners may seek federal habeas relief on basis of due process because of

flawed forensic evidence; such evidence includes forensics that are later found to be scientifically unreliable.

Mena v. Long, 2016 WL 625405 (9th Cir. 2016):
Holding: District court can stay and abey federal petition that raises only non-exhausted claims.

Rishor v. Ferguson, 99 Crim. L. Rep. 168 (9th Cir. 5/6/16):
Holding: A motion to reconsider under Rule 59 is not a prohibited "successive" petition, where the Rule 59 motion only seeks to reconsider a previously adjudicated claim.

Doe v. Ayers, 2015 WL 3389004 (9th Cir. 2015):
Holding: Petitioner should be allowed to use a pseudonym in the unsealing of his habeas proceeding, because the evidence was about repeated sexual assaults on Petitioner in prison, and there was expert testimony that Petitioner would be further assaulted in prison if his name were known.

Garcia v. Long, 2015 WL 9267557 (9th Cir. 2015):
Holding: Erroneous admission of Defendant's statements after he had invoked counsel under *Miranda* had substantial and injurious effect on jury in rape trial; even though Victim's testimony was detailed and powerful, it was not corroborated by physical evidence.

Foley v. Biter, 2015 WL 4231283 (9th Cir. 2015):
Holding: Federal habeas petitioner was abandoned by counsel where counsel failed to communicate with petitioner, threw away petitioner's letters under the mistaken belief counsel was no longer doing the representation, failed to notify petitioner that his petition was denied, and failed to appeal; this was true even though petitioner waited a long time to try to rectify the situation, because petitioner was under belief caused by counsel that there would be a long delay before receiving a decision from district court.

Crittenden v. Chappell, 98 Crim. L. Rep. 117, 2015 WL 6445531 (9th Cir. 10/26/15):
Holding: 9th Circuit *Batson* rule that prosecutor's strikes are unconstitutional if they are "motivated in substantial part" by race – even if there is also a secondary race-neutral reason – is retroactive.

Bastidas v. Chappell, 2015 WL 3972942 (9th Cir. 2015):
Holding: Denial of Petitioner's motion to stay and abey his habeas petition while he exhausted a state claim was dispositive as to the unexhausted claim; thus, magistrate judge lacked authority to issue a final order denying the motion absent Petitioner's consent, but was required to submit a recommendation to district court.

Nettles v. Grounds, 2015 WL 3406160 (9th Cir. 2015):
Holding: Even though Petitioner's due process claim challenging a prison disciplinary proceeding would not lead to his immediate release from prison, where he would have his

custody level lowered if his claim were successful, the claim was cognizable in federal habeas.

Lee v. Jacquez, 2015 WL 3559125 (9th Cir. 2015):
Holding: California's procedural rule that bars consideration of habeas claims that should have been considered on direct appeal was not consistently applied, and thus was inadequate to bar federal habeas review, even though the state rule was applied as much as 21% of the time.

Loftis v. Chrisman, 2016 WL 521076 (10th Cir. 2016):
Holding: Petitioner was entitled to equitable tolling of one-year habeas deadline where he had pursued a state postconviction appeal that was ultimately deemed untimely, but had reasonably relied on a lower state court ruling granting him an extension of time to file his appeal.

In re Encinias, 2016 WL 1719323 (10th Cir. 2016):
Holding: Petitioner can file second habeas petition to allege that residual clause of USSG regarding "crimes of violence" is unconstitutionally vague after *Johnson*.

Hogos v. Raemisch, 2015 WL 9466931 (10th Cir. 2015):
Holding: Even though Petitioner was serving two state life sentences and only challenged one in federal habeas, he satisfied the case or controversy requirement of Article III allowing the federal court to have jurisdiction, because he was challenging his other conviction in state postconviction; thus, his habeas application was a redressable claim, and habeas relief would also affect his custody status in prison and his eligibility for prison programs.

Westmoreland v. Warden, 2016 WL 1238241 (11th Cir. 2016):
Holding: Where Georgia authorized an "extraordinary motion for new trial" which could be filed after a direct appeal and which operated like a postconviction proceeding, this was an "application for state postconviction or other collateral review" which tolled the federal habeas time limit.

In re Johnson, 2016 WL 240362 (11th Cir. 2016):
Holding: The 30-day period for final disposition of Defendant's application for leave to file a successive postconviction motion is not mandatory; thus, the Court of Appeals has jurisdiction over the application beyond the 30-day timeframe of AEDPA.

Norris v. U.S., 99 Crim. L. Rep. 131 (11th Cir. 4/25/16):
Holding: Even though the trial transcript in African-American Petitioner's trial showed no evidence of racial bias, Petitioner was entitled to evidentiary hearing on his habeas claim that trial Judge harbored racial bias where he alleged that trial Judge had told a witness that he "had a difficult time" adjudicating cases involving blacks, and a government investigation had also shown that Judge "harbored racial bias."

Arvelo v. Sec'y Florida Dept. of Corrections, 2015 WL 3609351 (11th Cir. 2015):
Holding: State court's holding that Defendant waived any ineffective assistance of counsel claim merely by pleading guilty was contrary to clearly established federal law.

Woodfox v. Cain, 2015 WL 3549787 (M.D. La. 2015):
Holding: Defendant was entitled to unconditional release as remedy, where Defendant was granted habeas relief due to racial discrimination in selection of jury foreman at trial which took place 40 years ago, and lapse of time prejudiced Defendant's ability to present a defense because many witnesses were now dead.

Pouncy v. Palmer, 2016 WL 837168 (E.D. Mich. 2016):
Holding: Even though district court independently reviewed whether Petitioner validly waived counsel in State court in compliance with federal law, this did not violate the deferential review required by AEDPA; instead, this was just one step in determining whether State court unreasonably applied federal law.

Whitaker v. Dunbar, 2014 WL 7740267 (E.D. N.C. 2014):
Holding: Defendant was entitled to habeas relief on grounds of actual innocence of being a felon in possession of firearm, even though this wouldn't result in his earlier release from prison.

In re Richards, 2016 WL 3017139 (Cal. 2016):
Holding: "False evidence," for habeas relief, includes human bite mark testimony that has subsequently been found to be scientifically invalid either by later scientific research, or because the expert that gave the testimony has since repudiated it.

People v. Cotto, 2016 WL 2926359 (Ill. 2016):
Holding: Postconviction Movants are entitled to counsel who provide reasonable level of assistance, regardless of whether counsel is appointed or retained.

People v. Allen, 2015 WL 2410957 (Ill. 2015):
Holding: Inmate's "affidavit" confessing to a murder for which Defendant was convicted was not frivolous or patently without merit for purposes of initial postconviction review, even though it was not notarized and conflicted with some of the trial testimony.

Powers v. State, 103 Crim. L. Rep. 173 (Iowa 5/11/18):
Holding: Postconviction Movant is entitled to discovery of police reports that his alleged child sex Victim may (after Movant's trial) have made false similar sexual abuse allegations against others.

Caleb Corrothers v. State, 2015 WL 5667468 (Miss. 2015):
Holding: State was not entitled to reciprocal discovery from Petitioner before Petitioner's postconviction motion was filed; the State may obtain discovery only after a postconviction petition.

State v. Crawford, 865 N.W.2d 360 (Neb. 2015):
Holding: The one-year time for filing a postconviction motion is not jurisdictional, but is an affirmative defense that can be waived if not raised by the State.

People v. Martin-Huerta, 2015 WL 2405401 (Colo. App. 2015):
Holding: Postconviction petitioner's untimely filing of postconviction petition could be excused, where his claim was that his attorney misadvised him of immigration consequences but he did not discover the adverse immigration consequences until the time for filing a timely petition had expired.

Hoever v. Florida Dept. of Corrections, 2015 WL 233300 (Fla. App. 2015):
Holding: The date on which a DOC staff member acknowledged receipt of an appeal did not conclusively refute inmate's allegation that he had submitted the appeal in a timely fashion, where there was no initialing process to show that the date of receipt was the same as the date inmate placed his appeal in the "grievance box."

People v. Coe, 2018 WL 638616 (Ill. App. 2018):
Holding: Fact that Defendant completed sentence before his postconviction evidentiary hearing did render the PCR proceeding moot.

In re Fero, 2016 WL 48216 (Wash. App. 2016):
Holding: Defendant was entitled to relief from his conviction where current medical science shows that infants can be conscious for long periods of time after an injury, as opposed to testimony at Defendant's 2003 trial that the infant's injury must have occurred at Defendant's home because the child lost consciousness there.

State v. Finley, 2015 WL 5725173 (Wis. App. 2015):
Holding: Reducing Defendant's sentence to the maximum he was incorrectly told he faced does not cure violation of Defendant's due process rights for entering a plea that was not voluntary, knowing and intelligent, because he was misinformed of the maximum punishment.

Com. v. Burton, 2015 WL 5076284 (Pa. Super. 2015):
Holding: The presumption that a litigant has access to information in the public domain and that they must exercise due diligence to obtain that information does not apply to a petitioner proceeding pro se in a postconviction proceeding; in the absence of counsel, it would not be presumed that petitioner had access to a co-defendant's motion in which the co-defendant claimed responsibility for the crime and exculpated petitioner; co-defendant had never previously given any indication he would acknowledge guilt.

Sanctions

State v. Zuroweste, 2019 WL 1446943 (Mo. banc April 2, 2019):
Holding: (1) The State violated Rule 25.03(C) by not timely disclosing until four days before trial inculpatory recorded jail phone calls made by Defendant because such recordings were "in the possession or control of other governmental personnel" and the Rule requires the State to use diligence and make good faith efforts to provide such material to Defendant; but (2) the trial court did not abuse discretion in not excluding the recordings because the discovery violation did not warrant the drastic sanction of exclusion and could have been remedied by granting a continuance; and (3) since Defendant did not request a continuance, the judgment of conviction is affirmed.
Discussion: (1) Rule 25.03(A)(2) requires the State to disclose recorded statements of a defendant. Rule 25.02 requires such disclosure be made within 10 days of Defendant's discovery request. Rule 25.03(C) provides that if the defense requests discovery of information that would be discoverable under the Rule if in possession or control of the State but which is "in the possession or control of other governmental entities," the State must use diligence and make good faith efforts to cause the material to be disclosed. Here, the State waited months after Defendant filed her discovery request to disclose the jail recordings, and did so only four days before trial. The State argues that Defendant could have obtained the recordings on her own. But the State's attempt to put responsibility on Defendant ignores the fundamental nature of a criminal prosecution. If the State seeks to deprive Defendant of her liberty, the State must fulfill its discovery obligations. The State clearly violated Rule 25.03(C) and the 10-day deadline mandated by Rule 25.02 for disclosure. (2) Rule 25.18 sets for the sanctions and remedies for a discovery violation. The Rule provides a court "may" grant a continuance, exclude the evidence, or order other appropriate relief. Here, Defendant asked only for exclusion of the evidence. She did not ask for a continuance. But the drastic remedy of exclusion is warranted only to prevent fundamental unfairness. Before ordering exclusion, a court must consider employing less severe remedies to address the prejudice, and achieve fundamental fairness for the Defendant and State. If Defendant truly needed additional time to investigate the recordings, a continuance would have remedied those concerns and any unfairness. Significantly, Defendant was out of custody and had requested continuances before. Another continuance would not have prejudiced her. Since she didn't ask for a continuance, the judgment of conviction is affirmed.

Holm v. Wells Fargo Home Mortgage, 2017 WL 7700979 (Mo. banc Feb. 28, 2017):
Holding: (1) Where Defendant had engaged in repeated obstructive discovery tactics, trial court did not abuse discretion in ordering as sanctions that Defendant would be precluded from presenting any evidence at trial, objecting to Plaintiff's evidence, and cross-examining Plaintiff's witnesses; but (2) even though Defendant waited until day of trial to demand a jury trial, trial court erred in denying one because Defendant had a constitutional right to have a jury determine the extent of actual and punitive damages.
Discussion: (1) Rule 61.01 gives trial courts significant discretion to impose "just" sanctions for discovery violations. Here, despite warnings by the trial court that sanctions could result, Defendant repeatedly failed to produce requested documents, misled the court and opposing counsel about the existence of documents, and repeatedly

failed to produce witnesses for deposition. Sanctions were not an abuse of discretion. (2) The trial court denied a jury trial because Defendant had never requested one until day of trial, and did not submit jury instructions. Mo. Const. Art. I, Sec. 22(a) states that the right to a jury trial "as heretofore enjoyed shall remain inviolate." Sec. 510.190.2 provides that a party may waive a jury trial by not appearing at trial; filing a written waiver; giving oral consent to a bench trial; or proceeding to bench trial without objection. These are the *exclusive* ways to waive a jury trial. A party need not demand a jury trial to preserve its right to a jury trial. Failing to affirmatively request a jury trial until the day of trial or submit jury instructions are not among the ways in which a jury trial can be waived. Even though the sanctions here effectively amounted to a judgment that Defendant was liable at trial, the right to a jury trial includes the right to have a jury determine damages. Imposition of sanctions does not strip a party of the right to have a jury determine damages. Case remanded for a jury trial on damages.

C.S.G. v. R.G., 559 S.W.3d 416 (Mo. App. E.D. Oct. 23, 2018):
Holding: (1) Even though trial court may have lacked statutory authority to order Defendant to pay Plaintiff's mortgage in order of protection case, this did not deprive the court of subject-matter jurisdiction and Defendant's only remedy was to pursue a direct appeal; Defendant could not later collaterally attack the order after Plaintiff sought civil contempt and the court sought indirect criminal contempt for failure to pay; (2) on remand, the court is directed to enter a judgment of civil contempt but before ordering a jail sentence must convince itself of Defendant's ability to pay, or create a non-imprisonment remedy that would allow Defendant to purge himself of the contempt.
Discussion: (1) Defendant claims he cannot be held in contempt because the trial court's order directing him to pay the mortgage was not statutorily authorized. However, this is an impermissible collateral attack on that judgment. Defendant could have taken a direct appeal from the judgment, but did not. A contempt proceeding cannot be used to collaterally attack the judgment. The underlying judgment can only be attacked if it is void for lack of personal or subject matter jurisdiction. Here, Defendant claims only that the trial court lacked statutory authority. But even if true, the trial court had both personal and subject matter jurisdiction. (2) An order of contempt must specify how Defendant can purge himself of the contempt. Inability to pay is an affirmative defense that must be raised by Defendant. However, the coercive purpose of imprisonment for civil contempt is frustrated if Defendant does not have a key to the jailhouse door. Before the trial court can enter a civil contempt order committing Defendant to jail for failure to pay, it must convince itself that Defendant has ability to pay. If the court cannot convince itself that Defendant has ability to pay, the court must fashion a different remedy to allow Defendant to purge himself of contempt.

Francis v. Wieland, 2017 WL 770965 (Mo. App. W.D. Feb. 28, 2017):
Holding: Where trial court had said it would hold a hearing on whether to impose sanctions on counsel for pretrial discovery abuse, but then imposed them without a hearing, fundamental fairness requires case be remanded for a hearing.

* **Timbs v. Indiana, ___ U.S. ___, 139 S.Ct. 682 (U.S. Feb. 20, 2019):**
Holding: The 8th Amendment's excessive fines clause applies to the States through the 14th Amendment's due process clause; thus, drug Defendant can challenge the civil forfeiture of his vehicle under 8th Amendment as grossly disproportionate to his offense.

Carrick v. State, 2016 WL 903774 (Ark. 2016):
Holding: Court cannot impose contempt for Defendant's failure to hire an attorney, because this denies the right to self-representation.

State v. De La Portilla, 98 Crim. L. Rep. 143 (Fla. 11/5/15):
Holding: Failure to appear in court is "indirect contempt," not "direct contempt;" thus, Defendant must be given an opportunity to appear before the judge and explain the reasons why he failed to appear.

In re Neary, 102 Crim. L. Rep. 154 (Ind. 11/6/17):
Holding: Prosecutor disciplined for secretly listening to private attorney-client conversations at police station; this violated (Indiana) professional rules 4.4(b)(using evidence gathering methods that violate third person's legal rights) and 8.4(d)(conduct prejudicial to justice).

State v. Jones, 2015 WL 5081133 (Minn. 2015):
Holding: Violation of probation is not, standing alone, subject to criminal contempt because of term of probation is not a court mandate.

State v. Williams, 2015 WL 5061254 (Alaska App. 2015):
Holding: Even though state statute may give Executive branch the power to initiate criminal contempt proceedings for failing to comply with a court order, the ultimate authority over whether such a charge can proceed lies with the court whose order has been violated; the Executive branch cannot force a court to adjudicate a criminal contempt that the court does not believe is warranted.

People v. Landers, 2019 WL 181485 (Cal. App. 2019):
Holding: Trial court's post-trial imposition of sanctions on defense counsel on grounds that his cross-examination of a witness was a sham (because court believed the witness was really a friendly defense witness) violated due process, where Prosecutor had not objected on such grounds and trial court did not give any warnings to attorney during the trial itself.

Search and Seizure – Suppression of Physical Evidence

State v. Smith, 2020 WL 203155 (Mo. banc Jan. 14, 2020):
Holding: Where Defendant's tires crossed the "fog line" and drove on the shoulder, this constituted a traffic violation under Sec. 304.015 which justified Officer stopping the car; thus, this seizure and subsequent search (after smelling marijuana) did not violate 4th Amendment.

Greene v. State, 2019 WL 4149485 (Mo. banc Sept. 3, 2019):
Police do not need warrant to search a cigarette pack found in Defendant's pocket when he was arrested, even though Defendant was separated from the pack and Police delayed in searching the pack; a search of a person incident to arrest is different than search of an area within the arrestee's immediate control, and (unlike an area) requires no additional justification; statements in State v. Carrawell, 481 S.W.3d 833 (Mo. banc 2016), to the contrary should no longer be followed.
Facts: Defendant was arrested a motel for suspected drug activity. He was handcuffed and put on the ground. Police removed a cigarette pack from his pocket. About 30 minutes later, police searched it and found drugs. In a later Rule 29.15 motion, Defendant claimed his defense counsel was ineffective in failing to move to suppress the drugs.
Holding: The U.S. Supreme Court has distinguished between search of a *person* incident to arrest, and search of a *vehicle's compartment* incident to arrest, i.e., search of the area within the arrestee's immediate control. A warrantless search of an arrestee's person incident to arrest requires no additional justification. By contrast, search of an area within an arrestee's control can occur without a warrant only when an arrestee is unsecured and within reaching distance of the property. This case involves search of a person incident to arrest, so it was permissible for police to search the cigarette pack found on Defendant in his pocket without a warrant, even if they did not search it until later. Since there would have been no valid basis to suppress the cigarette pack, defense counsel wasn't ineffective.

State v. Hughes, 563 S.W.3d 119 (Mo. banc Dec. 18, 2018):
Holding: (1) Taking a motion to suppress evidence "with the case" during a bench trial largely negates the purpose of a motion to suppress, one of which is to avoid delays during trial in determining the issue, but since the parties didn't object to the procedure, any error in failing to rule on the motion before trial is not preserved; (2) even though defense counsel stated "no objection" during the bench trial to introduction of evidence that was the subject of the motion to suppress, this did not waive the claim under the facts of this case because under the mutual understanding doctrine, the parties understood that this meant no objection other than those stated in the motion to suppress; however, this should be avoided by making objections to admission of contested evidence during the bench trial and having the motion to suppress ruled before trial; but (3) there was no prejudice in denying the motion to suppress because defense counsel introduced evidence through questioning of police (about whether they found drugs in Defendant's property) or stipulated to other evidence (lab reports) which proved Defendant's guilt; Defendants

waive any objections to evidence made part of the record through their own questioning even if counsel's actions in doing so were strategic.

State v. Pierce, 2018 WL 2928086 (Mo. banc June 12, 2018):

(1) Even though the sentencing judge erroneously believed that persistent offender status increases the minimum sentence (when it increases only the maximum sentence), where the judge explained that he was sentencing Defendant to prevent recidivism, Defendant must show that the judge's mistaken belief as to the sentencing range played a significant part in the sentence imposed in order to receive plain error relief; here, the Defendant cannot meet that test because of the judge's statements about recidivism; and (2) Even assuming that Defendant did not "consent" to allow Officers into his home, where Officers entered his home after Defendant called a suicide hotline and was mentally disturbed, and Officers saw child pornography on Defendant's computer when they entered the home, application of the exclusionary rule to suppress the pornography is not warranted, because the exclusionary rule is designed to deter police misconduct, but here, there is no indication the police acted in bad faith in entering the home.

Facts: Defendant was found guilty of a Class B felony as a persistent offender. Under Sec. 558.016.7(2), this increases the maximum sentence to 30 years, but the minimum sentence remains five years. The sentencing judge stated that the sentence was 10 to 30 years, and sentenced Defendant to 15 years to prevent recidivism.

Holding: Defendant seeks re-sentencing based on plain error. However, this Court has never vacated a sentence based on plain error simply because the record shows that the judge was mistaken about the range of punishment. Rather, this Court has vacated sentences when the record shows the judge imposed a sentence *based on* his mistaken belief. To obtain plain error relief, Defendant must show that the judge's mistaken belief played a significant part in his sentencing decision. Here, while the record shows that the judge held a mistaken belief about the range of punishment, he said he was basing his sentence on the need to prevent recidivism. Thus, Defendant has failed to show manifest injustice. To the extent that court of appeals' decisions have granted resentencing based on plain error merely because a sentencing court held a mistaken belief about the range of punishment, those cases should no longer be followed.

State v. Perry, 2018 WL 2928022 (Mo. banc June 12, 2018):

Holding: (1) Even though the sentencing judge misunderstood the range of punishment (because persistent offender status increases only the maximum penalty, not the minimum penalty), Defendant was not entitled to re-sentencing under plain error because Defendant could not show that the judge's sentence was *based on* the mistaken belief, since the court did not sentence him to the minimum time; and (2) even though Officer (who suspected Defendant was driving while suspended) approached Defendant-Driver on foot; asked "can I talk to you?" and "can I see" your license; and took the license from him, this encounter was "consensual" (not a seizure), and Defendant voluntarily cooperated with the Officer, so the Fourth Amendment is not implicated, and drugs later found need not be suppressed.

State v. Douglas, 2018 WL 830306 (Mo. banc Feb. 13, 2018):
(1) When portions of a search warrant affidavit fail to satisfy the 4th Amendment's warrant requirements (e.g., lack of probable cause or particularity), the severance doctrine can be applied to redact invalid portions of the warrant and permit the evidence seized pursuant to the valid portions to be admitted; but (2) if the invalid portions of the search warrant predominate or so contaminate the whole warrant, they cannot be redacted pursuant to the severance doctrine; (3) where, in burglary case, Officer's search warrant affidavit used a standard form which, among other things, said there was probable cause to search for a human corpse when Officer knew there was no probable cause to believe there would be a corpse, and where other portions of the warrant also lacked probable cause or particularity, the severance doctrine cannot save what was, on balance, a general warrant authorizing a broad and invasive search of the residence.
Facts: Defendant was suspected of burglarizing a Victim's house. Officer obtained a search warrant to search Defendant's house for the burglary Victim's property. Officer used a standard "search warrant form" that had boxes Officer could check for various scenarios. Officer checked several boxes, among them being a box that said there was probable cause to search for a "deceased fetus or corpse." Officer also listed some of the specific items believed to be stolen from the burglary. Police then searched Defendant's residence pursuant to the warrant and found property stolen from the burglary (computers, a purse and bracelet). Defendant filed a motion to suppress, alleging the search warrant violated the 4th Amendment. At the suppression hearing, Officer admitted that there was no probable cause to search for a fetus or corpse, and that he checked that box to prevent having to obtain another warrant later if he happened to find a corpse. Officer admitted there was no probable cause to believe a fetus or corpse would be found. The case was a simple burglary that involved no dead bodies. The trial court granted the motion to suppress. The State appealed.
Holding: A search warrant is invalid if it was issued without probable cause, or if it does not describe the person, place or thing to be searched or the property to be seized with sufficient certainty. The State concedes there was no probable cause to search for a fetus or corpse, but contends that the invalid portions of the warrant can be severed from the valid portions. Under the severance doctrine, any invalid portions of a warrant are "redacted" or "severed" from the valid portions so long as the invalid portions can be meaningfully severed and have not created an impermissible general warrant. Severance is appropriate only if the valid portions are sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant. A five-step test is applied to determine this. The steps to be considered are: (1) divide the warrant into categories of items; (2) evaluate the constitutional validity of each category; (3) distinguish valid and invalid categories; (4) determine whether the valid or invalid portions make up the greater part of the warrant; and (5) severing the valid portions from the invalid portions *if* severance applies. Here, it is not just the corpse clause that lacked probable cause. Another checked box authorized a search for people with outstanding warrants, but there was no probable cause for this either. Four other provisions of the warrant are so lacking in particularity that they permit search of the house for evidence of any crime. The complete lack of probable cause and particularity in the invalid portions of the warrant created an unconstitutional general warrant. The severance doctrine cannot be used to save a general warrant. The State claims that no harm resulted from the

general portions of the warrant because stolen items that were listed in the warrant were actually found at the house. But the severance doctrine rejects the notion that the extent of the actual search or the actual items seized remedies otherwise invalid portions of the warrant. The doctrine focuses exclusively on the warrant itself, not what items were actually seized. The State argues the Officer's checking of boxes was not the kind of serious police misconduct where the exclusionary rule should be applied. But the search warrant here became a general warrant that violated the 4th Amendment; thus, the Officer's conduct isn't considered. The only remedy for an invalid general warrant is to suppress everything found.

State v. Carrawell, 2016 WL 142804 (Mo. banc Jan. 12, 2016):
(1) Even though Defendant was initially carrying a bag when he was arrested, where Officer separated Defendant from the bag, the bag could not be searched "incident to arrest" without a warrant because the bag was no longer in Defendant's immediate control, so there was no danger that Defendant might gain access to a weapon or destroy evidence in the bag; (2) to the extent that Court of Appeals' cases hold that such a search of the bag is valid as a search of the personal effects of a person subject to arrest, those cases should no longer be followed; but (3) even though the search violated the 4th Amendment, the exclusionary rule should not be applied because Officer reasonably relied on existing (but incorrect) case law from the Court of Appeals.
Facts: Defendant approached Officer and began yelling at him. Officer then told Defendant he was under arrest for peace disturbance. Defendant, who was carrying a bag, walked away. Officer grabbed Defendant and struggled to arrest him. Officer pulled the bag out of Defendant's hands, and it fell on the ground. Officer then handcuffed Defendant and put him in the police car. Officer then picked up the bag, looked inside, and found drugs. Defendant moved to suppress the drugs.
Holding: Defendant first claims that his arrest was unlawful because there was no probable cause to arrest him for a peace disturbance. The Court does not decide this, however, because there was probable cause to arrest him for resisting arrest; Officer told Defendant he was under arrest, and it is not a defense to resisting arrest that the Officer may have acted unlawfully in making the arrest, Sec. 575.150.4. Therefore, the arrest was lawful. The main issue here is whether the search of the bag was lawful; it was not. The bag was not within Defendant's immediate control at the time of Officer's search. The "search incident to arrest" exception to the 4th Amendment is based on the notion than an arrestee could gain access to a weapon or destroy evidence if the search did not occur. But if an arrestee cannot reach the item to be searched, the rationale for the exception no longer exists. Police can search items that are so intertwined with the arrestee's person that they cannot be separated from the person at the time of the arrest, such as the arrestee's clothing. However, the Court of Appeals has previously held that an arrestee's personal effects (such as a purse or backpack) may be searched even when they are not within the immediate control of the arrestee because such a search qualifies as a search of the person, i.e., the personal effects are part of the person. These cases are incorrect and should no longer be followed. Here, the bag was easily separable (and, in fact, was separated) from Defendant's person, so the search was unlawful. Even though the search was unlawful here, the exclusionary rule is not applied because Officer

reasonably relied on existing, but incorrect, case law from Court of Appeals in doing the search.

State v. Hughes, 2017 WL 4782226 (Mo. App. E.D. Oct. 24, 2017):
Holding: *State v. Carrawell*, 481 S.W.3d 833 (Mo. banc 2016), which held that, in a search incident to arrest, police may lawfully search only the arrestee's person and area within their immediate control from which they might gain possession of a weapon or destroy evidence, does not apply to searches and seizures which occurred before *Carrawell*.

Greene v. State, 2017 WL 6459982 (Mo. App. E.D. Dec. 19, 2017):
Holding: *State v. Carrawell*, 481 S.W.3d 833 (Mo. banc 2016), which held that, in a search incident to arrest, police may lawfully search only the arrestee's person and area within their immediate control from which they might gain possession of a weapon or destroy evidence, does not apply to searches and seizures which occurred before *Carrawell*.

State v. Williams, 2017 WL 2778052 (Mo. App. E.D. June 27, 2017):
Even though School had a policy whereby students who were 30 minutes late for school would be searched to protect school from violence and drugs, School lacked reasonable individualized suspicion to search Defendant-student, merely because he was tardy; drugs found are suppressed; (2) School's policy to search all tardy students for drugs was unreasonable in absence of specific evidence justifying policy; and (3) Defendant's statements made to security officer and police following the finding of drugs are suppressed as fruit of poisonous tree.
Facts: School had a policy that students who were 30 minutes late would be hand-searched. School claimed policy was to protect School from drugs and violence in "neighborhood." Defendant arrived at school 30 minutes late. He passed through School's metal detector without incident, but drugs were found in the hand-search. Defendant claimed search violated 4th Amendment.
Holding: The U.S. Supreme Court has promulgated two tests for determining reasonableness of school searches. The search here failed both. First, although constitutionality of school searches is more "relaxed," search here lacked any reasonable, individualized suspicion. Tardiness may be a factor in reasonable suspicion but it does not *per se* create reasonable suspicion. The State presented no evidence that tardy students are more likely to bring contraband to school, or anything about this particular Defendant-student other than he was tardy. Second, although the State seeks to uphold the search under its neutral school policy, this requires balancing Defendant-student's privacy interest with School's interest for safety and order. Here, School immediately turned student over to law enforcement when drugs were found. This shows the policy had a law-enforcement purpose, more than promoting welfare and safety of students. There was no evidence that tardy students contributed to the drug problem in School, that drugs were an immediate problem in School, or that the policy was effective in combatting drugs. Thus, search was unreasonable under School's policy. Drugs suppressed and statements suppressed as fruit of poisonous tree.

State v. McDowell, 2017 WL 1056216 (Mo. App. E.D. March 21, 2017):
Even though upon arrest Defendant was driving an unregistered car and failed to identify the owner, this was not sufficient under Sec. 304.155.1(5) to prove that Defendant was "unable to arrange for the [car's] timely removal" to allow police to seize and inventory the car; but where Officer testified it was customary to seize "prisoner autos" and the car was unregistered and the owner unidentified, police could seize and inventory the car pursuant to the "community caretaking" exception to 4th Amendment, even though there were not written procedures for an inventory search.
Discussion: An exception to the 4th Amendment's warrant requirement is an inventory search of a lawfully seized vehicle. The State claims the vehicle was lawfully seized and inventoried under Sec. 304.155.1, which establishes the criteria for impounding a vehicle. Sec. 304.155.1(5) states that police may seize a car an arrested person is driving "where such person is unable to arrange for the [car's] timely removal." Merely requesting the arrestee to provide the identity of the owner and lack of registration does not prove that arrestee is unable to arrange for timely removal of the car; thus, the car could not be impounded under Sec. 304.155. But the car could be impounded under "community caretaking" exception to 4th Amendment. Even though there were not written criteria for impounding cars, written criteria are not required. Officer testified it was customary to seize "prisoner autos," and the car was unregistered and owner unknown.

State v. Pierce, 2016 WL 4598537 (Mo. App. E.D. Sept. 6, 2016):
Even though police received a tip that methamphetamine was being produced in a chicken coop, search of coop without a warrant violated 4th Amendment because coop was within curtilage of home in that it was 100 yards from house, was protected by a fence and "no trespassing" signs, and the inside could not be viewed from outside the property, so Defendant had a reasonable expectation of privacy in coop; further, search of the coop without a warrant was not justified by exigent circumstances.
Facts: Police received a tip that Defendant was producing methamphetamine in a chicken coop at his residence. The property was surrounded by a fence and marked with "no trespassing" signs. Police climbed over the fence to search the coop, in which they found illegal materials. They then obtained a warrant after this search.
Holding: Issues regarding curtilage require a four-factor test: (1) the proximity of the home to the area claimed to be curtilage, (2) whether the area is within an enclosure surrounding the home, (3) the nature of uses to which the area is put, and (4) steps taken to protect the area from public view. Here, even though the coop was 100 yards from the house, that is not "far" in rural areas. Further, the property was surrounded by a fence and "no trespassing" signs, and the inside of the coop could not be seen from outside the property. The presence of the fence shows a reasonable expectation of privacy. There were no exigent circumstances allowing police to search without a warrant.

State v. Champagne, 561 S.W.3d 869 (Mo. App. S.D. Oct. 17, 2018):
Holding: Even though Defendant had one of three brake lights on her car which was operable, this violated Sec. 304.019.1(4) which language regarding "a signal light" requires that all lights be operable, and trial court erred in finding the stop was invalid.

State v. Tice, 2018 WL 2296538 (Mo. App. S.D. May 21, 2018):
Holding: (1) Suppression of evidence is not the same thing as exclusion of evidence; (2) "suppression" (motion to suppress) is used for evidence which is not objectionable as violating any rule of evidence, but which has been illegally obtained; (3) exclusion of evidence that is not illegally obtained (such as inadequate foundation) is done via a motion in limine, not motion to suppress.

State v. Alford, 2020 WL 3697794 (Mo. App. W.D. July 7, 2020):
Even though Driver-Defendant's car was parked near the entrance of a restaurant parking lot at 2:00 a.m., where Officer (1) did not observe any traffic violation, (2) did not observe anything mechanically wrong with the car, and (3) did not observe the Driver-Defendant in any distress, Officer lacked probable cause to detain Defendant for an investigatory stop because there was no reasonable suspicion of a crime; nor was the stop justified under community caretaker function since there were no articulable, reasonable facts showing Defendant was in distress or needed help; results of stop suppressed.
Facts: Officer saw Driver-Defendant's car parked in a restaurant parking lot at 2:00 a.m. He detained Defendant for a *Terry* stop, and ultimately arrested him for DWI. In his probable cause statement, Officer wrote that he detained Defendant because he might be having mechanical difficulties or having an unknown emergency. At the motion to suppress hearing, Officer "belatedly" testified Defendant was "blocking" the entrance but the trial court found that "not credible." The trial court suppressed the results of the stop. The State appealed.
Holding: A temporary traffic stop constitutes an unreasonable seizure unless supported by reasonable suspicion or probable cause. An officer's stop must be justified from its inception. Any traffic violation will provide probable cause for a stop, but here, there was no observed violation, so there was no reasonable suspicion for a stop. An officer can approach a car for community caretaking if he can point to reasonable, articulable facts upon which to base his action. Here, however, Officer did not observe any mechanical problems, engine trouble, flat tires, or other trouble with the car. Nor did he observed Defendant-Driver in any distress. Suppression affirmed.

State v. Ledbetter, 2020 WL 2120892 (Mo. App. W.D. May 5, 2020):
Where (1) Officer stopped Defendant's car because he was suspected of just having stolen a shirt from a store; (2) Officer removed Defendant from car; (3) Defendant was placed in handcuffs in back of patrol car; and (4) Officer then searched a first aid kit and sock in Defendant's car and found drugs, drugs are suppressed; search cannot be justified as "incident to arrest" because Defendant had been removed from the vehicle and a stolen shirt could not be in the first aid kit or sock.
Facts: A store notified police that a man had just stolen a shirt and fled in a car. Officer stopped Defendant, whose car matched the description. Defendant was not told why he was being detained, but he was placed in handcuffs and put in patrol car. After that, Officer searched Defendant's car and found a first aid kit and a sock that contained drugs. Defendant moved to suppress the drugs.
Holding: Officer's initial stop of Defendant was a lawful investigatory stop to investigate stealing a shirt. But once Defendant was handcuffed and put in patrol car, the

Terry stop was elevated to an arrest, even though Defendant was not told why he was being detained. The State claims the search was a lawful "incident to arrest." But there is a distinction between searching a *person* incident to arrest, and searching a *vehicle*. Police may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment=, or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Here, Defendant was not within reaching distance, and a stolen shirt could not be inside a small first aid kit or sock.

State v. Johnson, 2020 WL 534913 (Mo. App. W.D. Feb. 4, 2020):
Holding: Even though Officer testified he activated his red lights only for "safety purposes" to be visible to motorists, where (1) Officer activated his lights and stopped Defendant who was walking at 2:00 a.m. in a "high crime" area; (2) Defendant said he was walking to a nearby hotel, also in a "high crime area; (3) Defendant produced identification and had no warrants for arrest; (4) Officer asked if he could look inside Defendant's backpack, and Defendant said "go ahead"; and (5) Officer found drug paraphernalia in backpack that led to finding other drugs, the initial stop of Defendant was a seizure from which Defendant would not have felt free to leave, and was without reasonable suspicion of criminal activity; thus, all fruits of stop must be suppressed.
Discussion: Officer's activation of his red emergency lights in this pedestrian encounter was a show of authority effectuating a seizure. A reasonable person in Defendant's situation would believe that they were not free to leave and not free to disregard Officer's requests. An investigative *Terry* stop is justified only where specific and articulable facts support "reasonable suspicion" that illegal activity has occurred or is occurring. Here, the location in a high crime area and the fact that businesses in the area were closed at 2:00 a.m. were facts that would apply to anyone in the area and should not be given undue weight. The fact that Defendant was wearing a backpack does not rise to the level needed to justify a stop because backpacks are common, and Officer's claim that the backpack could carry burglary tools would apply to any bags or clothing. Mere presence in a high crime area is not sufficient to justify a stop. And the fact that the hotel was in a high crime area would also apply to anyone headed to the hotel. Since the initial stop of Defendant violated 4th Amendment, all evidence obtained as a result was fruit of poisonous tree.

State v. Henry, 2020 WL 1146007 (Mo. App. W.D. March 10, 2020):
Holding: Even though Defendant's wallet was found in a bedroom of a shared apartment where drug was found, where (1) the drug was in a drawer concealed from view, (2) another person's Social Security card was in the drawer, (3) still another person's health insurance card was in the drawer, (4) none of Defendant's other personal belongings were in close proximity to the drawer, and (5) Defendant did not engage in unusual conduct such as trying to flee, the evidence was insufficient to convict Defendant of constructive possession of that drug. This is true even though the evidence was sufficient to convict Defendant of possession of a different drug in the apartment.

State v. Boyd, 2019 WL 6703894 (Mo. App. W.D. Dec. 10, 2019):
Holding: Defendant has no expectation of privacy – thus, no standing – to contest the State's search of text messages he sent that are contained on a third-party's cell phone.
Discussion: *State v. Clampitt*, 364 S.W.3d 605 (Mo. App. W.D. 2012), held that a defendant can move to suppress text messages from *his* cell phone that the State obtained from *his cell phone provider* by investigative subpoena. *Clampitt* held that even though cell phone providers can access their subscribers' texts, that does not diminish subscribers' expectation of privacy in the texts. But *Clampitt* dealt with texts in custody of a third-party *intermediary*, not a third-part *recipient*, as here. A cell phone user retains control over the content of *their* phone, but loses control when they send texts to another person's phone. Defendant did not have a reasonable expectation of privacy in texts he sent to the third-party (girlfriend's) phone. Thus, he lacks sanding to challenge the police search of the third-party (girlfriend's) phone.

State v. Goucher, 2019 WL 3417152 (Mo. App. W.D. July 30, 2019):
Holding: Where (a) Officer stopped car for a broken light; (b) car was owned by Defendant-Passenger's mother but driven by another Driver; (c) Officer told Driver he would write him a ticket; (d) Officer then went and asked Defendant-Passenger about expired insurance, but when Defendant said she'd call her mother about current insurance, Officer said not to worry about it; (e) Officer then asked Defendant to search car and purse; (f) Defendant allowed search of car but not purse; (g) Officer then ordered Defendant to put purse on car's trunk; (h) Officer then asked if contraband was in purse and Defendant said it had drugs; (i) Officer then searched purse and found drugs, this violated 4th Amendment because the purpose of the traffic stop was completed when Officer said he would write a ticket and not to worry about calling mother for insurance, so traffic stop was unnecessarily prolonged, and Defendant's statements and drugs found in search are suppressed. The fact that Defendant-Passenger was "nervous," had a "sunken" face that looked different than driver's license, and refused consent to search purse did not create reasonable suspicion of criminal activity to prolong traffic stop or justify warrantless search.

State v. Osborn, 2019 WL 1599307 (Mo. App. W.D. April 16, 2019):
Even though Defendant-Driver was unconscious in hospital following an auto accident in which he was suspected of DWI, the warrantless draw of his blood was not supported by exigent circumstances, and the implied consent law, Secs. 577.020 and 577.033, does not authorize a warrantless draw without exigent circumstances either; trial court erred in overruling motion to suppress blood draw BAC evidence.
Facts: Defendant-Driver was involved in an auto accident in which he and others were injured. He was taken to a hospital. He was initially conscious at the hospital. Officer asked him if he would take a preliminary breath test, and he agreed. That test showed the presence of alcohol. Officer then placed Defendant under arrest for DWI, but Defendant then became unconscious. Officer directed nurse to take a blood draw, which showed a BAC of .161. Defendant moved to suppress the BAC results. The trial court overruled the motion, and admitted them at trial.
Holding: The 4th Amendment requires that there be something beyond the natural dissipation of alcohol in a suspect's blood to constitute "exigent circumstances" to permit

a warrantless blood draw. Modern telecommunications are such that police are generally required to get a warrant to do a blood draw in DWI cases. The State argues that the implied consent law authorizes a warrantless draw. Sec. 577.020 provides that people who operate vehicles on public roads are deemed to have consented to a blood test in the event they are arrested for DWI or an accident involving a serious injury or fatality. Sec. 577.033 states that a person who is "unconscious … shall be deemed not to have withdrawn the consent provided by Sec. 577.020 and the test or tests may be administered." Although these statutes appear to authorize the warrantless draw, the statutes must comply with constitutional requirements. Prior Missouri cases have authorized warrantless blood draws from unconscious subjects. But those cases are called into question in light of *Missouri v. McNeely*, 569 U.S. 141 (2013) and other decisions. Other states have held that warrantless blood draws from unconscious drivers in criminal cases cannot be summarily controlled by an informed consent statute. According, we hold that Sec. 577.033 does not allow warrantless blood draws of unconscious drivers unless exigent circumstances are present. Reversed and remanded for new trial.

State v. Johnson, 2019 WL 1028462 (Mo. App. W.D. March 5, 2019):
(1) A search warrant to search a cell phone meets the particularity requirements of the 4th Amendment so long as the warrant constrains the search to evidence of a specific crime; and (2) even though requiring a Defendant to reveal the passcode of his cellphone has 5th Amendment privilege against self-incrimination implications, where Defendant had already provided the passcode one time to his defense expert in the presence of the police, Defendant could be compelled to provide the passcode a second time under the "foregone conclusion" exception because he had essentially already "admitted" all the information the 5th Amendment privilege would protect (i.e., that he had possession and control over the contents on the phone).
Facts: The State obtained a search warrant to search all data on Defendant's cell phone for evidence of drug distribution, Sec. 195.211, and first degree rape, Sec. 566.030. This led to seizure of the phone from Defendant's residence. However, the State could not search the phone because it was locked. The State and Defendant ultimately agreed that Defendant would provide the password so both a defense expert, and a State expert could examine the phone. In the presence of the defense expert and police expert, Defendant unlocked the phone for the defense expert. But when the phone re-locked, Defendant refused to unlock the phone for the State expert. The court then granted a motion to compel Defendant to unlock the phone for the State. Incriminating evidence regarding the charges sex crime was found on the phone. Defendant's motion to suppress was overruled. He appealed after conviction at trial.
Holding: (1) Defendant argues the search warrant was not particularized and was overbroad because it allowed everything on the phone to be searched. No Missouri case has addressed particularity and breadth regarding cell phones. Other states have held that a warrant is not sufficiently particular if it does not limit the categories of data to, e.g., photos, videos or texts. But another line of authority from other states holds that the particularity requirement is met so long as the warrant constrains the search to evidence of a specific crime; the Court of Appeals adopts this latter approach. Just as a search of a file cabinet allows search of every document or folder for incriminating evidence, so too

should a warrant for search of a phone allow search of every document or file on the phone, which serves the same function as a file cabinet. Here, the particularity requirement was met since the State was limited to searching for evidence regarding drugs or rape. (2) No Missouri court has addressed whether requiring a defendant to reveal a passcode violates the 5th Amendment privilege against self-incrimination. The majority of courts which have addressed this have ruled that this *does* implicate the 5th Amendment because by revealing the passcode, a defendant is implicitly acknowledging that he has possession and control over the content on the phone. However, the 5th Amendment privilege can be waived where the protected information that would be disclosed is a "foregone conclusion." The "foregone conclusion" exception provides that an act of production does not involve testimonial communication where the facts conveyed are already known to the State. Here, Defendant acknowledged possession and control over the phone's contents when he entered the passcode for the defense expert. This made the "foregone conclusion" exception apply, and the court could compel Defendant to provide the passcode to the State's expert

State v. West, 2018 WL 1797998 (Mo. App. W.D. April 17, 2018):
(1) Even though Defendant's employer (not Defendant) owned semi-truck involved in vehicle crash, Defendant was the lawful operator and possessor of the truck, and had standing to contest its search; (2) warrantless search of truck's electronic control module (ECM) violated Fourth Amendment because Officers trespassed into or onto the truck to download the ECM's data; (3) "automobile exception" did not apply to allow warrantless search because that requires probable cause to believe the vehicle contains contraband and the ECM data itself was not contraband; there was no probable cause to believe a crime had occurred; and there were no exigent circumstances that would have prevented obtaining a warrant.
Facts: Defendant-truck driver was involved in a truck crash that killed another person. He was ultimately charged with involuntary manslaughter. Officers at the crash scene downloaded data from the truck's ECM, which stores data about how the truck was being operated. Officers testified that it was "standard practice" for them to download this data without a warrant. Defendant moved to suppress this data obtained from the warrantless search. The trial court granted a motion to suppress. The State appealed.
Holding: (1) The State contends Defendant did not have standing to contest the search, because even though he may have had an expectation of privacy in the truck, he did not even know that the ECM data existed and could not access the ECM. The appellate court does not answer that question, however, because the case can be resolved on a trespass basis. Defendant was the lawful operator and possessor of the vehicle when he was driving it (even though his employer owned it), and Officers had to trespass into or onto the truck to download the data. The physical intrusion onto or into the truck without a warrant violated the Fourth Amendment. (2) The "auto exception" allows police to search a vehicle if there is probable cause to believe that the vehicle contains contraband and exigent circumstances necessitate the search. Here, the ECM data was not contraband or illegal in itself. Moreover, in order for there to be probable cause that evidence of crime is located in a vehicle, there must first be probable cause to believe a crime has occurred. Here, the Officers had no evidence to believe a crime had occurred at the time they downloaded the ECM data. To the contrary, they obtained the data as

part of their "standard practice." Thus, Officers were investigating *whether* a crime occurred. The auto exception cannot be expanded to permit a warrantless search of whether a crime occurred because this would emasculate the Fourth Amendment. Finally, the State did not identify any reason that exigent circumstances would have prevented obtaining a warrant.

State v. Robinson, 2017 WL 2241523 (Mo. App. W.D. May 23, 2017):
(1) Even though Robinson I held that the search warrant affidavit did not supply probable cause but that "based upon the record established to this point" the good faith exception to the exclusionary rule should apply, the law of the case doctrine did not preclude the trial court from hearing additional evidence on remand and determining that the good faith exception should not apply, because rulings on motions to suppress are interlocutory; and (2) trial court did not err in concluding that Officer showed "systemic negligence" in preparing warrant affidavits and, thus, good faith exception should not apply because there is a need to deter future police misconduct here, and State presented no evidence as to why the good faith exception should apply.
Facts: *State v. Robinson*, 454 S.W.3d 428 (Mo. App. W.D. 2015), held that a search warrant in case lacked probable cause, but also held that "based upon the record established to this point," the good faith exception to the warrant requirement should apply. On remand, Robinson filed a new motion to quash the search warrant; second motion to suppress; and presented additional evidence, including search warrant affidavits from other cases, which showed that Officer knew he prepared defective affidavits for search warrants but did so anyway. The trial court found "systemic negligence in regard to careless preparation of warrant affidavits," refused to apply the good faith exception, and suppressed evidence. State appealed.
Holding: The purpose of the exclusionary rule is to deter future Fourth Amendment violations. The extent to which the exclusionary rule is justified varies depending on the culpability of the law enforcement conduct. The law of the case doctrine does not preclude consideration of whether the good faith exception applies here. *Robinson I* pertained only to whether the good faith exception was inapplicable based on Officer's act of relying on the deficient affidavit, not his act of preparing the deficient affidavit. A trial court's ruling on a motion to suppress is interlocutory and can be changed through trial. *Robinson I* held only that the record before the court at that time did not support a finding of systemic negligence, but this did not preclude the introduction of new evidence for this proposition. The State had the burden under Sec. 542.296.6 both to go forward with evidence and the risk of non-persuasion regarding the second motion to suppress. The State was obligated to produce evidence why the good faith exception should apply. But the State offered no evidence. The State did not meet its burden of production or persuasion to show why motion to suppress should be overruled.

State v. McCarty, 500 S.W.3d 876 (Mo. App. W.D. Oct. 4, 2016):
Even though (1) Officer was dispatched to an apartment complex to investigate an anonymous report that a man and woman were arguing in a parking lot, and (2) Officer passed a man and woman in a car while driving on the road to the apartment complex, Officer lacked reasonable suspicion to stop the car and question the man and woman; contraband found in the car suppressed.

Facts: When Office didn't find anyone in the parking lot, he pursued the man and woman he had passed in the car, and stopped them based on his "hunch" that they could be the arguing couple. Contraband was eventually found in the car.
Holding: An investigative *Terry* stop requires reasonable suspicion of criminal activity. Here, the car stop was not supported by reasonable suspicion of any criminal activity by the man or woman. Officer acted on a "hunch" that the man and woman might be the people who allegedly argued in the parking lot. But Officer didn't see them arguing in the car. Further, he said his only basis for the stop was his "hunch" and "training" that "sometimes people leave the area." This self-described hunch was not supported by a particularized and objective basis for suspecting Defendant-driver of criminal activity. Since the only evidence supporting conviction is the contraband seized after the illegal car stop, conviction is reversed without remand.

State v. Perry, 2016 WL 6081854 (Mo. App. W.D. Oct. 18, 2016):
(1) Even though (a) Officer believed Defendant had a suspended license based on a general conversation she had with another officer; (b) when Defendant got out of his car, Officer approached Defendant, requested and took his license so she could check it; and (c) while she was checking the license, she saw something in Defendant's hand, and Defendant ran and dropped drugs, the drugs are suppressed because Defendant was seized and the seizure was without reasonable suspicion, since State produced no specific and articulable facts as to why the other officer believed Defendant's license was suspended (when, in fact, it wasn't). (2) Even though Defendant dropped the drugs at issue, Defendant has standing to raise a 4th Amendment violation because abandonment doctrine only applies if the incriminating evidence has been abandoned voluntarily, and abandonment is not voluntary if resulting from an illegal seizure.
Facts: Officer believed that Defendant sold drugs out of his house, and had been trying to make a case against him for two years. One day, she followed Defendant in her patrol car, after Defendant left his house in his vehicle. Officer followed him for two to four minutes, hoping he would make a mistake. Officer believed Defendant had a suspended license, based on her general conversation with another officer. Officer called in Defendant's license status but before she got an answer, Defendant stopped at his girlfriend's house and got out of his car. Officer got out of patrol car, said she thought Defendant was suspended, and asked for his license. Defendant said he wasn't suspended but handed over his license. Officer said she needed to check the license, and took the license to her patrol car. However, Officer couldn't make contact with dispatch because her car's radio wasn't working properly. Meanwhile, Officer saw Defendant had something in his hand. Defendant ran away. Officer later found plastic bag (dropped by Defendant) and determined it contained drugs. It was later determined that Defendant's license was not suspended. Defendant moved to suppress the drugs, which the trial court overruled. Defendant was convicted of possession of drugs.
Holding: The State claims Defendant has no standing to challenge the seizure of drugs because they were abandoned. But abandonment doctrine only applies if the incriminating evidence has been abandoned voluntarily, and abandonment is not voluntary if resulting from an illegal seizure. Here, Defendant's initial seizure by Officer was illegal because Officer lacked reasonable suspicion to believe Defendant was engaged in criminal activity. Officer said she stopped him to investigate whether he had

a suspended license, but the basis of her belief was a conversation with another officer. There was no evidence presented as to why the other officer believed Defendant's license was suspended. The State was required to produce evidence that the other officer's suspicion was supported by specific and articulable facts. Although Officer had a general belief that Defendant sold drugs, the sole basis for her stop was her belief that he didn't have a valid license. Further, Defendant's conduct during the temporal parameters of the unlawful *Terry* stop could not supply a new factual predicate for reasonable suspicion that he was engaged in criminal activity. Since the only evidence supporting Defendant's guilt are the seized drugs, the State is unable to prove an essential element, warranting reversal without remand. Reversed.

State v. Pierce, 2016 WL 6081444 (Mo. App. W.D. Oct. 18, 2016):
(1) Persistent offender status increases maximum punishment for offense but not minimum punishment; trial court plainly erred in sentencing Defendant with misunderstanding as to minimum punishment; and (2) even though trial court found that Defendant was not competent to consent to police entering his house due to his mental condition, appellate court does not apply exclusionary rule to contraband found in house because police did not engage in deliberate misconduct or have significant culpability; police were trying to help a mentally-confused person, and did not deliberately violate 4th Amendment.
Facts: Defendant called police to say he was hearing voices and was suicidal. When police arrived, Defendant was emotionally disturbed. He said his cat wanted to stab him. Police said "if you'd like, we can check out [your house] for you, make sure it's safe." Defendant agreed. Police went inside and saw in plain view a computer with child pornography displayed on the screen. Defendant was convicted of Class B possession of child pornography as a prior and persistent offender. At sentencing, the asked if the range of punishment was "10 to 30." No one said the minimum was 5. The judge sentenced Defendant to 15 years.
Holding: (1) That Defendant was emotionally disturbed and experiencing auditory hallucinations may not by itself render his consent to search involuntary. Regardless of whether the trial court correctly found that Defendant did not voluntarily consent, the exclusionary rule should be applied only when police practices are deliberate enough to yield meaningful deterrence and culpable enough to be worth the price to the justice system. Here, police did not conduct the search with the intent of finding criminal evidence. Police did not intend to violate 4th Amendment. Hence, the exclusionary rule should not apply. (2) The persistent offender statute increases the maximum punishment to that of the next higher degree of felony, but does not alter the minimum sentence. Here, the minimum for a B felony remained 5 years. Even though the court explained its sentence as protecting children, and it may be unlikely that the court would further reduce it, where the record shows the court was under a mistaken impression as to the minimum sentence, case must be remanded for resentencing.

State v. Williams, 2016 WL 1427317 (Mo. App. W.D. April 12, 2016):
Even though Defendant was not the owner of a car that was searched, he had standing to challenge the search of the car because he had a legitimate expectation of privacy in the car, in that he had permission from the car's owner to possess or control the car;

Defendant was the driver, the passenger in the car was the owner, and Officer believed that driver had ultimate decision to consent despite his lack of ownership.
Facts: Officer stopped car for having an invalid license plate. Defendant was driving the car. Passenger, who owned the car, was asleep in the passenger seat. Officer discovered Defendant's license was suspended, ordered him out of the car, told him he was being arrested for a suspended license, and ordered him to empty his pockets. Defendant had bundles of money in his pocket similar to what drug dealers carry. Officer asked for consent to search the car, but Defendant refused consent on grounds that Passenger owned the car and was asleep. Officer called for a drug dog. The dog alerted to drugs in the trunk. Defendant filed a motion to suppress the drugs. He argued that although the stop was lawful and was initially lawfully extended because of his arrest for a suspended license, the purpose of the stop was over once Officer determined that the car was lawfully registered to Passenger, and that Passenger's driver's license was valid. Defendant contended that Officer did not have reasonable suspicion of criminal activity, and that Passenger should have been permitted to leave with the car. The trial court suppressed the drugs. The State appealed.
Holding: The State claims Defendant lacks standing to challenge the search. The test is whether Defendant had a reasonable expectation of privacy in the car. To have standing, Defendant needed to show that he had permission from the owner to possess or control the vehicle. Viewing the evidence in the light most favorable to the lower court's ruling, the trial court could have concluded that Defendant had control over the vehicle and denied consent because Passenger was asleep. Thus, Defendant has standing.

State v. Lee, 2016 WL 2338427 (Mo. App. W.D. May 3, 2016):
(1) Even though Officer smelled marijuana during a traffic stop, Officer could not conduct a warrantless pat-down of Defendant pursuant to Terry when Officer did not believe Defendant had weapons or was dangerous; the pat-down was not justified as a "search incident to arrest" when Officer had no intent to arrest at the time of the pat-down; the "exigent circumstances" exception does not apply because Defendant had been put in a patrol car, and there was no reason Officer could not have obtained a warrant; the "inevitable discovery" exception does not apply because Defendant was stopped for a license plate infraction, and there was no evidence Defendant would have inevitably been arrested and searched because of that; and even though a second pat-down (where drugs were found) was conducted after Defendant fled, the second pat-down was the result of the unconstitutional first pat-down; (2) Even though Officer suspected Defendant had marijuana, where Officer only intended to "detain" Defendant when he fled, the evidence was insufficient to support conviction for felony resisting arrest, because there was no proof that Officer was arresting Defendant for a felony, or that fleeing from the detention created a substantial risk of serious injury or death, even though Officer and Defendant tumbled down a hill when Officer caught Defendant.
Facts: Defendant was convicted of felony cocaine possession, misdemeanor marijuana possession, and felony resisting arrest. Officer stopped Defendant for driving without a front license plate. Officer smelled raw marijuana coming from the car. Officer put Defendant in the patrol car. Even though Defendant did not have his license, Defendant gave his identify, which Officer confirmed. Defendant said the marijuana smell was from his girlfriend who had a "license" for a marijuana vaporizer. Defendant gave

permission to search his car. No drugs were found in the car. Officer then decided to search Defendant for drugs. Officer testified he had no reason to believe Defendant had weapons or was dangerous. Officer patted Defendant down and felt a small, hard object. Officer told Defendant to put his hands behind his back. Officer testified he planned to "detain" Defendant. Instead, Defendant ran away. Officer caught Defendant, and they tumbled down an embankment. Officer handcuffed Defendant, and then found marijuana and cocaine on his person.

Holding: (1) The drugs should have been suppressed because the pat-down search (before Defendant ran) was without a warrant, and without consent. The search was not a *Terry* search because that can only be for weapons; here, Officer testified he did not believe Defendant had weapons or was dangerous. The smell of marijuana and Defendant's nervousness would give rise to a belief that Defendant was involved in crime, but this is tempered by the fact that Defendant did not conceal his identity and was polite and compliant. Under totality of circumstances, a reasonable person would not have feared Defendant had a weapon. The State contends that the smell of marijuana justified the search as one incident to arrest. But there was no testimony that Officer intended to make an arrest at the time he did the search. Under the search-incident-to-arrest exception, the State needs more than probable cause to make an arrest; it needs an *actual arrest*. Nor does the exigent circumstances exception apply. Officer made no effort to obtain consent or a warrant. Given that Defendant was in the patrol car and another Officer could have easily observed him while a warrant was obtained, there is no reason Officer could not have obtained a warrant. The State argues that even if the first pat-down was not justified, the second pat-down after Defendant fled was. But the second pat-down was the direct result of the first unconstitutional pat-down. The flight does not justify the search. Lastly, the State argues the inevitable discovery exception applies. But Defendant was stopped for a license plate violation. Absent the unconstitutional search, there is no indication Defendant would have been arrested leading to the inevitable discovery of drugs. The drugs should have been suppressed. Defendant's drug convictions vacated and Defendant discharged. (2) There is insufficient evidence to prove felony resisting arrest. Sec. 575.150.5 provides that resisting arrest for a felony is a felony, but resisting a detention or stop is only a misdemeanor unless the State proves that it was done in a manner that creates a substantial risk of serious physical injury or death. The relevant inquiry is not whether Defendant is guilty of the charge for which he was arrested, but whether Officer contemplated making a felony arrest. Here, Officer testified he was seeking only to "detain" Defendant. Whether the intent was to arrest for a felony or merely detain is important because the latter is only a misdemeanor. The events here cannot support felony resisting. Officer had suspicion that Defendant had marijuana, but there was nothing to suggest he had cocaine, which is the felony charge. Even though Officer and Defendant tumbled down a hill, the State does not contend that this created a substantial risk of serious injury or death. Because resisting a lawful stop by fleeing is not a lesser of felony resisting, court discharges Defendant.

State v. Douglas, 2016 WL 1212371 (Mo. App. W.D. March 29, 2016):

(1) Even though a search warrant in a burglary case stated that police may seize certain property suspected of being stolen and a "deceased human fetus or corpse," and (2) even

though police seeking the warrant had no probable cause to believe they would find a human fetus or corpse but included such "form language" to avoid having to possibly get a second warrant later, the portion of the warrant concerning the fetus or corpse violated the 4th Amendment, but was severable from the valid portions of the warrant; the warrant as a whole was not unconstitutional and did not require suppression of items seized pursuant to the valid portions.

Facts: Defendant was suspected of stealing various household items (such as a purse, laptop and jewelry) from Victim's house during a burglary. Officer sought a search warrant to search Defendant's home. The search warrant listed the household items believed to have been stolen, and also contained various boxes that were checked by the Officer allowing, among other things, seizure of a "deceased human fetus or corpse." Using the warrant, police searched Defendant's home and found the stolen listed household items. Defendant moved to suppress everything seized under the warrant on grounds that it was an invalid general warrant. At the suppression hearing, Officer testified that police intentionally include and check the "fetus or corpse" language in warrant applications so that they won't have to get a second warrant later if something about a "fetus or corpse" develops. Officer testified there was no probable cause to believe a "fetus or corpse" was involved in this case. The trial court suppressed everything on grounds that Officer had intentionally falsified the warrant application by checking the "fetus or corpse" box and, thus, had turned the warrant into a general search warrant. The State appealed.

Holding: Even though probable cause to support the "fetus or corpse" provision was lacking, probable cause did exist to support a search for the listed household items. Thus, only part of the warrant – rather than the whole --- was unconstitutional and invalid. Here, the warrant may be severed into valid and invalid portions, and each part examined for both probable cause and particularity. The valid portions of the warrant make up the greater part of the warrant. Since the invalid portions do not make up the greater part, the warrant, as a whole, is not an invalid general warrant. The "fetus or corpse" box was a minor part of the warrant. Order suppressing evidence reversed.

*** Kansas v. Glover, ___ U.S. ___, 140 S.Ct. 1183 (U.S. April 20, 2020):**

Holding: An officer who knows that a car's registered owner has a revoked driver's license can conduct an investigatory stop, absent other information that the driver is not the owner.

*** Mitchell v. Wisconsin, 2019 WL 2619471, ___ U.S. ____ (U.S. June 27, 2019):**

Holding: The Fourth Amendment generally does not require a warrant to draw blood from an unconscious driver suspected of drunk driving or driver in a "stupor," if the driver was taken to a hospital or other facility for treatment; a warrantless blood draw is justified in these situations under exigent-circumstances exception to warrant requirement; but Court does "not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties," i.e., that police could have reasonably obtained a warrant.

* **Byrd v. U.S., ___ U.S. ___, 138 S.Ct. 1518 (U.S. May 14, 2018):**
Holding: Drivers may have a reasonable expectation of privacy in a rental car, even though the rental agreement does not authorize them to drive the car.

*** Dahda v. U.S., ___ U.S. ___, 138 S.Ct. 1491 (U.S. May 14, 2018):**
Holding: Even though an order for a wiretap under the Omnibus Crime Control and Safe Streets Act contained a presumptively-invalid authorization to tap phones *outside* the territorial jurisdiction of the authorizing judge, the order was not "insufficient on its face" with regard to communications *within* the jurisdiction. The Act requires suppression of communications if the wiretap order was "insufficient on its face." An order is sufficient if it meets the mandatory requirements of the statute (such as the communications to be intercepted and the crime to which they relate), which the order here did with regard to within-jurisdiction communications. The sentence authorizing extra-territorial wiretaps was mere surplus and did not render the entire order "insufficient," because the Government did not use the extraterritorial communications at trial.

* **Collins v. Virginia, ___ U.S. ___, 138 S.Ct. 1663 (U.S. May 29, 2018):**
Holding: The Fourth Amendment prohibits police from entering the curtilage of a home to search a vehicle without a warrant; such a search is not justified under the "automobile exception."

*** Carpenter v. U.S., ___ U.S. ___, 138 S.Ct. 2206 (U.S. June 22, 2018):**
Holding: The Government's obtaining of cell phone-site information from third-party service provides is a "search" under the Fourth Amendment, and requires a warrant based on probable cause.

* **District of Columbia v. Wesby, ___ U.S. ___, 138 S.Ct. 577 (U.S. Jan. 22, 2018):**
Holding: In Sec. 1983 action, Supreme Court reaffirms that whether probable cause to arrest exists is based on an objective totality of circumstances test.

Editor's note: The case is notable for its concurring opinion by Ginsburg, in which she called for reexamination of Supreme Court precedent that an officer's subjective intent should not be considered in deciding whether probable cause exists. "A number of commentators have criticized the path we charted in *Whren v. United States*, 517 U.S. 806 (1996), and follow-on opinions, holding that an arresting officer's state of mind … is irrelevant to the existence of probable cause." "The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection."

*** Utah v. Strieff, 2016 WL 3369419, ___ U.S. ___ (U.S. June 20, 2016):**
Holding: Discovery of a valid arrest warrant during an unconstitutional investigatory stop can attenuate the taint of the stop; thus, even though an initial stop was illegal, evidence found during the stop need not be suppressed because the officer discovered a warrant for the defendant during the stop, and could arrest him on the warrant and search him incident to the arrest.

*** Birchfield v. North Dakota, 2016 WL 3434398, ___ U.S. ___ (U.S. June 23, 2016):**
Holding: States can criminalize refusal to take a breath test without a warrant after an arrest for drunk driving, because a breath test is categorically a search incident to arrest. However, States cannot criminalize refusal to submit to a blood test without a warrant, due to the blood test's more intrusive nature.

U.S. v. Griffith, 101 Crim. L. Rep. 555 (D.C. Cir. 8/18/17):
Holding: Warrant that allowed police to seize every mobile phone and electronic device in a home was overly broad, for (among other reasons) that Gov't didn't have proof that Subject of investigation even owned a mobile phone.

U.S. v. Delgado-Prez, 101 Crim. L. Rep. 558 (1st Cir. 8/16/17):
Holding: (1) Even though a guilty plea typically waives a right to appeal a denial of motion to suppress, where plea court had repeatedly said that Defendant would be able to appeal, appellate court allows the appeal; (2) merely because a Defendant is arrested for drug trafficking in his home does not, by itself, give reason to believe another dangerous person is in the home to authorize a "protective sweep."

U.S. v. Bain, 102 Crim. L. Rep. 93 (1st Cir. 10/13/17):
Holding: Putting a key found on Defendant into an apartment's door lock and turning it without a warrant violated Fourth Amendment.

Matalon v. Hynnes, 98 Crim. L. Rep. 183 (1st Cir. 11/18/15):
Holding: Officers cannot enter a home without a warrant to search for a fleeing suspect under "community caretaking" exception.

U.S. v. Serrano-Acevedo, 103 Crim. L. Rep. 305 (1st Cir. 6/13/18):
Holding: Where robbery Defendant came out of his house and was arrested outside, Officers had no reasonable fear for their safety to allow them to conduct a "protective sweep" inside the house; and (2) even though Defendant consented to the sweep of the house *after* it occurred, the consent was invalid because it was inextricably linked to the illegal search; money from robbery found inside home suppressed.

U.S. v. Ramirez-Rivera, 2015 WL 5025225 (1st Cir. 2015):
Holding: An uncorroborated tip from an anonymous source was not sufficiently reliable to give police probable cause for a warrantless entry and search of Defendant's home and his vehicle in the carport.

U.S. v. Alexander, 103 Crim. L. Rep. 115 (2d Cir. 5/1/18):
Holding: Even though (1) Officers conducted an unrelated drug arrest near Defendant's property, and (2) Defendant's nearby-yard wasn't completely enclosed and was within public view, Officers violated 4th Amendment by coming onto Defendant's property and searching an area a few steps from Defendant's backdoor which was used for events such as family BBQ's, because this area was curtilage of the home; guns found in curtilage area suppressed.

U.S. v. Allen, 98 Crim. L. Rep. 434, 2016 WL 362570 (2d Cir. 1/29/16):
Holding: Where Officer reached across threshold of doorway to Defendant's home to arrest Defendant without a warrant, this violated 4th Amendment; the location of the arrestee rather than location of the Officer controls.

U.S. v. Watson, 2015 WL 2402528 (2d Cir. 2015):
Holding: Officer could not have reasonably believed that Defendant, whom he stopped and frisked while searching for a robbery suspect, was the suspect, where Officer previously knew Defendant, Defendant produced valid identification, and Defendant's face, skin tones, height and age did not match the robbery suspect.

U.S. v. Bershchansky, 2015 WL 3513759 (2d Cir. 2015):
Holding: Officers exceeded scope of search warrant by searching the first apartment in a multi-family apartment building, instead of the second apartment more specifically described in the search warrant.

U.S. v. Vasquez-Algarin, 99 Crim. L. Rep. 166, 2016 WL 1730540 (3d Cir. 5/2/16):
Holding: The *Payton* test which requires police who have an arrest warrant (but not a search warrant) to have a "reason to believe" an arrestee is in a house before entry is the equivalent of the "probable cause" standard, not something less; the federal circuits are split on this issue. Here, police entered and searched a residence they mistakenly believed was the home of a murder suspect; drugs found in the search suppressed because police lacked probable cause to believe murder suspect was in the residence.

U.S. v. Robinson, 2016 WL 714968 (4th Cir. 2016):
Holding: Even though Officer received anonymous tip that a person was in a high crime area with a gun in his pocket, this did not provide reasonable suspicion for a *Terry* stop since carrying a concealed gun is legal in West Virginia.

Sims v. Labowitz, 102 Crim. L. Rep. 257 (4th Cir. 12/5/17):
Holding: Even though police had a warrant authorizing them to obtain photos of teenage-Defendant's erect penis, forcing Defendant to masturbate in front of police was an unlawful search under 4th Amendment which violated his heightened privacy interest, where police knew they could have used such photos from his phone; Defendant was charged with producing child pornography for photographing his penis and sending it to his girlfriend.

U.S. v. Escamilla, 101 Crim. L. Rep. 8 (5th Cir. 3/29/17):
Holding: Even though Defendant consented to search of his cell phone and police looked at it then gave it back to him, this consent did not extend to a second search after Defendant was taken to the police station.

U.S. v. Beene, 98 Crim. L. Rep. 568 (5th Cir. 3/8/16):
Holding: Even though a drug dog alerted on a car parked in a residential driveway, the "automobile exception" to 4th Amendment does not allow search of the car without a

warrant, unless there are exigent circumstances; the mere mobility of vehicles does not relieve the Gov't of the warrant requirement; the car was not mobile here.

Trent v. Wade, 97 Crim. L. Rep. 713 (5th Cir. 9/14/15):
Holding: Even though Police chased a fleeing suspect on a highway and saw him go into a house, Police were required to "knock and announce" before going into the house; there is no per se "hot pursuit" exception to knock and announce rule.

U.S. v. Perkins, 103 Crim. L. Rep. 35 (6th Cir. 4/4/18):
Holding: Officers executing an anticipatory search warrant (where a magistrate had found that probable cause would exist if certain events occur) which would be triggered if drugs were delivered to a certain person, could not execute the search when the drugs were delivered to the person's fiancé instead; "law enforcement needs to say what it means and mean what it says."

U.S. v. Brown, 99 Crim. L. Rep. 628 (6th Cir. 6/27/16):
Holding: Even though Officers had probable cause to search Defendant's car for drugs, this did not provide probable cause to support a search warrant to search Defendant's house; "general knowledge" of the types of items that drug traffickers "usually" have in their house is insufficient for a warrant; there was no evidence that Defendant trafficked drugs from his house or stored drugs there.

U.S. v. Lopez, 907 F.3d 472 (7th Cir. 2018):
Holding: (1) Even though police knew who Informant (who said Defendant had drugs) was, they needed to take steps to verify his tip that Defendant was involved in illegal drugs to have reasonable suspicion to stop Defendant because Informant just gave them general information such as Defendant's name and address that anyone could have known; even though police knew the Informant, the tip was really more akin to an anonymous tip; thus, the later stop of Defendant was unlawful; (2) even assuming police validly stopped Defendant, when they didn't find any drugs, they unlawfully prolonged the stop by holding his keys and cellphone (even though they told him he was free to leave), and this invalidated his subsequent consent to search his residence (where drugs were found).

U.S. v. Rodriguez-Escalera, 102 Crim. L. Rep. 552 (7th Cir. 3/7/18):
Holding: Even though car's occupants gave conflicting information about their travel, and the car smelled strongly of air fresheners, where a drug dog smelled the car and found nothing (which took about 30 minutes), Officer unreasonably prolonged the stop by continuing to question occupants and did not have reasonable suspicion to believe criminal activity was afoot to search the car.

U.S. v. Paniagua-Garcia, 98 Crim. L. Rep. 481, 2016 WL 670162 (7th Cir. 2/18/16):
Holding: Even though Officer saw Driver touching his cell phone while driving, there was no reasonable suspicion to stop car for violating state texting-while-driving law, because it was just as likely that Driver was using his phone for a lawful purpose, such as using a GPS application or dialing a phone number.

U.S. v. Whitaker, 99 Crim. L. Rep. 69, 2016 WL 1426484 (7th Cir. 4/12/16):
Holding: Police violated 4th Amendment when they used a drug dog in a common hallway of an apartment building to smell at doors; *Jardine* applies to common hallways in apartment buildings.

U.S. v. Smith, 97 Crim. L. Rep. 556 (7th Cir. 7/20/15):
Holding: Police on bicycle patrol who were investigating a crime "seized" Defendant without reasonable suspicion when they blocked him from existing an alley and asked him an incriminating question.

U.S. v. Wilbourn, 2015 WL 5026077 (7th Cir. 2015):
Holding: Even though other officers had seen Defendant engaged in drug trafficking, where that information was not communicated to Officers who did *Terry* stop of car in which Defendant was a passenger, there was no reasonable suspicion to stop the car and search it.

U.S. v. Leo, 2015 WL 4036257 (7th Cir. 2015):
Holding: Even though Officer could conduct *Terry* stop of Defendant based on reasonable suspicion, where Officer handcuffed Defendant and put his backpack on the ground after *Terry* stop was concluded, Officer could not search the backpack without probable cause.

U.S. v. Rahman, 2015 WL 6841031 (7th Cir. 2015):
Holding: Gov't Investigator did not reasonably rely in good faith on Defendant's broadly written consent and failure to object to Investigator's search of his restaurant's basement, and thus, the good faith exception to exclusionary rule did not apply to his violation of Defendant's 4th Amendment rights under common-law trespass theory.

U.S. v. Craddock, 100 Crim. L. Rep. 146 (8th Cir. 11/8/16):
Holding: Officer exceeded scope of *Terry* frisk for weapons when he felt and grabbed a key out of Defendant's pocket and then used the key to unlock a stolen car parked nearby; the "plain feel" doctrine did not apply because there was nothing inherently incriminating about the key and Officer didn't have any evidence connecting Defendant to the stolen car.

U.S. v. Burston, 98 Crim. L. Rep. 184, 2015 WL 7454379 (8th Cir. 11/23/15):
Holding: Even though Officer let a drug dog roam off a leash so that Officer would not come within curtilage of home, 4th Amendment was violated when dog alerted to drugs by going up to home's window and sniffing.

U.S. v. Gorman, 101 Crim. L. Rep. 298 (9th Cir. 6/12/17):
Holding: Where (1) first officer unnecessarily prolonged a traffic stop such that it became unconstitutional; (2) first officer let Driver go, but then (3) first officer called

second officer to find a reason to stop Driver again, second Officer's stop was fruit of poisonous first stop; evidence found in second stop must be suppressed.

U.S. v. Orozco, 101 Crim. L. Rep. 243 (9th Cir. 6/1/17):
Holding: A state law allowing police to randomly stop commercial trucks for safety inspections did not save a search of truck that was conducted after police received a tip (not supported by reasonable suspicion) that truck might be carrying drugs, and without the tip the stop would have never happened; state safety inspection law cannot be used to circumvent Fourth Amendment restrictions on searches for evidence of crime.

U.S. v. Johnson, 103 Crim. L. Rep. 199 (9th Cir. 5/14/18):
Holding: An otherwise proper inventory search of car conducted with an improper motive of finding evidence violates 4th Amendment.

U.S. v. Soto-Zuniga, 99 Crim. L. Rep. 722 (9th Cir. 9/16/16):
Holding: Even though (1) immigration checkpoints are a legal exception to suspicionless stops of vehicles, and (2) Officer testified that 90% of arrests at Defendant's checkpoint were for immigration offenses, drug-Defendant should've been allowed discovery to prove that the checkpoint he was stopped at was being used as an unconstitutional pretext to search for drugs; he should be given access to data on the number and types of arrests and searches at the checkpoint.

Mendez v. County of Los Angeles, 98 Crim. L. Rep. 573 (9th Cir. 3/2/16):
Holding: Even though Officers have knocked and announced at a main residence on a property, they must re-knock and re-announce when they approach a separate residence on the property from the main house; here, the second residence was a plywood shack in the backyard.

U.S. v. Lundin, 98 Crim. L. Rep. 619 (9th Cir. 3/22/16):
Holding: Police cannot use the "knock and talk" exception to the warrant requirement for making an arrest to approach a home at 4:00 a.m. and bang on the door; the implied license that invites police and the public to approach a front door does not apply at 4:00 a.m. and cannot be invoked if police are less interested in talking than in ambushing the occupant and making an arrest.

U.S. v. Lara, 98 Crim. L. Rep. 540 (9th Cir. 3/3/16):
Holding: Even though Defendant-Probationer signed an agreement that Gov't could conduct suspicionless searches of his "property" while on probation, this did not allow Gov't to search his mobile phone merely because he missed a probation meeting; the waiver did not unambiguously apply to the phone; further, "there is a limit on the price the government may exact in return for granting probation;" court must balance Gov't's interest combatting recidivism and helping probationers reintegrate into society vs. Defendant's privacy rights.

Thomas v. Dillard, 99 Crim. L. Rep. 53, 2016 WL 1319765 (9th Cir. 4/5/16):
Holding: Police cannot automatically frisk a person whenever they respond to a domestic violence call; a mere report of "domestic violence" does not necessarily give rise to reasonable suspicion that a weapon is involved; a vague call about a man pushing a woman does not give rise to reasonable suspicion that the man is armed and dangerous.

U.S. v. Evans, 2015 WL 2385010 (9th Cir. 2015):
Holding: Officer violated 4th Amendment by prolonging traffic stop beyond its purpose when Officer conducted an ex-felon registration check and summoned a drug dog.

U.S. v. Fowlkes, 2015 WL 5667555 (9th Cir. 2015):
Holding: Forcible removal of object from Defendant's rectum during intake process at jail was unreasonable under 4th Amendment; the removal was conducted by nonmedical personnel without exigent circumstances.

U.S. v. Knapp, 2019 WL 1030173 (10th Cir. 2019):
Holding: Where Defendant had already been handcuffed with her hands behind her back, Officer could not search Defendant's purse (which was on the hood of her car) as a "search incident to arrest," because this wasn't justified by any need to disarm Defendant or preserve evidence.

U.S. v. Dahda, 101 Crim. L. Rep. 29 (10th Cir. 4/4/17):
Holding: A stationary listening post to intercept cell phone calls established outside the territorial jurisdiction of the court isn't authorized; judge may authorize telephone interception only within the judge's territorial jurisdiction unless a mobile interception device is used.

U.S. v. Nelson, 101 Crim. L. Rep. 557 (10th Cir. 8/17/17):
Holding: Where police had secured arrestee in home and there was no proof that any unknown dangerous person remained in the home, subsequent "protective sweep" of home during which items were seized violated 4th Amendment.

U.S. v. Dunn, 102 Crim. L. Rep. 280 (10th Cir. 12/12/17):
Holding: Where a search warrant inadvertently inserted routine "items to be searched for include but are not limited to" language in the wrong place so that the warrant inadvertently allowed search of an entire home for anything, the warrant violated 4th Amendment as overly broad.

U.S. v. Saulsberry, 102 Crim. L. Rep. 311 (10th Cir. 12/28/17):
Holding: Even though Defendant was arrested for smoking marijuana in a car, Officers lacked probable cause to examine or seize credit cards found in a bag in the car; the marijuana odor did not give Officers probable cause to believe the cards were involved in a crime.

U.S. v. Bagley, 102 Crim. L. Rep. 309 (10th Cir. 12/18/17):
Holding: (1) Even though Officers had a warrant to arrest Defendant, where he came out of a bedroom and was arrested right inside the front door of his house, Officers did not have grounds to conduct a "protective sweep" of the house, and items found during the protective sweep should have been suppressed; and (2) a later search warrant based on items seen during the protective sweep was tainted by the unconstitutional sweep.

Vasquez v. Lewis, 99 Crim. L. Rep. 655 (10th Cir. 8/23/16):
Holding: Even though Defendant-Driver was from Colorado, which has legalized marijuana, Kansas police could not detain him until a drug dog arrived on grounds that his residency in Colorado made it more likely that he was engaged in activity (marijuana possession) which was criminal in Kansas.

U.S. v. Ackerman, 99 Crim. L. Rep. 600 (10th Cir. 8/5/16):
Holding: Even though the National Center for Missing and Exploited Children claims to be a private, nonprofit entity, it is an arm of the federal gov't for 4th Amendment purposes because it is funded by Congress and internet service providers are required to report child pornography violations to it; thus, where AOL sent the Center an unopened email believed to contain child pornography, the Center violated 4th Amendment by opening it without a warrant.

U.S. v. Krueger, 2015 WL 6904338 (10th Cir. 2015):
Holding: Defendant was prejudiced by seizure of evidence in Oklahoma pursuant to a warrant issued by a Kansas magistrate, since the Kansas magistrate lacked authority to issue the warrant.

U.S. v. Johnson, 102 Crim. L. Rep. 594 (11th Cir. 3/22/18):
Holding: Even though a pat down was justified under the circumstances, and Officer felt a bullet in Defendant's pants pocket, this was not sufficient to reach in the pocket and examine its contents because only weapons or contraband can be removed during a pat down; a bullet in itself isn't illegal contraband.

Moore v. Pederson, 97 Crim. L. Rep. 712 (11th Cir. 9/16/15):
Holding: Even though Defendant refused to identify himself when police came to his door in response to a disturbance in a parking lot, 4th Amendment did not allow Police to reach into his home across the doorway, handcuff him and conduct a *Terry* search.

U.S. v. Scurry, 2016 WL 1391995 (D.C. Cir. 2016):
Holding: Wiretap authorizations under Omnibus Crime Control and Safe Streets Act, which failed to specify the names of DOJ officials who approved the wiretaps and listed them only as "deputies" or other titles, were legally insufficient, even though the application contained the names; suppression of intercepted communications was required.

U.S. v. Weaver, 2015 WL 5165990 (D.C. Cir. 2015):
Holding: Exclusionary rule was appropriate remedy for violation of knock-and-announce rule at residence because it would promote deterrence for constitutional violations.

U.S. v. Hoffmann, 98 Crim. L Rep. 505 (C.A.A.F. 2/18/16):
Holding: Even though Officers had already piled up certain items in Defendant's room to seize from Defendant's room after he had given consent to search, where Defendant then revoked his consent to search during the search, Officers violated 4th Amendment by then carrying off the piled up (earmarked) items.

U.S. v. Mestre, 2019 WL 302503 (M.D. Ala. 2019):
Holding: Even though Defendant was sleeping in a car in a high crime neighborhood, Officer did not have reasonable suspicion to open the car door and question occupants.

In re Search of Information Associated with Fifteen Email Addresses, 101 Crim. L. Rep. 481 (Ala. Dist. Ct. 7/14/17):
Holding: Gov't application for warrants for email was overly broad, didn't limit time period from which data could be seized, and didn't set forth a procedure for how long Gov't would keep the email.

U.S. v. Ellis, 101 Crim. L. Rep. 598 (N.D. Cal. 8/24/17):
Holding: Police generally need a warrant to use "Stingray" mobile phone tracking device, but exigent circumstances justified not getting one here.

U.S. v. Giraudo, 99 Crim. L. Rep. 605 (N.D. Cal. 8/1/16):
Holding: Even though Gov't placed hidden wiretaps outside of courthouses (e.g., in planter boxes) to record conversations in public places in an investigation regarding bid rigging at foreclosure auctions, this warrantless surveillance violated 4th Amendment because it was designed to record private conversations spoken in "hushed tones."

In re: [REDACTED]@gmail.com, 2014 WL 782415 (N.D. Cal. 2014):
Holding: Gov't's proposed "seize first, search second" application for search warrant to search through email account violated 4th Amendment where it did not contain a date restriction of any kind, and there was no commitment by Gov't to return or destroy irrelevant emails.

U.S. v. Johnson, 2019 WL 451516 (D.D.C. 2019):
Holding: Even though police could ask Defendant, who they thought was shot, to walk toward them to see if they were shot under "community care-taking" exception to warrant, this did not authorize them to search Defendant.

U.S. v. Smith, 2019 WL 399822 (D.D.C. 2019):
Holding: Even though Defendant was standing outside a car and Officer thought he could be under influence of drugs, handcuffing Defendant was not reasonable for

Officer's safety and transformed the initial *Terry* stop into an arrest requiring probable cause.

U.S. v. Binh Tang Vo, 2015 WL 222318 (D.D.C. 2015):
Holding: Rule 17 that gave Government right to use subpoena duces tecum to obtain certain documents pretrial did not authorize Government to obtain them without court approval and did authorize Government to tell subpoenaed party to send documents directly to U.S. Attorney in lieu of appearing in court.

U.S. v. Kim, 2015 WL 2148070 (D.D.C. 2015):
Holding: Laptop computer was not a "container" that was subject to warrantless, suspicionless search at border where Defendant-owner of laptop was leaving U.S.; this was especially true since Gov't seized laptop and spent weeks searching it at a location far removed from the border; the search was also not justified on grounds that Defendant had violated export laws in the past.

U.S. v. Cotton, 2019 WL 6125284 (N.D. Ill. 2019):
Holding: Even though reliable Informant told police that a black man had entered a high crime area known for gang activity in a van, Police lacked reasonable suspicion to stop man-Defendant because they had no information that he was a convicted felon who could not possess a gun or who displayed a gun, so the information the Informant provided was legal activity and didn't provide reasonable suspicion for an investigatory stop.

U.S. v. Barber, 2016 WL 1660534 (D. Kan. 2016):
Holding: Warrant to search email account for child pornography was invalid where judge exceeded his territorial jurisdiction in issuing warrant; since the warrant was void from inception, the good-faith exception to exclusionary rule was inapplicable.

U.S. v. Jones, 2016 WL 2743526 (M.D. La. 2016):
Holding: Where Officer's testimony at suppression hearing directly contradicted his police report, Officer's testimony was not credible and failed to establish the validity of the stop.

U.S. v. Vega, 2015 WL 176148 (M.D. La. 2015):
Holding: Even though Defendant slowed down when border patrol Officer pulled alongside him, did not look at Officer when he shined a flashlight at vehicle, and nervously smoked a cigarette, Officer lacked reasonable suspicion to stop vehicle for investigatory stop where Officer was driving an unmarked vehicle, was far away from border, and did not decide to stop Defendant until he determined Defendant was Hispanic.

U.S. v. Clark, 2015 WL 5025277 (M.D. La. 2015):
Holding: Where a search warrant authorized search of vehicles "on the premises," Officers could not stop and search a vehicle seen leaving the premises.

U.S. v. Toussaint, 2015 WL 4509616 (E.D. La. 2015):
Holding: Even if an exigency existed when police conducting a wiretap heard a gang leader give permission to another person to kill the driver of a silver car, the exigency was over by the time Officers stopped the silver car over 45 minutes later; the emergency aid exception to the warrant requirement did not justify stopping the car; there were not continued threats on the wiretap or other evidence that a killing was going to take place.

U.S. v. Perez, 2018 WL 6619747 (D. Mass. 2018):
Holding: Even though providing unredacted copies of affidavits in support a wiretap application would reveal a confidential informant, Title III of the Omnibus Crime Control and Safe Streets Act required the Gov't to disclose the entire contents of a wiretap application and order; it does not allow for redaction.

Pearce v. Emmi, 101 Crim. L. Rep. 156 (E.D. Mich. 5/8/17):
Holding: Where (1) Plaintiff-Woman was suing Defendant-Officer for allegedly using an iPhone to spy on her and take nude photos of her through an app; (2) Plaintiff's Expert was going to review the phone; and (3) the phone was in police custody for an unrelated drug investigation, police needed a warrant to be present to observe the Plaintiff's Expert's review of the phone because police might inadvertently learn information relevant to the drug investigation.

U.S. v. Mahone, 2016 WL 148087 (E.D. Mich. 2016):
Holding: Even though Defendant initially consented shortly after stop for not wearing a seatbelt to search of his vehicle, this consent did not allow police to extend the stop to carry out the search after they had verified that Defendant owned the car and had decided not to ticket him.

U.S. v. Pena, 2019 WL 168529 (S.D. N.Y. 2019):
Holding: Even though police may have been justified in handcuffing Defendant for an investigatory stop after a firearm was discharged, where police did not find a firearm on Defendant, his continued handcuffing became an unlawful arrest without probable cause.

U.S. v. Lambis, 99 Crim. L. Rep. 549 (S.D.N.Y. 7/12/16):
Holding: Use of a cell-site simulator to force a cell phone to ping information about its location without a warrant violates 4th Amendment.

U.S. v. Hulscher, 100 Crim. L. Rep. 457 (D.S.D. 2/17/17):
Holding: A federal law enforcement agency needed a second search warrant to examine iPhone data which a state law enforcement agency had obtained pursuant to a warrant in an unrelated criminal case; the state agency had extracted all data from the phone for the unrelated case, and then gave it to the federal law enforcement agency as part of a sharing agreement.

U.S. v. Waller, 2015 WL 2345152 (W.D. Tex. 2015):
Holding: Where police illegally stopped Defendant in traffic stop and then obtained consent to search her home, the consent was not independently given and the taint was not purged where police then allowed Defendant to drive home and have her home searched.

U.S. v. Darby, 2016 WL 3189703 (E.D. Va. 2016):
Holding: Gov't deployment of network investigative technique (NIT) which surreptitiously placed code on Defendant's computer to access his IP address and related information after Defendant allegedly logged into child pornography site on Tor network was a "search" of the computer within meaning of 4th Amendment; the code placed on the computer allowed it to send information to the Gov't without Defendant's consent or knowledge and, thus, Gov't seized the contents of the computer.

Belleau v. Wall, 97 Crim. L. Rep. 739 (E.D. Wis. 9/21/15):
Holding: Where (1) Defendant was convicted of sex offense in 1994, (2) after he finished his sentence, he was civilly committed as a sexually violent person (SVP), and (3) three years before his SVP release, the State enacted a law requiring lifetime GPS monitoring of those released from SVP commitment, application of GPS law to him was ex post facto since it increased the punishment for the 1994 offense; like probation, parole or supervised release, GPS tracking constitutes "punishment" through technology, not a nonpunitive civil purpose; GPS tracking also implicates 4th Amendment issues.

MacKintrush v. State, 98 Crim. L. Rep. 370 (Ark. 1/21/16):
Holding: Even though Defendant used a fake name when he picked up at Post Office a package that smelled like dryer sheets (which sheets are often used to mask the smell of drugs), this did not give reasonable suspicion during a subsequent traffic stop to prolong the stop for 30 minutes to obtain a drug-dog.

State v. Peoples, 99 Crim. L. Rep. 639 (Ariz. 9/12/16):
Holding: Even though Defendant failed to password protect his cell phone and left it unattended in a room, this did not vitiate his expectation of privacy and allow the police to pick it up and search it.

Brown v. McClennen, 2016 WL 1637664 (Ariz. 2016):
Holding: Defendant's consent to chemical test in boating-while-intoxicated case was not voluntary where Officer told him that implied consent law required that he consent.

State v. Valenzuela, 2016 WL 1637656 (Ariz. 2016):
Holding: Defendant's consent to blood and breath test was not voluntary where Officer told Defendant that implied consent law "requires you to submit."

People v. Brown, 2015 WL 4646932 (Cal. 2015):
Holding: Even though Defendant was already parked, he was detained when Officer pulled up behind him and turned on his emergency lights; Defendant would not have felt free to leave due to the flashing patrol lights.

People v. Herrra, 98 Crim. L. Rep. 98, 2015 WL 6443045 (Colo. 10/26/15):
Holding: Police exceeded scope of search warrant for certain texts and indicia of ownership on Defendant's phone when they began searching through unrelated files on the phone; the warrant did not permit police to search every folder in the phone because that would be a general warrant that would violate the particularity requirement of the 4th Amendment; the search was not justified under "plain view" exception to warrant either; the computer folder was analogous to a closed container.

State v. Brown, 2019 WL 1413812 (Conn. 2019):
Holding: Even though State had an ex parte court order compelling production of Defendant's cell-site location data, this violated 4th Amendment because State did not obtain a warrant based on probable cause.

State v. Davis, 2019 WL 1341331 (Conn. 2019):
Holding: Anonymous tip that a "young man" had a gun and that a "whole bunch" of young men were gathered around a car did not give rise to reasonable suspicion to stop Defendant for an investigatory stop, because tip didn't give any way for police to know specifically who had a gun, and the movement of people could have meant no one had a gun.

Wheeler v. State, 98 Crim. L. Rep. 573, 2016 WL 825395 (Del. 3/2/16):
Holding: A search warrant for a computer in a witness-tampering case that was "cut and pasted" from a child pornography warrant did not satisfy the particularity requirement of the 4th Amendment; given the broad scope of private information that may be contained on a computer, warrant must be particular in what can be searched for.

Gore v. U.S., 99 Crim. L. Rep. 640 (D.C. 8/18/16):
Holding: Even though Officers testified the "could have" gotten a warrant to search, this is too speculative to trigger inevitable discovery doctrine, because it doesn't show that a lawful process to obtain a warrant was already underway when the unconstitutional search occurred.

Sharp v. U.S., 98 Crim. L. Rep. 483 (D.C. 2/18/16):
Holding: Officer, who "asked" Defendant to exit his vehicle after he refused a consent to search, seized the man for 4th Amendment purposes; a reasonable person in Defendant's position would not have felt free to refuse to exit the car.

Carpenter v. State, 101 Crim. L. Rep. 430 (Fla. 6/29/17):
Holding: Good faith exception to warrant requirement didn't apply to unconstitutional, warrantless search of Defendant's phone where Officer relied on a new Florida case that hadn't yet been reviewed by Florida Supreme Court in conducting the search; this made case different than *Davis v. U.S.*, where officers objectively reasonably relied on precedent.

Rodriguez v. State, 98 Crim. L. Rep. 244 (Fla. 12/10/15):
Holding: Drugs found during a warrantless search of home are not admissible under "inevitable discovery" exception to 4th Amendment, unless police were already in the process seeking a warrant during the search of the home; to apply "inevitable discovery" every time police have probable cause to search but simply fail to get a warrant would eliminate the warrant requirement.

Rodriguez v. State, 2015 WL 8469580 (Fla. 2015):
Holding: The inevitable discovery exception to search warrant did not apply to search of a home, where police were not in pursuit of a search warrant, and there was no legal means present that would have led to the found evidence.

Finney v. State, 98 Crim. L. Rep. 545 (Ga. 3/7/16):
Holding: Even though Prosecutor was busy preparing for an oral argument, this did not excuse the State's failure to comply with the federal law requiring that intercepted communications be "immediately" presented for sealing once the warrant expires; wiretap evidence suppressed.

State v. Alvarez, 99 Crim. L. Rep. 525 (Haw. 6/30/16):
Holding: Even though Officer who stopped Defendant for seat-belt violation knew that Defendant was "known drug user" and police had received a tip 5 days earlier that Defendant was dealing drugs, this did not create reasonable suspicion to call drug dog to search; to hold otherwise would allow any traffic stop to be used to detain people based on their previous misconduct.

State v. Won, 2015 WL 7574360 (Haw. 2015):
Holding: Where refusal to consent to BAC test was crime carrying up to 30 days in jail and $1,000 fine, Defendant's consent to BAC test was not voluntary; he was forced to choose between fundamental constitutional rights.

State v. Eversole, 2016 WL 1296185 (Idaho 2016):
Holding: Even though State had an implied consent law, where Defendant refused to take a breath test, the implied consent was withdrawn for the breath test and also for blood testing.

State v. Neal, 2015 WL 6735793 (Idaho 2015):
Holding: Even though Defendant's car drove onto, but not across, the line on the right side of the road, this did not violate the statute that required cars to remain within lanes, and thus, did not justify a traffic stop.

People v. Smith, 100 Crim. L. Rep. 491 (Ill. 3/1/17):
Holding: Defendant entitled to hearing on whether State laid proper foundation for admission of certain evidence regarding his phone based on whether police used a pen register or Stingray to gather the evidence; the distinction mattered because a pen register captures only phone numbers, but a Stingray captures a precise location; the State

claimed they used a pen register, but the defense argued the State's explanation sounded like a Stingray.

People v. Ringland, 101 Crim. L. Rep. 431 (Ill. 6/29/17):
Holding: A "special investigator" for Prosecutor was not a law enforcement officer and didn't have authority to conduct traffic stops and search cars; evidence found during such stops suppressed.

State v. Vanderkolk, 2015 WL 3608834 (Ind. 2015):
Holding: Even though Defendant's home detention agreement stated that he waived all rights to search and seizure under federal and state law, where the agreement also stated that he was consenting to searches only upon probable cause, the warrantless search of his residence without reasonable suspicion violated the agreement.

State v. White, 100 Crim. L. Rep. 218 (Iowa 11/18/16):
Holding: Where uniformed Officer with badge, gun and lights flashing on patrol car told Defendant "Can you step down from here [porch] and talk to me," and "I need you to step down here and talk to me, OK," this was a seizure for Fourth Amendment purposes, because a reasonable person would think compliance was mandatory.

State v. Gaskins, 2015 WL 3958499 (Iowa 2015):
Holding: Under Iowa Constitution, a warrantless search of a container in a vehicle can only be done "incident to arrest" if necessary to protect Officer or prevent destruction of evidence; once Defendant is put in patrol car, a warrantless search is unconstitutional because Defendant cannot access the container in the car.

State v. Ryce, 98 Crim. L. Rep. 507, 2016 WL 756686 (Kan. 2/26/16):
Holding: Driver who refused to consent to warrantless blood draw in DWI case cannot be criminally prosecuted for the refusal, because Driver has a due process right to withdraw consent under the implied-consent laws; once Driver withdrew consent, the "consent" under the implied-consent law was no longer voluntary.

State v. Weddle, 2020 WL 424922 (Me. 2020):
Holding: Statute requiring police to test blood of all drivers involved in fatal or serious accidents without a warrant is unconstitutional.

Sellman v. State, 99 Crim. L. Rep. 653 (Md. 8/24/16):
Holding: Even though police policy authorized pat-downs of all passengers whenever a driver consents to a search, the frisk of Passenger-Defendant violated *Terry* absent legitimate concern for Officer's safety.

Com. v. Goncalves-Mendez, 2020 WL 524773 (Mass. 2020):
Holding: Where Police are aware that a passenger could lawfully take custody of a car, Police cannot impound the car and inventory it, without first offering driver the option of letting passenger take car, because Police impoundment is not reasonably necessary when someone else can take custody of car.

Com. v. Agogo, 2019 WL 1212940 (Mass. 2019):
Holding: Even though Defendant was arrested for alleged drug dealing, had taken a fighting stance upon arrest, and sought to avoid a frisk, police lacked probable cause to strip search Defendant for drugs.

Com. v. Leslie, 101 Cirm. L. Rep. 135 (Mass. 5/9/17):
Holding: Police need warrant to search under porch of multi-family house.

Com. v. Thomas, 100 Crim. L. Rep. 409 (Mass. 2/13/17):
Holding: Police were unduly suggestive in showing photos of guns to Witness and making comments such as "Looks just like it, huh," and "We're smarter than you think, aren't we."

Com. v. Crowley-Chester, 100 Crim. L. Rep. 565 (Mass. 3/9/17):
Holding: Even though police arrested Driver (on a drug offense) whose car was parked in a public place in a high crime neighborhood, police could not impound and search the car to "protect it from theft."

Com. v. Mauricio, 101 Crim. L. Rep. 532 (Mass. 8/14/17):
Holding: Even though when Defendant was arrested for burglary police saw stolen items in his backpack, they needed a warrant to search the content of the digital camera, and this was not justified under the inventory exception because inventory is to safeguard and catalogue property, not search for evidence of crime.

Com. v. Ortiz, 102 Crim. L. Rep. 447 (Mass. 2/12/18):
Holding: Even though Defendant-driver consented to search of car, this consent did not extend to searching under the hood and removing the air filter, because a reasonable person would think that consent is limited to search of the car's interior only; standard is what a reasonable "person" would think of the scope of consent, not a reasonable "officer."

Com. v. Campbell, 100 Crim. L. Rep. 48 (Mass. 9/30/16):
Holding: Even though Driver-Defendant was driving a rental car he did not rent (but had permission from renter to drive it), Driver's conduct was breach of contract but not a crime, so this did not create probable cause to arrest Driver, impound and search vehicle; Driver's conduct did not violate law making it a crime to use a car "without authority."

Com. v. Oliveria, 98 Crim. L. Rep. 622 (Mass. 3/28/16):
Holding: Even though Defendant-Shoplifter's car was legally parked in the store's parking lot, Police had no justification to impound and search the car where Defendant said his girlfriend was coming to pick it up.

Com. v. Jones-Pannell, 35 N.E.3d 357 (Mass. 2015):
Holding: Defendant was seized when Officer said "wait a minute" and another Officer began chasing Defendant after he began jogging; Defendant would not have felt free to leave.

Com. v. Estabrook, 98 Crim. L. Rep. 4, 2015 WL 5662710 (Mass. 9/28/15):
Holding: State Constitution requires a warrant when police seek phone company cell phone data that allows determining Defendant's location for more than six hours.

Com. v. Rodriguez, 37 N.E.3d 611 (Mass. 2015):
Holding: Investigatory stop of vehicle solely because of smell of marijuana was not warranted, where marijuana possession was only a civil infraction.

Com. v. Depiero, 98 Crim. L. Rep. 309 (Mass. 1/4/16):
Holding: Anonymous tipster's 911 call about a drunken driver does not provide reasonable suspicion to stop driver; court rejects rationale of *Navarette v. Calif*. (U.S. 2014) that such calls were reliable because of caller ID; unless the caller knows that caller ID is being used, the existence of caller ID doesn't deter unreliable callers.

Com. v. Kaeppeler, 98 Crim. L. Rep. 283 (Mass. 12/30/15):
Holding: Where police knew that two people had become seriously ill after drinking tequila at a residence, police could enter residence without a warrant to check on well-being of resident under "emergency aid exception," but once they determined that the resident was fine, police could not seize and test the tequila bottle without a warrant; the emergency ended once police determined resident was fine.

People v. Franklin, 101 Crim. L. Rep. 157 (Mich. 5/12/17):
Holding: Defendant can challenge the truthfulness of a search warrant affidavit and receive hearing on issue, even if he can't meet standard of *Franks v. Delaware* that officer made an intentionally false or reckless statement necessary for warrant to issue.

People v. Frederick, 101 Crim. L. Rep. 245 (Mich. 6/1/17):
Holding: Even though Resident consented to search of his home, where Police had knocked on the door at predawn, 6:00 a.m. and asked to search, the early morning approach and knock violated the "implied license" to approach and knock without a warrant, so consent was invalid; *Florida v. Jardines* makes the timing of when officers approach a home relevant to Fourth Amendment analysis; Girl Scouts or trick or treaters wouldn't approach a home at this time.

State v. Chute, 102 Crim. L. Rep. 570 (Minn. 3/14/18):
Holding: Even though Defendant had given the public an "implied license" to use his driveway to reach the backdoor of his house, the driveway was curtilage and Officers' inspection/search of a camper parked in the driveway was outside the scope of any implied license; Defendant did not implicitly invite Officers to "snoop" in his parked camper.

State v. Scriven, 99 Crim. L. Rep. 570 (N.J. 7/20/16):
Holding: Officer had no probable cause to stop a car he saw driving on a deserted street with its high beams on, because this is not illegal.

State v. Feleciano, 2016 WL 885284 (N.J. 2016):
Holding: Particularity requirement of search and seizure provision of N.J Constitution requires that in roving wiretap cases, the State must notify the wiretap judge within 48 hours after the State begins intercepting a new phone facility.

State v. Bivins, 99 Crim. L. Rep. 107 (N.J. 4/20/16):
Holding: A search warrant which authorized searching everyone in a drug house and everyone connected to it did not authorize searching two men sitting in a parked car several blocks away, unless police had proof that the men had fled the house as the police raid occurred.

State v. Witt, 2015 WL 5601436 (N.J. 2015):
Holding: Under N.J. Constitution, the automobile exception to warrant requirement applies only where police have probable cause to believe a car contains contraband or evidence of crime, and the circumstances giving rise to the probable cause are unforeseeable and spontaneous.

State v. Jones, 98 Crim. L. Rep. 371 (N.J. 1/20/16):
Holding: When evaluating the reliability/suggestibility of a showup identification, the court should consider only the reliability/suggestibility of the showup itself, and not extrinsic evidence of the guilt of Defendant.

State v. Davis, 98 Crim. L. Rep. 102 (N.M. 10/18/15):
Holding: Even though a police flyover of property does not usually violate the 4th Amendment, where police helicopter flew so low over Defendant's property (where marijuana was being grown) that it caused debris, property damage and panic, this was an unconstitutional search that violated 4th Amendment; such searches without a warrant violate 4th Amendment when the helicopter physically disturbs the owner's ability to use the property.

People v. Sanders, 2016 WL 697944 (N.Y. 2016):
Holding: Even though Defendant, who was being treated for a gunshot wound, left his clothing in a bag on the hospital floor near where he was being treated, Officer violated 4th Amendment by seizing bag to examine clothes because there was no probable cause to believe the clothes were the instrumentality of a crime.

People v. Gonzalez, 2015 WL 3885933 (N.Y. 2015):
Holding: Even though Defendant shouted obscenities at police in a subway station, this did not constitute the crime of disorderly conduct, and did not provide probable cause to detain and search Defendant.

State v. Ballard, 2016 WL 165517 (N.D. 2016):
Holding: Even though Defendant was on probation, Officer did not have reasonable suspicion to conduct a warrantless search of Defendant's home following a vehicle stop, where Defendant's probation was unsupervised and for a misdemeanor; the Gov't's interest did not outweigh the Defendant's expectation of privacy.

State v. O'Connor, 99 Crim. L. Rep. 11 (N.D. 3/28/16):
Holding: Where implied consent law required that Officer inform Driver that failure to take BAC test was "a crime punishable in the same manner as DWI," Driver's BAC results must be suppressed where Officer failed to give this warning; court rejects State's argument that Driver's voluntary acquiescence to the test cured the failure to warn.

State v. Banks-Harvey, 102 Crim. L. Rep. 383 (Ohio 1/16/18):
Holding: Even though (1) Officer arrested Defendant-Woman during a traffic stop, and (2) police department had a "policy" to seize women's purses upon arrest, it violated 4th Amendment for Officer to remove purse from car because this was not justified under search "incident to arrest" since Defendant was not near her purse when arrested, and the "policy" of seizing all purses cannot justify an objectively unreasonable intrusion under the 4th Amendment; items found in purse must be suppressed.

State v. Brown, 2015 WL 687503 (Ohio 2015):
Holding: Probate judge does not have authority to issue criminal search warrants.

State v. Leak, 98 Crim. L. Rep. 370 (Ohio 1/20/16):
Holding: (1) Even though police arrested Passenger on an outstanding warrant for domestic violence, they could not search the car "incident to arrest" because that exception only applies if Defendant can reach in car to obtain a weapon or it is reasonable to think the car contains evidence of the crime of arrest; here, Defendant-Passenger could not do that since he was secured in a police car; (2) police could not impound and search the car under the "community care-taking" function because the car was legally parked when Passenger was arrested, the driver had a valid license, and was free to take the car.

State v. Barnthouse, 100 Crim. L. Rep. 49 (Or. 10/6/16):
Holding: Oregon Const., which protects property and privacy rights, prevents police from pulling a package addressed to Defendant out of mail bin, having a dog sniff it, and then taking it to Defendant's house to obtain permission to search; people have protected possessory interest in packages throughout their journey in the stream of mail.

Com. v. Myers, 101 Crim. L. Rep. 495 (Pa. 7/19/17):
Holding: State's Implied Consent Law did not authorize taking blood draw from unconscious suspected drunk Driver-Defendant, because the law leaves the option of refusal, which an unconscious person can't do.

Com. v. Loughnane, 102 Crim. L. Rep. 204 (Pa. 11/22/17):
Holding: Police need warrant to seize vehicle parked in residential driveway.

Editor's note: The Supreme Court reached a similar conclusion in *Collins v. Virginia*, 138 S.Ct. 1663 (2018).

Com. v. Fulton, 102 Crim. L. Rep. 512 (Pa. 2/21/18):
Holding: Even though Officer's turning on of Defendant's phone to retrieve its assigned number was minimally invasive, this required a search warrant and content seized from the phone must be suppressed.

Com. v. Romero, 103 Crim. L. Rep. 116 (Pa. 4/26/18):
Holding: Even though Officers had an arrest warrant for a suspect and believed the suspect lived in Defendant's home (though suspect didn't), Officers needed a separate search warrant – not merely an arrest warrant – to enter Defendant's home to look for suspect; contraband found inside Defendant's home suppressed; the lawfulness of an entry cannot depend on Officers' subjective assessment of a suspect's residence and likelihood of finding the suspect there.

State v. Gonzalez, 98 Crim. L. Rep. 622, 2016 WL 1211410 (R.I. 3/29/16):
Holding: (1) Even though Defendant's Mother silently indicated with her eyes and arm that Defendant was upstairs after multiple officers with weapons drawn knocked on her door at 7:00 a.m. and demanded to know where her son was, this was not consent to a warrantless entry of the home; a reasonable person confronted with such force would likely submit to the show of force; Mother merely acquiesced; (2) even though Officers believed Defendant was involved in a murder and was armed and dangerous, exigent circumstances did not justify warrantless entry into his house when murder had happened 7 hours earlier, and there were no attempts to obtain a warrant.

State v. McElrath, 2019 WL 1122944 (Tenn. 2019):
Holding: Good-faith exception to exclusionary rule did not apply where Defendant was arrested and searched because he was mistakenly on a list of people excluded from a public housing property.

Love v. State, 100 Crim. L. Rep. 242 (Tex. Crim. App. 12/7/16):
Holding: Gov't violated 4th Amendment by subpoenaing Defendant's text messages from mobile phone service provider without a warrant; text messages are analogous to regular mail and email, and Gov't cannot force a phone company to turn over texts without a warrant anymore than Gov't can "storm the post office and intercept a letter;" Defendant did not give up expectation of privacy in his texts just because the third-party phone company was entrusted with delivering them.

State v. Budd, 99 Crim. L. Rep. 219 (Wash. 5/19/16):
Holding: When police conduct a "knock and talk," they must inform person being questioned that they can refuse to talk; thus, where police approached Defendant in his driveway and asked for permission to search his home computer for child pornography, police were required to inform him that he could refuse entry and consent.

State v. Hinton, 319 P.3d 9 (Wash. 2014):
Holding: Where (1) police seized Arrestee's smart phone incident to his arrest and discovered incoming text messages from Defendant asking to do a drug transaction, (2) police answered the texts by pretending to be Arrestee and arranged a drug transaction with Defendant, and (3) Defendant was arrested and convicted of attempted drug possession, the warrantless search of the smart phone and police conduct at issue violated Wash. Constitution's right to privacy; "Unlike a phone call where a caller hears the recipient's voice, and has the opportunity to detect deception, there was no indication that anyone other than [Arrestee] possessed the phone, and [Defendant] reasonably believed he was disclosing information [only] to [Arrestee]. … Forcing citizens to assume the risk that the government will confiscate and browse their associates' cell phones tips the balance too far in favor of law enforcement at the expense of the right to privacy."

State v. Noel, 98 Crim. L. Rep. 141, 2015 WL 6829845 (W.Va. 11/6/15):
Holding: (1) Where police chased and stopped Defendant for having a cracked windshield, handcuffed him and put him in a patrol car, police could not search the car "incident to arrest" because there was no reason to believe that evidence of the arresting crime – fleeing police – would be found in the car; and (2) where police did not see any personal items in the car, they could not search the car as part of a pre-impoundment "inventory search" because there was nothing obvious to inventory.

Pohland v. State, 2019 WL 421247 (Alaska App. 2019):
Holding: A search warrant for landlord's residence where Defendant-Tenant was renting an apartment did not establish probable cause to seize and search Defendant-Tenant's laptop; even if police thought landlord could gain access to Defendant-Tenant's living space, police offered no explanation for why they thought landlord would gain access to Tenant's laptop and put stuff on it.

State v. Snyder, 100 Crim. L. Rep. 70 (Ariz. App. 10/7/16):
Holding: Where shoplifting Defendant had been handcuffed and separated from his backpack by store security before police arrived, 4th Amendment prohibited police from searching backpack "incident to arrest," since the incident-to-arrest exception only applies to items within arrestee's immediate control; inevitable discovery exception doesn't apply either because shoplifting is a misdemeanor which does not always lead to a suspect being taken to jail.

State v. Ontiveros-Loya, 2015 WL 3986142 (Ariz. App. 2015):
Holding: Even though Defendant's cell phone was in the room where he was arrested, Officer could not search phone without a warrant "incident to arrest," because that exception only applies when Defendant can endanger police or destroy evidence; once Defendant was in custody, he could not threaten police with the phone or destroy evidence on the phone.

State v. Sisco, 2015 WL 4429575 (Ariz. App. 2015):
Holding: Even though Officers smelled marijuana coming from a warehouse, the mere smell of marijuana, standing alone, is not sufficient evidence of criminal activity to supply probable cause to obtain a warrant since medical marijuana is now legal in Arizona.

People v. Marquez, 2019 WL 192359 (Cal. App. 2019):
Holding: Even though Defendant was arrested, where no charges were ever filed, it can be inferred the arrest was without probable cause, and thus, the warrantless taking of his DNA sample violated 4th Amendment, especially where there was no evidence that DNA samples were a routine part of booking at the jail.

People v. Espino, 2016 WL 2993994 (Cal. App. 2016):
Holding: (1) Even though Officer had probable cause to arrest Defendant during traffic stop for belief he had drugs in his pocket, when search of the pocket turned up no contraband, there was no probable cause to extend the traffic stop further and search the car; and (2) Defendant's consent to search car was not voluntary because he was unlawfully under arrest when obtained.

People v. Subramanyan, 2016 WL 1298516 (Cal. App. 2016):
Holding: Even though Victim's Bill of Rights gave victims the right to seek restitution "in any trial or appellate court with jurisdiction over the case," this did not authorize Victim to appeal the trial court's denial of a motion for additional restitution.

People v. Linn, 193 Cal. Rptr.3d 342 (Cal. App. 2015):
Holding: Even though Officer approached Defendant in a friendly manner, where he told her put out her cigarette and put down her soda can, and initiated a record check on her, Defendant would not have felt free to leave and was seized under 4th Amendment; court cites social science research showing that a significant number of people do not feel free to leave when approached by police.

King v. State, 2015 WL 7282901 (Cal. App. 2015):
Holding: Even though Defendant-Driver honked his horn to get someone to come out of a residence, there was no reasonable suspicion to support a traffic stop for alleged offense of operating a sound amplification system which could be heard more than 50 feet away; thus, the stop and subsequent search of Driver violated 4th Amendment.

Jones v. U.S., 101 Crim. L. Rep. 24 (D.C. Ct. App. 9/21/17):
Holding: Warrantless tracking of Defendant's phone using a cell tower simulator violated Fourth Amendment.

State v. Robusto, 2019 WL 512798 (Ga. App. 2019):
Holding: Even though (1) Officer saw drugs in a center console of a car which was stopped for a traffic violation and (2) Driver told Officer that the drugs belonged to Defendant-Passenger, Officer did not have authority to order Defendant-Passenger out of car and frisk him as a *Terry* search; even though Officer testified such searches were

"standard procedure," he did not testify that Defendant was dangerous or armed, and did not search Driver.

Hernandez v. State, 2019 WL 513626 (Ga. App. 2019):
Holding: Defendant-Driver's consent to blood test was not voluntary where Officer falsely told her that her out-of-state license would be revoked if she refused.

Watts v. State, 2015 WL 7305936 (Ga. App. 2015):
Holding: Where police had completed the purpose of the traffic stop regarding expired license tags, a 4-minute extension of the stop to wait for a drug dog violated 4th Amendment.

People v. Litwin, 2015 WL 5453175 (Ill. App. 2015):
Holding: Defendant's continued detention exceeded permissible scope of traffic stop where, among other evidence, Defendant's video expert testified that the police video had been manipulated and changed.

Zanders v. State, 99 Crim. L. Rep. 621 (Ind. App. 8/4/16):
Holding: Search warrant is required for police to obtain cell phone tower data used to track a person's location from a mobile phone company.

Wertz v. State, 2015 WL 4092864 (Ind. App. 2015):
Holding: Officer's warrantless search of GPS data on Defendant's GPS device in his car was not within the "automobile exception" to 4th Amendment; Defendant had reasonable expectation of privacy in the data, and the device was not a "container;" the exclusionary rule applied because it was not objectively reasonable for Officer to believe that obtaining the GPS data was the search of a "container" under existing appellate case law.

State v. Toliver, 2016 WL 360584 (Kan. App. 2016):
Holding: Even though Defendant-parolee signed an agreement permitting warrantless, suspicionless searches of his residence, the statute governing this only allowed such searches of Defendant's person.

Pulley v. Com., 2016 WL 192135 (Ky. App. 2016):
Holding: Even though Officer saw that Defendant had a non-concealed gun during a traffic safety checkpoint stop, this was not a permissible reason to extend the stop to check the serial number, because possession of a non-concealed gun is legal in Kentucky.

Com. v. Ortiz, 39 N.E.3d 458 (Mass. App. 2015):
Holding: Where the DEA suspected Defendant of drug trafficking and prearranged for him to be stopped on a minor traffic violation in order to be able to search his car, the warrantless inventory search of a backpack in the car was an unconstitutional pretextual search under 4th Amendment.

State v. Woldt, 2015 WL 4452361 (Neb. App. 2015):
Holding: Police violated 4th Amendment by stopping Defendant-Driver, who was believed to be a witness in several crimes, for an information gathering stop, where police knew Defendant and knew where he worked, and could have gone to his place of employment to seek an interview.

State v. Martinez, 2019 WL 3369642 (N.M. App. 2019):
Holding: Even though Officer thought Defendant might drive away during traffic stop, Officer's opening of Defendant's car door required a warrant under 4th Amendment.

State v. Tapia, 2015 WL 674711 (N.M. App. 2015):
Holding: Where Officer illegally stopped Defendant for a seat belt violation without reasonable suspicion, the "new crime" exception to the exclusionary rule did not automatically apply to Defendant's subsequent new forgery crime of giving the Officer a false name and false signature; the new forgery crime was directly connected to the illegal traffic stop, so the exclusionary rule applied.

People v. Dessasau, 2019 WL 288044 (N.Y. App. 2019):
Holding: Where police had removed Defendant (the sole occupant) from his parked van, they lacked probable cause to then open the van's door (where they then found a weapon).

People v. Savage, 2016 WL 1165331 (N.Y. App. 2016):
Holding: Even though Defendant-Pedestrians were in a "high crime" area at 6:30 p.m. and "stared" at police while walking, this did not provide reasonable suspicion to stop and search them.

People v. Suncar, 2020 WL 7421759 (N.Y. Supp. 2019):
Holding: Testimony that Officer could smell small amount of raw marijuana (which was inside a plastic bag inside another plastic bag) from outside sealed vehicle was not believable.

State v. Lowe, 2015 WL 4449993 (N.C. App. 2015):
Holding: The search of a vehicle in a driveway exceeded the scope of the search warrant issued for the house, where Officers knew that the vehicle did not belong to the homeowner.

Oregon v. Winn, 2016 WL 3024865 (Or. App. 2016):
Holding: Under Oregon Constitution, scope of Defendant's consent to warrantless search of her purse at courthouse security checkpoint did not include a small, closed makeup kit, even though Defendant did not object to the search; a reasonable person would have believed she was consenting to a search for weapons to ensure the safety of the courthouse, not a search for drugs; the signs posted at the courthouse only announced prohibitions on firearms and weapons.

State v. Delong, 2015 WL 8350095 (Or. App. 2015):
Holding: Even though Officer asked Defendant if there was "anything we should be concerned about" in his car and Defendant said "no" and allowed Officer to search, Officer's search of a zipped backpack in car exceeded scope of Defendant's consent; a reasonable person would not have understood the Officer's vague inquiry of what he intended to search for to include searching the backpack.

McGuire v. State, 2016 WL 2747221 (Tex. App. 2016):
Holding: Where none of seven officers at accident/DWI scene made any effort to secure a warrant, no exigent circumstances existed and warrantless blood draw violated 4th Amendment.

Perez v. State, 2016 WL 2605755 (Tex. App. 2016):
Holding: Warrantless, nonconsensual blood draw under mandatory blood draw DWI law violated 4th Amendment.

Roop v. State, 2016 WL 690755 (Tex. App. 2016)"
Holding: Good-faith exception to exclusionary rule did not apply to Officer's reliance on State implied consent and mandatory blood draw laws in conducting a warrantless blood draw, because seeking a warrant would not have conflicted with the State laws.

State v. Molden, 2016 WL 690795 (Tex. App. 2016):
Holding: Exclusionary rule applied even though Officer relied in good faith on existing appellate precedent that authorized warrantless blood draw based on implied consent law; here, Defendant had refused a blood test, and *McNeely* held a warrant was required to conduct one absent exceptional circumstances.

Carter v. State, 2015 WL 1905914 (Tex. App. 2015):
Holding: Absent exigent circumstances, 4th Amendment did not permit warrantless search of cellphone found in a car during Defendant's arrest; risk that the phone could be remotely wiped did not present an exigent "now or never" situation justifying a warrantless search.

Johnson v. State, 2015 WL 4115989 (Tex. App. 2015):
Holding: Even though Defendant was walking at 9:00 p.m. in a dark area known for prostitution, this did not provide reasonable suspicion of criminal activity to stop Defendant, and his consent to search was not independent of the stop.

McClintock v. State, 2015 WL 6851826 (Tex. App. 2015):
Holding: Even though Officer relied on binding (but erroneous) judicial precedent regarding drug-dog sniffs at the time he had dog sniff around residence, the statutory exclusionary rule applies because Texas' statutory exclusionary rule provides broader protection.

State v. Cortez, 2015 WL 7422784 (Tex. App. 2015):
Holding: Even though Defendant drove on fog line between driving lane and shoulder, this did not provide evidence of criminal violation to stop car.

State v. Rendon, 2015 WL 9858886 (Tex. App. 2015):
Holding: Where Officer entered a four-unit apartment building with a drug dog to sniff at Defendant's door, this exceeded any express or implied consent, which was generally limited to knocking on a door, and was a "search" that violated 4th Amendment because this was an unlawful intrusion into curtilage of home.

Gonzales v. State, 2015 WL 6876822 (Tex. App. 2015):
Holding: The ability to challenge the veracity of statements contained within an affidavit in support of a search warrant provided in *Franks* applies to challenges of material omissions from the affidavit, as well.

State v. Pena, 2014 WL 7465614 (Tex. App. 2014):
Holding: Where Defendant initially refused consent to search, but then did so after Officers told him the results of a warrantless dog sniff of the curtilage of his home, his consent was not freely and voluntarily given.

State v. Brown, 432 P.3d 1241 (Wash. App. 2019):
Holding: Where State's turn signal statute required use of a turn signal only when "public safety is implicated," Defendant's failure to use a turn signal when only he and a trailing trooper were on a road was not a violation of the statute.

City of Seattle v. Pearson, 2016 WL 793911 (Wash. App. 2016):
Holding: Natural dissipation of THC in blood does not justify warrantless blood draw.

State v. VanNess, 2015 WL 887865 (Wash. App. 2015):
Holding: Even though Officer was complying with an established inventory procedure for searching backpacks, the search incident to arrest exception and inventory search exception did not apply to a warrantless search of a locked box found in Defendant's backpack when he was arrested; there was no concern Defendant could access a weapon or destroy evidence since he was handcuffed and away from the backpack.

State v. Budd, 2015 WL 894324 (Wash. App. 2015):
Holding: Under Washington Constitution, before conducting a warrantless consent search of a house, Officers are required to give a Defendant warnings that he can revoke consent to search and limit the scope of consent at any time.

State v. Linder, 2015 WL 5933732 (Wash. App. 2015):
Holding: Where Officer conducted inventory search of Defendant's car in violation of policy that the search be observed by the owner or another third-person, exclusionary rule would be applied to drugs found in the car.

State v. Meza, 2015 WL 8950248 (Wash. App. 2015):
Holding: Funds in a bank account cannot be seized without a valid warrant; an ex parte order to freeze and seize funds is not a warrant or functional equivalent of a warrant.

State v. Andrews, 2016 WL 1254567 (Md. Ct. Spec. App. 2016):
Holding: (1) Defendant has reasonable expectation of privacy under 4th Amendment in real-time cell tower phone location information; Defendant did not voluntarily disclose his location information simply by using a cell phone; (2) a pen register trap and trace order is not sufficient to authorize use of a cell site simulator, which actively sends an electronic signal and triggers a cell phone to respond; the pen register statute does not apply to newer technologies.

People v. Mendoza, 2015 WL 5827541 (N.Y. Sup. 2015):
Holding: Where Officer reached across threshold of Defendant's doorway to grab and arrest Defendant, this warrantless arrest was inside Defendant's residence and violated 4th Amendment.

People v. Jackson, 2015 WL 6875461 (N.Y. Sup. 2015):
Holding: Police identification procedure consisting of a single, unpreserved photo of Defendant taken on Officer's cell phone and shown to Witness two hours after alleged assault was unduly suggestive.

People v. Bermudez, 2015 WL 3832587 (N.Y. County Ct. 2015):
Holding: Parole Officer's search of Parolee was without reasonable suspicion and violated 4th Amendment, where Parolee was merely in the vicinity of an unrelated parolee's residence where a shooting occurred and Officer did not ask Parolee before searching him if he was headed home or what he was doing in the area.

Com. v. Coleman, 2015 WL 8677416 (Pa. Super. Ct. 2015):
Holding: An anonymous tip that Defendant-Parolee was selling drugs and had a suspended driver's license, was not sufficiently reliable to allow warrantless search of Defendant's residence without reasonable suspicion, where the Officer confirmed only that Defendant's license was suspended.

Com. v. Myers, 2015 WL 3652667 (Pa. Super. 2015):
Holding: Where Defendant was arrested in response to a report of a man screaming in an area (and not arrested due to a vehicle incident), but then was rendered unconscious by an intervening event and taken to the hospital, the exigent circumstances exception to the warrant requirement did not allow a warrantless blood draw pursuant to the State's implied consent law for a DWI offense that Defendant was also believed to have committed.

Self Defense

State v. Barnett, 577 S.W.3d 124 (Mo. banc July 16, 2019):
Even though Defendant testified he did not stab Victim (which was contrary to the State's evidence and third-party witness testimony), Defendant was entitled to a self-defense instruction because the evidence viewed favorably to Defendant supported it; the test for a self-defense instruction remains the same regardless of which party introduced the testimony supporting the instruction and regardless of whether Defendant testified to the contrary.
Facts: Victim approached Defendant after they both left and bar, and threatened to kill him. Defendant testified he saw a metal object in Victim's hand. Defendant testified he then shoved Victim to ground and left. The Victim was later found with stab wounds. Defendant denied stabbing Victim but claimed he acted in self-defense. Defendant's request for a self-defense instruction was refused.
Holding: The State claims Defendant is entitled to a self-defense instruction only if the evidence supporting the theory of self-defense was offered by the State or testimony of a third-party Witness. But while there are old cases supporting the State's argument, those cases are based on a wrong reading of applicable law and should no longer be followed. A court is required to submit an instruction if there is substantial evidence to support it, and that rule does not change when Defendant's testimony contradicts the requested instruction. This would usurp the jury's fact-finder role. When the evidence supports two conflicting versions, even when both versions have been provided by Defendant, the court must refrain from determining which version is correct. The question whether a Defendant is entitled to an instruction cannot turn on which party introduced the evidence supporting the instruction. Going forward, it will be simplest if, when determining whether a defendant is entitled to an instruction, the court evaluates each requested instruction individually. When the instruction is supported by the evidence, it should be given regardless of any other instruction also being given.

State v. Bruner, 2018 WL 414948 (Mo. banc Jan. 16, 2018):
Whether a self-defense instruction is required is based on the elements in Sec. 563.031; the common law elements of self-defense and cases citing the common law elements are no longer to be followed.
Facts: When Defendant learned that his estranged wife was out with another man, he went looking for them. When he found them, Defendant began to verbally confront his wife. The man then assumed a "fighting stance," and said he would "have your throat slit in two hours." The man did not move toward Defendant or attempt to hit him. Defendant shot and killed the man. Defendant testified at trial, but did not testify that he acted in self-defense. Instead, he testified he shot the man when Defendant was in a dissociative state. Nevertheless, the defense sought a self-defense instruction, which was denied. Defendant was convicted of first-degree murder.
Holding: In order to receive a self-defense instruction, self-defense must be shown by substantial evidence. The elements of self-defense that must be shown are set out in Sec. 563.031. As relevant here, before use of force can be justified, Defendant must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful force by another, Sec. 563.031.1.

Defendant may use deadly force only if he reasonably believes that such deadly force is necessary to protect himself against death, serious physical injury, or any forcible felony, Sec. 563.031.2(1). Sec. 563.031.1(1) also provides that force may not be used if the Defendant was the "initial aggressor." The State and Defendant quote from cases setting out a common law test for self-defense, which includes the absence of aggression or provocation; real or apparent necessity to use deadly force; reasonable cause for belief that deadly force is necessary; and attempt to avoid the danger. While these elements largely, but not completely, parallel the elements of self-defense under the statute, it is the statute that necessarily must govern what is required to inject self-defense. Reliance on cases addressing what is required under a different test is not helpful and such cases should no longer be followed. Here, Defendant did not testify he acted in self-defense. A victim's words alone are insufficient to support a claim of self-defense. Neither is deadly force justified in response to fear of being grabbed or punched. At most, Defendant showed a fear of simple assault or battery, but deadly force cannot be used to repel simple assault and battery. Deadly force is only justified when Defendant reasonably believes such force is necessary to protect from death, serious physical injury, or a forcible felony. That's not the case here, so self-defense instruction need not be given.

State v. Oates, 2018 WL 830311 (Mo. banc Feb. 13, 2018):
Self-defense is not available as a defense to felony murder unless the underlying felony involves the use of force; Defendant was not entitled to self-defense instruction where the underlying felony was attempting to distribute a controlled substance.
Facts: Defendant shot and killed two people while trying to sell them marijuana. He was charged with conventional second degree murder, and an alternative count of felony murder for the killing during the drug deal. The trial court instructed the jury on conventional murder, and lesser offenses of voluntary and involuntary manslaughter – all with self-defense instructions. The trial court also instructed on felony murder, but refused a self-defense instruction on felony murder. The jury convicted of felony murder.
Holding: Pre-2007 cases hold that self-defense is not an available defense to felony murder. Defendant argues that amendments to Secs. 563.031.1 and 563.074.1 in 2007 changed this. However, the 2007 changes did not alter the principle that self-defense justifies only the use of force and is, therefore, a defense only to prosecution for the use of force. Where, as here, the prosecution for felony murder is not based on Defendant's use of force, but rather the underlying felony of attempting to distribute drugs, self-defense is not an available defense. In other words, unless the underlying felony involves the defendant's use of force, felony murder is not prosecuting the Defendant's use of force. Felony murder is prosecuting a different act – the commission of a felony that results in the death of person.

State v. Oates, 2017 WL 2854195 (Mo. App. E.D. July 5. 2017):
Even though Defendant was charged with felony-murder with the predicate felony being distribution of a controlled substance, Defendant was not precluded from raising a self-defense claim "as a matter of law," and the trial court erred in refusing a self-defense instruction. Self-defense is not precluded "as a matter of law" from being raised by a

defendant charged with felony murder when the predicate felony can be classified as "non-forcible."
Facts: Defendant killed two people in a car in connection with a drug deal. Defendant claimed that the Victims had threatened to kill him and he shot Victims in self-defense. The jury was instructed on self-defense as to conventional second degree murder, voluntary manslaughter and involuntary manslaughter, but the court refused a self-defense instruction on felony-murder.
Holding: The State contends that Defendant was not entitled to an instruction on self-defense because it is not a defense to felony-murder where it was not a defense to the underlying felony. Although "any" felony may be used to establish a basis for felony murder, when a death results from the use of reasonable force as permitted in Sec. 563.031.1(3) – which only precludes use during the commission of a felony that is *forcible* – self-defense is a potential defense to negate criminal liability. Self-defense is not precluded "as a matter of law" from being raised by a defendant charged with felony murder when the predicate felony can be classified as "non-forcible." A trial court must give a self-defense instruction when substantial evidence is adduced to support it. Defendant's testimony showed that Victims were the aggressors; he had reasonable grounds for believing he faced immediate danger when Victims pulled a gun on him; the force he used was reasonably necessary given the circumstances; and he did everything in his power to avoid danger, given the close confines of the car. Hence, the court erred in not giving a self-defense instruction to felony murder.

State v. Whipple, 2016 WL 6080418 (Mo. App. E.D. Oct. 18, 2016):
Holding: (1) As a matter of first-impression, even though the owner of property does not have a duty to retreat under the "castle doctrine" and "stand your ground" law, Sec. 563.031, in order for the owner to use deadly force, he must have a reasonable belief that such force is necessary to defendant himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force; and (2) although Defendant-owner was not entitled to a self-defense instruction solely because he had no duty to retreat, trial court erred in failing to give self-defense instruction where a man came onto Defendant's property; argued with Defendant; and appeared to seek to run over Defendant with the man's vehicle, which caused Defendant to shoot at the man's car; this is true even though Defendant had gone to another location and argued with the man shortly before the shooting incident on Defendant's property.

State v. Comstock, 2016 WL 3213492 (Mo. App. S.D. June 9, 2016):
Even though trial court gave a self-defense instruction that Defendant was allowed to use deadly force to protect himself from "death or serious physical injury," trial court erred in refusing Defendant's self-defense instruction that he could also use deadly force to protect himself from the "forcible felony" of second degree domestic assault, which involves only "physical injury," where Defendant and Victim were housemates who got into fight.
Facts: Defendant had been married to Victim's mother, and although divorced, Defendant lived with Victim and mother. Victim was not happy that Defendant lived with them. Victim told Defendant he "wasn't wanted" in the house. Victim "came at" Defendant and began shoving him. Victim was larger than Defendant. Defendant was

scared, grabbed a knife and stabbed Victim. A fight ensued, during which Defendant again stabbed Victim.
Holding: Regarding refusal of Defendant's self-defense instruction, the evidence is viewed in light most favorable to Defendant. Defendant's proposed instruction stated that he could use deadly force "to protect himself against the commission of a forcible felony." The instruction identified the forcible felony as second degree domestic assault, which occurred if Victim was attempting to cause "physical injury" to Defendant. Instead of this instruction, the trial court submitted the State's self-defense instruction. It said Defendant could use deadly force only to "protect himself from death or serious physical injury." Sec. 563.031 allows a self-defense instruction allowing deadly force to defend against three situations: death, serious physical injury or "any forcible felony." On appeal, the State claims second degree domestic assault does not qualify as a "forcible felony" here because it must be committed by a deadly weapon, dangerous instrument, choking or strangulation; however, the second degree domestic assault statute, 565.073.1(1), states the offense is committed "by any means, including but not limited to" those methods. Thus, second degree domestic assault includes Victim's conduct here. Defendant was prejudiced by the failure to give Defendant's self-defense instruction because the jury could have found that Defendant used deadly force to protect against only "physical injury" upon him, not "serious injury or death." Reversed for new trial.

State v. Gates, 2020 WL 6277241 (Mo. App. W.D. Oct. 27, 2020):
Holding: Secs. 563.074.1 and 536.031.1(3) combine to codify pre-2007 decisional law declaring self-defense to be unavailable as a matter of law as a defense to felony murder predicated on the commission of a *forcible* felony; thus, where Defendant was accused of committing or attempting to commit a forcible felony (first-degree robbery) as the predicate offense for second-degree murder, Defendant was not permitted to use self-defense as a defense, and trial court did not err in excluding Defendant's testimony about his version of the crime (indicating he acted in self-defense) or not instructing jury on it.
Discussion: Sec. 563.074.1 creates the defense of justification. It states that "a person who uses force as described in section[] 563.031 … is justified in using such force and such fact shall be an absolute defense to criminal prosecution." Sec. 563.031 allows a person to use force to defend himself *unless* three exceptions apply. As relevant here, Sec. 563.031.1(3) applies. It excludes justification as a defense if the "actor was attempting to commit, committing, or escaping after commission of a *forcible* felony."

State v. O'Bryan, 2015 WL 5201133 (Conn. 2015):
Holding: Even though Defendant and Victim had agreed to a fistfight, where the fight escalated into a knife fight, the combat-by-agreement disqualification to self-defense did not apply, because once the fight escalated, there was no agreement to fight at all.

State v. Sutton, 2015 WL 3447907 (Ga. 2015):
Holding: Defendant was immune from prosecution for murder under state self-defense law, where the shooting occurred after an argument between Defendant and Victim, Victim left threatening voicemails for Defendant, Defendant knew Victim had been violent before, and Defendant knew Victim had a gun.

Com. v. Allen, 48 N.E.3d 427 (Mass. 2016):
Holding: Instruction which told jurors that if Defendant used unreasonable or excessive force in defense of another, he did not act in lawful self-defense misstated the law; if Defendant used excessive force in defense of another, he did not lose self-defense altogether; rather, the crime was mitigated from murder to manslaughter.

People v. Triplett, 2016 WL 1191512 (Mich. 2016):
Holding: Common-law affirmative defense of self-defense is available to Defendant charged with carrying a concealed weapon, when the instrument at issue is dangerous only because it is used as a weapon.

People v. Coahran, 2019 WL 303029 (Colo. App. 2019):
Holding: Even though Defendant was charged with a property crime (where she kicked her ex-boyfriend's car during an argument), she was entitled to a self-defense instruction for taking steps reasonably necessary to defend herself, which could include kicking the car.

Sentencing Issues

State v. Barnett, 2020 WL 1861732 (Mo. banc April 14, 2020):
Holding: Sec. 565.020, which mandates life without parole for first-degree murder, is not unconstitutional as applied to Defendant, who was 19 years old at the time of his offense; the U.S. Supreme Court's jurisprudence on the necessity to consider mitigating circumstances for juveniles before sentencing them to life in prison without parole applies only to persons younger than 18 years old.

State v. Russell, 2020 WL 2036711 (Mo. banc April 28, 2020):
Where (1) before Bazell, Defendant pleaded guilty to felony stealing, Sec. 570.030, and received a suspended imposition of sentence, but (2) after Bazell, when the State sought revocation, he timely objected to felony sentencing but received a 7-year sentence anyway, Defendant can raise this error on direct appeal because Sec. 547.070 authorizes a direct appeal of final judgments, and Bazell applied forward to his case. Remanded for misdemeanor sentencing.
Facts: In 2013, Defendant pleaded guilty to felony stealing and received an SIS. In 2016, *Bazell* was decided, effectively making the offense a misdemeanor. In 2017, the State sought to revoke Defendant's probation. At his sentencing, Defendant timely asserted that *Bazell* required misdemeanor sentencing and objected to felony-level sentencing. The court imposed a 7-year sentence. Defendant filed a direct appeal.
Holding: The State argues that Defendant cannot do a direct appeal of a guilty plea, and that his sole remedy, if any, was under Rule 24.035 for imposing an excessive sentence. The right of appeal is statutory. Sec. 547.070 provides a direct appeal in all cases of final judgment. This statutory language does not prohibit the right of appeal after guilty pleas, and neither can the Supreme Court, because Mo. Const. Art. V, Sec. 5, prohibits the Court from enacting Rules that change substantive rights "or the right of

appeal." Rule 24.035 does not purport to change the right of appeal. It simply provides that procedure for seeking relief from an excessive sentence *in the sentencing court*. Rule 24.035 does not say – and the Court could not adopt a rule that says – this procedure supplants the statutory right to direct appeal. This Court has previously stated that *Bazell* applies "forward" and the "appropriate remedy is a direct appeal." Defendant raised his *Bazell* claim after *Bazell* – i.e., forward – and he pursued a direct appeal. While Defendant could have waived his claim by not objecting at his sentencing, here, he did object and fully preserved his *Bazell* issue for appeal. Judgment reversed and remanded for sentencing as misdemeanor.

Hamilton v. State, 2020 WL 2029272 (Mo. banc April 28, 2020):
Where (1) before Bazell Movant pleaded guilty to felony stealing, Sec. 570.030, and received a suspended imposition of sentence, but (2) after Bazell Movant's probation was revoked and she received a 5-year sentence, Movant was entitled to Rule 24.035 relief because Bazell applied "forward" to her and Rule 24.035 allows claims that a sentence exceeds the maximum authorized by law.
Facts: In 2012, Movant pleaded guilty to felony stealing and eventually received an SIS. In 2016, *Bazell* was decided, effectively making the offense a misdemeanor. In 2017, Movant's probation was revoked and she was sentenced to 5-years. She filed a 24.035 motion challenging her sentence. The motion court denied relief on grounds that Movant should have raised this claim in a direct appeal.
Holding: The Supreme Court previously held in *Windeknecht* that *Bazell* applies to cases "pending on direct appeal" and to cases going "forward." Because Movant received an SIS, there was no conviction or final judgment until sentence was entered – which was after *Bazell*. Since *Bazell* had already been decided at the time Movant was sentenced, Movant's case is a "forward" application of *Bazell*. To the extent that the language in prior opinions is unclear, the Court "reiterates that, in stating *Bazell* applies forward, it meant that *Bazell* applies to all cases that were not yet final when *Bazell* was announced, even if already filed, tried, or subject to a plea, so long as sentence had not been entered when *Bazell* was decided, as well as to cases on direct appeal." Reversed and remanded for misdemeanor sentencing.

State ex rel. Jonas v. Minor, 2020 WL 3529366 (Mo. banc June 30, 2020):
(1) Petitioners (Defendants) can challenge the erroneous calculation of their probation discharge date with accrual of Earned Compliance Credits (ECC's) in habeas corpus; (2) even though courts generally defer to the Division of P&P to calculate the discharge date, this is not a "rubberstamp"; where the Division improperly calculated the date, and Petitioner was revoked after he should have been discharged, habeas relief is granted; and (3) even though the Division did not give the court 60 days' notice of the date of final discharge as required by Sec. 217.703.10, failure to give notice cannot extend the date of discharge.
Facts: In 2012, Petitioner pled guilty to a felony; received an SES; and was ordered to pay restitution (among other conditions). Various field violation reports and motions to suspend were filed 2013, though probation was ultimately continued. One of those reports said Petitioner's discharge date (with ECC's) was April 15, 2015. In June 2015, a report was filed showing Petitioner still owed restitution. The State filed to suspend and

revoke for failure to pay, but withdrew that motion in November 2015, when Petitioner completed paying restitution. In January 2016, a field violation report was filed. That report said Petitioner had paid his restitution, and had a discharge date with ECC's of March 15, 2016. In February 2016, the State filed to suspend and revoke for other violations of probation. In May 2017, the court revoked and ordered his 7-year sentence executed. He filed a writ of habeas corpus.

Holding: (1) Petitioner can challenge the calculation of his discharge date in habeas corpus. Even though Sec. 217.703.8 says that the award of ECC's cannot be raised in "any motion for postconviction relief," a habeas action is *not* a motion for "postconviction relief." (2) Petitioner accrued sufficient ECC's to be discharged once he paid his restitution. This Court generally defers to the division of probation and parole to calculate ECC's. But this Court does not "rubberstamp" the division's calculation when it is improperly calculated. Here, the division failed to include any ECC's in its June 2015 report even though Petitioner was in "compliance" at that time. Although Petitioner could not be discharged until he paid his restitution, he finished paying in November 2015. At that point, Petitioner had accrued enough ECC's to be discharged, and should have been discharged. (3) Even though the division failed to give the court 60 days' notice of the date of final discharge as required by Sec. 217.703.10, the failure to give notice is not controlling, because the division's failure to act will not extend the date of discharge. Once restitution was completed and Petitioner accrued all his ECC's, the court was divested of authority to revoke. Defendant discharged.

Mitchell v. Phillips, 2020 WL 547402 (Mo. banc Feb. 4, 2020):

Holding: Even though Sec. 195.295.3 RSMo. 2000, which made prior drug offenders ineligible for probation or parole, was repealed effective January 1, 2017, persons convicted and sentenced before the repeal remain ineligible for probation or parole because this ineligibility was part of their sentence.

Discussion: When an offender's sentence contains no restrictions on parole eligibility, statutory amendments and repeals of general parole-eligibility statutes govern, subject to the constitutional prohibition against ex post facto laws. Here, however, the statute designating the permissible penalty for prior drug offenders, Sec. 195.295.3 RSMo. 2000, expressly mandated that the term of imprisonment be without probation or parole. Thus, ineligibility for probation or parole is part of the sentence. Any application of the repeal of Sec. 195.295.3 to people convicted and sentenced before the repeal would retroactively change their sentences. Thus, such persons remain ineligible for probation and parole.

Hicklin v. Schmitt, 2020 WL 6881220 (Mo. banc Nov. 24, 2020):

Holding: (1) Even though Petitioner was convicted of first-degree murder and sentenced to life-without-parole when she was a Juvenile, Missouri has complied with *Miller* and *Montgomery* by granting parole-eligibility after 25 years, and allowing Parole Board to determine whether such Juveniles should be released, Sec. 558.047.1(1); *Montgomery* allowed States discretion whether to grant new sentencing hearings to such Juveniles or grant parole-eligibility, and Missouri chose the latter; and (2) challenges to the constitutionality of statutes are brought as a declaratory judgment action, but attacks on validity of sentence should be brought in habeas corpus; to the extent Petitioner seeks

a judgment about the constitutionality of the first degree murder statute, Sec. 558.047, and their application to her, declaratory judgment is proper; declaratory judgment is also proper to determine when Petitioner is eligible for parole under applicable statutes, and to challenge what process a parole hearing must use to comply with relevant statutes.

State ex rel. Jones v. Eighmy, 2019 WL 1912241 (Mo. banc April 30, 2019):
(1) Trial court failed to make every reasonable effort to bring Defendant/Petitioner before the court for a probation revocation hearing before his probation expired, where judge and prosecutor knew that Defendant/Petitioner was being held in another county jail but failed to issue a writ of habeas corpus ad testificandum or ad prosecquendum to bring about his appearance before the term expired; and (2) the filing of a violation report does not suspend Earned Compliance Credits that are already earned; it merely suspends the continued accumulation of credits pending the outcome of a hearing, if a hearing is held.
Facts: With Earned Compliance Credits, Defendant/Petitioner's probation term was set to expire in December 2017. Meanwhile, in August 2017, the prosecutor filed a motion to revoke probation because Defendant/Petitioner committed a new offense in another county and was being held in that county's jail. The trial court set a probation violation hearing for September 2017. The prosecutor did not seek, and the trial court did not issue, a writ of habeas corpus ad testificandum or ad prosecquendum.
Defendant/Petitioner did not appear at the September 2017 hearing because he was in jail in the other county. The court made a docket entry: "Deft fails to appear – warrant already in place." In June 2018, Defendant/Petitioner contacted the court to ask about his probation. The court then set a revocation hearing. Defendant/Petitioner's counsel moved to discharge from probation because it had expired, and sought a writ of prohibition or mandamus.
Holding: After probation expires, a court cannot revoke unless, before expiration, it (1) manifested an intent to revoke, and (2) made every reasonable effort to hold a hearing before expiration. Here, the court manifested an intent to revoke because it held a revocation hearing without Defendant in September 2017. But the court didn't make every reasonable effort to hold a hearing with Defendant present. The court and prosecutor knew Defendant was in another county jail, but took no action to have him brought to court for his revocation hearing until after expiration. The State incorrectly argues that Defendant's probation didn't expire because the filing of the violation report suspended even those ECC credits that had already been earned because §217.703.5 says credits shall not accrue during any month a violation report is filed and "shall be suspended pending the outcome of a hearing, if a hearing is held." But this language refers only to the continued accumulation of credits. It does not mention suspension of credits already earned. Contrary to the dissent's argument that Defendant/Petitioner had a duty to request a timely hearing before expiration, §559.036.8 makes it the duty of the *court* to make every reasonable effort to hold the hearing before expiration. Defendant discharged.

State ex rel. Griffith v. Precythe, 2019 WL 2181680 (Mo. banc May 21, 2019):
(*1) Trial court exceeded its authority in placing Defendant on a third term of probation; (2) when a court places a defendant on an erroneous third term of probation, the case should be returned back to the point in time before the erroneous third term to determine what the defendant's sentence should be; but (3) where Defendant was discharged from parole during the appeal, he should not be returned to custody.*
Facts: In 2010, Defendant pleaded guilty and was placed on 5 years probation. In 2011, he was revoked and sentenced to a 120-day program under §559.115. Following successful completion of that program, he was placed on a *second* 5 year probationary term. In 2013, the court revoked Defendant's probation and placed him on a *third* 5 year probationary term. In 2014, Defendant was revoked and sentenced to 5 years in prison. Defendant filed a writ of habeas corpus alleging the trial court exceeded its authority in placing him on the third term.
Holding: §559.036 provides that when a probation violation occurs, a court may continue the probation term, extend the term by one additional year, or issue a second term of probation. But a court has authority to revoke a term of probation only one time if the probationary terms are violated. Here, the court had authority to revoke the first term and place Defendant in the 120-day program. When Defendant completed that program, the court properly placed Defendant on the *second* 5 year probation term. But when the court revoked in 2013, it placed him on an unlawful *third* term. A court may impose a new term of probation only once. The imposition of the *third* term was void. The usual remedy should be to return Defendant to the point in time before the third term in 2013; then the court would decide an appropriate sentence disposition, taking into account the additional time served on probation and the incarceration in crafting a judgment. Here, however, Defendant was discharged from parole during the appeal, so he should not be returned to custody.

State ex rel. Sampson v. Hickle, 2019 WL 2182766 (Mo. banc May 21, 2019):
(1) Where Defendant was already serving a second term of probation, the trial court had authority to place Defendant in a 120-day program, but when he successfully completed the program, his second term of probation should have continued; the trial court erred in placing Defendant on an unlawful third term of 5 years probation following the 120-day program; and (2) case is remanded to trial court to place Defendant back on second term, and then determine whether his probation expired with application of Earned Compliance Credits.
Facts: In 2012, Defendant pleaded guilty, received an SIS, and was placed on 5 years probation. In 2013, he was revoked, given an SES, and placed on a new, *second* 5 year probationary term. In 2015, he was revoked and placed in a 120-day program under §559.115. Following successful completion, the court placed Defendant on a *third* probation term of 5 years. In 2017, the State sought to revoke probation. Defendant filed a motion to be discharged, claiming his third term was unlawful and that with Earned Compliance Credits, his probation term had expired. The trial court denied the motion. During the appeal, the Board of Probation and Parole issued a letter saying that with ECC, Defendant was discharged from probation in August 2018.
Holding: §559.036.4(1) provides that if a continuation, modification, enlargement or extension of probation is not appropriate, the court shall place a Defendant in a 120-day

program. Thus, the court properly placed Defendant in the 120-day program. But §559.036.4(3) provides that when a Defendant successfully completes the program, the court shall release him "to continue to serve the term of probation, which shall not be modified, enlarged, or extended based on the same incident of violation." Thus, the court erred in placing Defendant on a new, *third* 5 year probation term when Defendant was released from the 120-day program. Instead, Defendant should have resumed serving his *second* term of probation. While it is clear that the trial court erroneously imposed a third term, it is not clear whether Defendant's second term of probation has expired. The Board's report is invalid because it is based on the unlawful third term of probation. Case is remanded with directions to enter an order continuing Defendant's second term of probation, and recalculation of ECC credits to determine if Defendant was discharged before the court manifested an intent to revoke.

State ex rel. Hillman v. Beger, 566 S.W.3d 600 (Mo. banc Feb. 13, 2019):
Holding: A defendant under the pre-2018 amendments to the Earned Compliance Credit statute, Sec. 217.703, may not be discharged from probation as a result of ECC if he has not fully paid restitution, because Sec. 559.105.2 prohibits discharge if restitution has not been paid. (The 2018 amendment to ECC expressly adopted this rule.)
Discussion: This case concerns the pre-2018 amendments to the ECC statute. Sec. 217.703.7 creates a mandatory duty to discharge a defendant from probation when he has served the total term of probation minus the ECC's he has earned. However, Sec. 559.105.2 prohibits a defendant from being released from probation if they have not paid full restitution. Where two statutes conflict, a reviewing court must attempt to harmonize them. This Court holds a probationer may accrue ECC's under Sec. 217.703, but may not be discharged from probation by applying those ECC's to reduce the term of probation until he has paid the full amount of restitution. This result follows for several reasons. First, the ECC statute is the more general statute, while 559.105.2 imposes a more specific restriction. Specific statutes prevail over general ones. Second, 559.105 was enacted later in time. Third, 559.015 is remedial in nature. Finally, the 2018 amendment shows that the legislature always intended 559.105.2 to prevail over 217.703.7 because the amendment expressly provides that the restitution obligation survives ECC accrual.

State ex rel. Coleman v. Horn, 2019 WL 1030744 (Mo. banc March 5, 2019):
Holding: A "notice of citation" under the pre-2018 amendments to the Earned Compliance Credit statute, Sec. 217.703, does not stop the accrual of ECC's for that month because a "notice of citation" is not a "violation report" or motion to revoke or suspend probation, which would stop the accrual of EEC's; thus, even though Defendant received multiple "notices of citation" for various non-compliant behavior on probation, she continued to accrue ECC's and her probation expired before the court later revoked it after a "violation report" was eventually filed. (The 2018 amendment of Sec. 217.703.4 now includes "notice of citation," so such notices now will stop the accrual of EEC's for that month.)

Miller v. State, 2018 WL 3626508 (Mo. banc July 31, 2018):
Where (1) the State filed a motion to revoke probation shortly before Defendant/Movant's probation expired, (2) a revocation hearing was scheduled to occur shortly before expiration, but (3) Defendant/Movant's counsel consented to continuing the revocation hearing until after the expiration date, Defendant/Movant was bound by the actions of his counsel, and the trial court was not without authority to later revoke probation.
Facts: Shortly before Defendant/Movant's probation expired, the State filed a motion to revoke probation for various violations. A revocation hearing was scheduled to occur five days before expiration, but Defendant/Movant's counsel agreed to continue the hearing. Defendant/Movant's probation was later revoked, after the probation term had expired. He filed a Rule 29.15 motion claiming the court lacked authority to revoke.
Holding: Sec. 559.036.8 allows a court to revoke after a probation term has expired if (1) there was an affirmative manifestation of an intent to conduct a revocation hearing before the term expired, and (2) the court made every reasonable effort to conduct the hearing before expiration. Here, only the second condition is disputed. But Defendant/Movant's counsel agreed to continue the revocation hearing which would have occurred before expiration (and agreed to another continuance after expiration). Even though Defendant/Movant's counsel may not have consulted with Defendant/Movant personally about the continuances or received his permission to continue, this does not matter because, in general, a Defendant/Movant is bound by the actions of his counsel. Judgment setting aside revocation is reversed.

State v. Pierce, 2018 WL 2928086 (Mo. banc June 12, 2018):
(1) Even though the sentencing judge erroneously believed that persistent offender status increases the minimum sentence (when it increases only the maximum sentence), where the judge explained that he was sentencing Defendant to prevent recidivism, Defendant must show that the judge's mistaken belief as to the sentencing range played a significant part in the sentence imposed in order to receive plain error relief; here, the Defendant cannot meet that test because of the judge's statements about recidivism; and (2) Even assuming that Defendant did not "consent" to allow Officers into his home, where Officers entered his home after Defendant called a suicide hotline and was mentally disturbed, and Officers saw child pornography on Defendant's computer when they entered the home, application of the exclusionary rule to suppress the pornography is not warranted, because the exclusionary rule is designed to deter police misconduct, but here, there is no indication the police acted in bad faith in entering the home.
Facts: Defendant was found guilty of a Class B felony as a persistent offender. Under Sec. 558.016.7(2), this increases the maximum sentence to 30 years, but the minimum sentence remains five years. The sentencing judge stated that the sentence was 10 to 30 years, and sentenced Defendant to 15 years to prevent recidivism.
Holding: Defendant seeks re-sentencing based on plain error. However, this Court has never vacated a sentence based on plain error simply because the record shows that the judge was mistaken about the range of punishment. Rather, this Court has vacated sentences when the record shows the judge imposed a sentence *based on* his mistaken belief. To obtain plain error relief, Defendant must show that the judge's mistaken belief played a significant part in his sentencing decision. Here, while the record shows that the judge held a mistaken belief about the range of punishment, he said he was basing his

sentence on the need to prevent recidivism. Thus, Defendant has failed to show manifest injustice. To the extent that court of appeals' decisions have granted resentencing based on plain error merely because a sentencing court held a mistaken belief about the range of punishment, those cases should no longer be followed.

State v. Perry, 2018 WL 2928022 (Mo. banc June 12, 2018):
Holding: (1) Even though the sentencing judge misunderstood the range of punishment (because persistent offender status increases only the maximum penalty, not the minimum penalty), Defendant was not entitled to re-sentencing under plain error because Defendant could not show that the judge's sentence was *based on* the mistaken belief, since the court did not sentence him to the minimum time; and (2) even though Officer (who suspected Defendant was driving while suspended) approached Defendant-Driver on foot; asked "can I talk to you?" and "can I see" your license; and took the license from him, this encounter was "consensual" (not a seizure), and Defendant voluntarily cooperated with the Officer, so the Fourth Amendment is not implicated, and drugs later found need not be suppressed.

State v. Johnson, 524 S.W.3d 505 (Mo. banc Aug. 22, 2017):
(1) The predatory sexual offender statute, Sec. 558.018.5(3), allows a defendant to be found to be a predatory sexual offender based on committing acts against more than one victim in the charged offense; the acts need not be prior to the charged offense; (2) even though the statute allows a judge to find a defendant to be a predatory sexual offender for current acts, this does not necessarily render the statute unconstitutional as violating the Sixth Amendment right to a jury finding of predicate facts necessary to increase punishment, where the jury also convicts based on more than one victim; however, the statute may be unconstitutional, as applied, if the jury does not convict based on multiple victims; and (3) even though the trial court violated the timing requirements of Sec. 558.021.2 by not finding the Defendant to be a predatory sexual offender before the case was submitted to a jury, this was not plain error where Defendant had waived jury sentencing before trial.
Facts: Defendant was charged with various sex offenses against three children. The State charged him with being a "predatory sexual offender" under Sec. 558.018.5(3), because he "[h]as committed an act or acts against more than one victim" in the instant offense. Defendant argued the statute applies only to prior acts, not acts that form the basis for the current offense. The State sought to have the trial court find Defendant to be a predatory sexual offender before the case was submitted to the jury, but the trial court initially agreed with Defendant's interpretation of the statute and denied the State's request. At sentencing, the State again requested that Defendant be found to be a predatory sexual offender. The trial court then agreed with the State's interpretation of the statute, and found and sentenced Defendant as a predatory sexual offender to life in prison without parole for 25 years.
Holding: (1) Regarding Defendant's claim that the statute only applies to prior offenses, this is belied by the plain language of Sec. 558.018.5(3), which declares a person to be predatory sexual offender if they have "committed an act or acts against more than one victim." The statue is unambiguous. Nowhere does subdivision 3 refer to "prior" or "previous" acts. Those are dealt with in Sec. 558.018.5(2). (2) Defendant claims the

statute is unconstitutional under *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013), which requires that any fact, other than prior conviction, that increases the penalty for a crime must be submitted to the jury and determined by the jury. Here, however, both the judge and jury found the necessary facts of acts committed against more than one victim. *Alleyne* held only that the jury must find the necessary facts, not that a statute may not require a trial court to also find the facts. The trial court's pre-submission findings of predicate facts does not necessarily preclude the jury from also having to later find the same predicate facts. If either the circuit court or jury would fail to find the required facts, the defendant could not be sentenced as a predatory sexual offender. That the statute could be unconstitutional *as applied* when the jury does not also find the predicate facts does not render it facially unconstitutional. (3) The trial court violated the timing requirements of Sec. 558.021.2 because it did not find Defendant was a predatory sexual offender before the case was submitted to the jury, as required by Sec. 558.021.2. However, because Defendant did not object to violation of the timing requirements, this can only be reviewed for plain error. Here, no manifest injustice resulted from the violation of the timing requirements. The trial court's error did not deprive Defendant of any possible benefit of jury sentencing (because he waived jury sentencing prior to trial), did not give the State an unfair advantage, and did not lack foundational support in the evidence. Sentence as predatory sexual offender affirmed.

Concurring opinion: Judge Breckenridge would find that Sec. 558.018.5(3) is unconstitutional under *Alleyne*, as applied, when used to classify a defendant as a predatory sexual offender based on acts committed against multiple victims for which the defendant has not been previously convicted, as occurred here. However, under the facts here, she would not reverse for the *Alleyne* error.

Dissenting opinion: Judges Stith and Draper would reverse the sentence because of the violation of the timing requirements of 558.021.2, and because allowing a trial judge to designate a defendant as a predatory sexual offender based on current acts against multiple victims violates *Alleyne*. The majority's holding means the enhanced mandatory minimum applies in every case with more than one victim, since it requires trial judges to make the predatory sexual offender finding before submission to the jury. If the judge does not so find, the judge would have to refuse to submit the charges to the jury at all and instead submit a judgment of acquittal on them. This is because the defendant could not be convicted of an act based on evidence insufficient to support such a finding. For each charge submitted, the defendant would either be acquitted and so subject to no sentence, or be convicted and automatically subject to the enhanced mandatory minimum. The one thing that will *never* happen is for the defendant to receive the sentence actually prescribed by the statute based on the jury's verdict. This cannot be what the legislature intended.

State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. banc July 11, 2017):

Holding: Where Juvenile had been convicted in 1980s under murder scheme, Sec. 565.001 RSMo. 1978, which provided mandatory sentence of life without parole for 50 years, this violated 8th Amendment under *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), because sentencer had no opportunity to consider his age, maturity or capacity for rehabilitation; Defendant must be resentenced pursuant to the procedure in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013).

Discussion: Habeas relief is available to inquire into the validity of a criminal conviction which violates fundamental fairness. Although prisoners are generally required to raise constitutional claims on direct appeal or in postconviciton, a defendant has cause for failing to raise such claims where a new constitutional rule may be applied retroactively on collateral review. *Miller* controls because Defendant was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme without the jury having any opportunity to consider mitigating circumstances attendant to youth.

Willbanks v. Mo. Dept. of Corrections, 522 S.W.3d 238 (Mo. banc July 11, 2017):
Juvenile's multiple consecutive sentences for multiple non-homicide offenses (which totaled more than 300 years) did not violate Graham, even if Juvenile would not be eligible for parole until beyond his normal life expectancy.
Facts: Juvenile was convicted of kidnapping, assault, robbery and armed criminal action and sentenced to consecutive sentences which totaled more than 300 years. He would not be eligible for parole until he is 85 years old. He claimed his sentence exceeded his life expectancy and violated the 8th Amendment under *Graham v. Florida*, 560 U.S. 48 (2010).
Holding: *Graham* held that the 8th Amendment prohibits sentencing a juvenile to a *single* sentence of life without parole for a non-homicide offense. *Graham* is different than the instant case, which involves Juvenile convicted of *multiple* non-homicide offenses who received multiple fixed-term sentences. The U.S. Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life in prison without parole. Sec. 558.047 (2016), which allows juveniles sentenced to life without parole to apply for parole after serving 25 years, is limited to juveniles serving life without parole; Supreme Court will not extend statute to Juvenile's situation, since beyond the terms of the statute.
Dissenting opinion: Three judges would follow three circuits and the majority of state supreme courts to hold that imposition of lengthy aggregate sentences that are the functional equivalent of life without parole violate the juvenile's 8th Amendment rights under *Graham*. "To do so does not require extending existing law but merely applying *Graham* to new facts, something courts do every day." The dissenting judges would also apply the framework of Sec. 558.047 (2016) to juveniles. "To be clear, this remedy is offered not to suggest this Court should hold the statute applies directly … but rather because the statute sets out what the legislature has defined as a meaningful opportunity for release."

State v. Nathan, 522 S.W.3d 881 (Mo. banc July 11, 2017):
Juvenile's multiple consecutive sentences for a homicide (second-degree murder) and multiple non-homicide offenses did not violate Graham or Miller even if the sentences amount to de facto life in prison without parole.
Facts: Juvenile was convicted of second-degree murder and related non-homicide offenses. The trial court sentenced him to life in prison, plus a consecutive 30 year sentence for robbery and a consecutive 15 year sentence for kidnapping.
Holding: *Graham v. Florida*, 560 U.S. 48 (2010), held that the 8th Amendment prohibits imposition of life without parole on juveniles who do not commit homicide offenses. What the Supreme Court did not have before it in *Graham*, but which is present here, is

whether the 8th Amendment is violated when a juvenile commits multiple non-homicide offenses along with a homicide offense and receives consecutive, lengthy sentences. *Graham* does not clearly establish that consecutive, fixed term sentences for juveniles who have committed multiple non-homicide offenses are unconstitutional when they amount to the practical equivalent of life without parole. While the Supreme Court has said that youth diminishes the penological justification for life without parole solely for non-homicide offenses, and *mandatory* life without parole for homicide offenses, *Miller v. Alabama*, 132 S.Ct. 2455 (2012), it has never applied that rationale to a system that recognized multiple violent crimes deserve multiple punishments.
Dissenting opinion: Three dissenting judges would follow the majority of state supreme courts and two federal appellate courts, which have prohibited imposition of sentences that aggregate to a term of years that approaches or exceeds a juvenile's life expectancy absent a determination by a jury that the juvenile is irredeemably corrupt.

State ex rel. Bowman v. Inman, 516 S.W.3d 367 (Mo. banc April 4, 2017):
Where Defendant was convicted of receiving stolen property, trial court could not order payment of restitution for other property that was stolen from the victim but which Defendant did not receive, because Sec. 559.105.1 authorizes restitution only for losses connected to the offense charged; there was no evidence connecting Defendant to the property he did not receive.
Facts: Victim's apartment was burglarized and various items stolen. Later, Defendant was found with some, but not all, of the stolen items. The items Defendant had were returned to Victim without damage. Defendant was convicted of receiving stolen property for the items he possessed. The trial court placed him on probation and did not originally order restitution. Later, the trial court modified the terms of probation and required restitution of $4,000 for items stolen from Victim's apartment but never recovered. No evidence was offered connecting Defendant with any of these other stolen items. Defendant sought writ of prohibition.
Holding: Because Defendant was not charged with – and did not plead guilty to – receiving any of the "other" stolen property, and because the State offered no evidence connecting Defendant to the "other" stolen property, the court lacked authority to order restitution for this "other" property under Sec. 559.105.1. 559.105.1 states a court may order restitution "for the victim's losses *due to* such offense." "Due to" means "because of" such offense. There was no evidence that Victim's losses for the "other" property were "because of" the receiving stolen property offense. Writ granted.

State ex rel. Fleming v. Mo. Bd. Probation and Parole, 515 S.W.3d 224 (Mo. banc April 4, 2017):
(1) Where Defendant claimed he could not pay all his court costs due to unemployment and mental health issues, but court revoked his probation for failure to pay without determining whether he had the ability to pay and had willfully failed to pay, the revocation violated due process; and (2) habeas relief is available to a person on parole because that is a restraint on liberty.
Facts: (1) Defendant was placed on probation and ordered to pay about $4,000 in court costs (about $3,700 of which were jail board bills). Defendant repeatedly had trouble paying due to unemployment and mental health problems. However, Defendant made

periodic small payments. Eventually, revocation was sought due to failure to pay. At the time of the revocation hearing, Defendant had paid about $1,000 but still owed $3,000. Defendant claimed he could not be revoked because he couldn't afford to pay the remaining costs. The court revoked his probation on grounds that he had not paid. He sought a writ of habeas corpus.
Holding: *Bearden v. Georgia*, 461 U.S. 660 (1983), generally prohibits a court from revoking probation solely because of inability to pay. *Bearden* requires that a court inquire as to whether a defendant has the ability to pay, and if so, whether defendant willfully refused to pay. *Bearden* also requires a court to consider alternatives to incarceration where defendant cannot pay. Although the court here said people should not "be sent to prison because they can't pay their court costs," the court did not comply with the requirements of *Bearden*. The court revoked solely because costs weren't paid. The court made no findings about inability to pay or willfulness. Thus, the revocation was invalid. However, while the habeas case was pending, Defendant was released on parole. Thus, the court imposes as a remedy that the State elect either to have a new revocation hearing within 60 days or discharge Defendant. (2) On a procedural matter, the majority finds that habeas proceedings may be brought by someone on parole because that is a restraint of liberty. Actual confinement is not required.
Dissenting opinion: Judge Fischer would hold that habeas corpus is limited to persons who are physically confined by the State. Since Defendant had been released on parole, he would hold that habeas relief is not available and the case is moot.

State ex rel. Zimmerman v. Dolan, 514 S.W.3d 603 (Mo. banc April 4, 2017):
Where (1) Defendant-probationer was in prison in another State; (2) Missouri judge knew where Defendant was incarcerated and "suspended" his probation; and (3) Defendant repeatedly sought to have his probation revocation case heard over the course of 10 years but court did not hear it until Defendant was released from the other State, court did not make every reasonable effort to hold a probation revocation hearing before probation term expired; Defendant discharged.
Facts: In 2000, Defendant was placed on 5-year probation in Missouri and allowed to move to Indiana. Later in 2000, Defendant was charged with a new crime in Indiana. A probation violation report was filed in Missouri. Meanwhile, Defendant was sentenced to a long prison term in Indiana. In 2005, the Missouri court "suspended" Defendant's probation. In 2005, 2006 and 2011, Defendant wrote to the Missouri court seeking to resolve his probation revocation. The court told the Prosecutor to prepare a writ to have Defendant brought back to Missouri, but the Prosecutor never did so. In 2016, Defendant was released from Indiana and brought to Missouri for probation revocation. Defendant sought a writ of prohibition to preclude the revocation.
Holding: The court evidenced an intent to conduct a probation violation hearing before the probation term expired by issuing a capias warrant and "suspending" probation, but the court did not make every reasonable effort to hold a revocation hearing before the term expired, as required by Sec. 559.036.8. Defendant need not prove he suffered prejudice from the delay. Defendant tried repeatedly to resolve the matter by filing requests under the Interstate Agreement on Detainers. Even though the IAD doesn't apply to probation revocations, Defendant's filings put the court on notice that Defendant wanted to resolve the matter, but the court did not resolve it in a timely fashion.

Defendant showed that Indiana officials would have brought Defendant to Missouri for a revocation hearing if the court had acted. Writ granted; Defendant discharged.

State ex rel. Delf v. Missey, 518 S.W.3d 206 (Mo. banc May 30, 2017):
Even though Defendant entered into a binding plea agreement under Rule 24,02(d)(1)(c) which called for 7-years SES and 5 years probation, trial court was allowed to impose as a condition of probation a 120-day shock incarceration in county jail, and this did not violate the plea agreement; this is because a condition of probation is different than a sentence; although the parties could have specifically made the plea agreement contingent on Defendant not having to serve shock incarceration, the parties did not here.
Facts: Defendant and State entered into a binding plea agreement under Rule 24.02(d)(1)(c) which called for Defendant to receive 7-years SES and 5 years probation. After receiving the SAR, the trial judge said he would impose as a special condition of probation a 120 day shock incarceration in the county jail. Defendant objected to that because of the "binding" plea, and sought to enforce the plea agreement or withdraw the plea. After the trial court overruled that, Defendant sought a writ of prohibition.
Holding: Rule 24.02(d)(1)(c) provides a prosecutor can agree to a specific *sentence*. Here, the parties reached agreement as to a specific *sentence*, but that differs from conditions of probation. Probation and terms of probation are not a "sentence." Here, the trial court imposed the precise *sentence* agreed upon, but with the *condition of probation* of 120-days shock incarceration. Sec. 559.021.1 grants a circuit court the authority to determine conditions of probation. Defendants can plea bargain for special conditions of probation, and if Defendant here had bargained for no shock incarceration, that would be enforceable or she would be allowed to withdraw her plea. But the agreement doesn't reflect that. Even though Defendant rejected two prior jail-time offers, the parties did not take any steps to memorialize that the agreement reached would include no shock incarceration. Writ of prohibition denied.

State v. Bazell, 2016 WL 4444392 (Mo. banc Aug. 23, 2016):
Sec. 570.030.3 does not enhance any of its stealing provisions to a felony because it only applies to "offenses in which the value of property or services is an element," and the stealing statute, Sec. 570.030.1, does not include the value of property or services appropriated as an "element."
Facts: Defendant was convicted of felony stealing from theft of two firearms during a burglary.
Holding: Sec. 570.030.3(3)(d) provides that "*any offense in which the value of property or services is an element* is a class C felony if … the property appropriated consists of … any firearms." Under Sec. 570.030.1 a person commits the crime of stealing "if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." The definition of stealing in Sec. 570.030.1 does not include "the value of property or services appropriated" as an *element* of the offense. Thus, enhancement pursuant to Sec. 570.030.3 does not apply to Defendant's convictions for stealing firearms. The offenses must be classified as misdemeanors. Reversed and remanded for sentencing as misdemeanors.

Editor's Note: This opinion clearly invalidates *all* of the felony stealing enhancements in Sec. 570.030.3(1), (2) and (3), and the enhancement in 570.030.8, because it also contains the "value of property or services is an element" language. The opinion's effect – if any -- on Secs. 570.030.6 and .7 (which refer to Sec. 570.030) is uncertain.

State ex rel. Amorine v. Parker, 2016 WL 2996781 (Mo. banc May 24, 2016):
Even though Judge had been notified before expiration of probation that Defendant had not paid court costs or done community service and that probation was soon expiring, where Judge had multiple opportunities to revoke probation before probation expired but kept continuing the case, Judge did not make every reasonable effort to revoke probation within the probationary term, and had no authority to revoke after the term expired.
Facts: In 2011, Defendant was placed on probation and ordered to pay court costs and do community service. In 2014, the court extended Defendant's probation for one year due to failure to pay court costs or do community service. In January 2015, Probation and Parole filed a "case summary report" and "field violation report" which informed the court that, with Earned Compliance Credits, Defendant had earned an optimal discharge date of April 1, 2015, but that Defendant had not paid court costs or done community service. On February 17, 2015, Defendant appeared and the court set a probation revocation hearing for March 17, 2015. On March 17, Defendant appeared and the court continued the case to May 2015. Various other continuances then occurred. In August 2015, the court appointed a public defender to represent Defendant. The public defender moved to discharge Defendant because his probation had expired. When the court denied that motion, Defendant sought a writ of prohibition.
Holding: Under the Earned Compliance Credit statute, Sec. 217.703, Defendant should have been discharged from probation on April 1, 2015. When a probation term ends, so does a court's authority to revoke, unless (1) the court manifested an intent to conduct a probation revocation hearing within the probationary term, and (2) the court made every reasonable effort to notify defendant and hold the hearing before the term ended. Assuming, *arguendo*, that the court here manifested an intent to revoke before expiration of the term, the court did not make every reasonable effort to hold a hearing before the term ended. Defendant appeared in court in February and March 2015, yet the court continued the case. After Defendant's probation term ended, the court continued the case six more times. The court had multiple opportunities to conduct a probation revocation hearing but did not. Writ granted and Defendant discharged.

State ex rel. Upshaw v. Cardona, 2020 WL 4458792 (Mo. App. E.D. Aug. 4, 2020):
(1) Even though Defendant/Petitioner had two conduct violations before beginning his long-term treatment program under Sec. 297.362, where (a) he successfully completed the program, and (b) DOC recommended his release, the evidence was insufficient for the trial court to deny his release, especially in the absence of an evidentiary hearing; (2) although Sec. 297.362 no longer makes an evidentiary hearing mandatory, where the DOC report does not clearly delineate facts upon which the trial court can rely to find probation inappropriate, the court must either grant probation or hold a hearing.
Facts: Defendant/Petitioner was sentenced to long-term treatment. He successfully completed the program. DOC recommended release. However, the trial court denied

release on grounds of two pre-program conduct violations. Defendant sought a writ of mandamus to require release.
Holding: The trial court's decision to deny probation is unsupported by evidence in the record. Since the court did not hold a hearing, the prior conduct violations are not fully developed in the record but appear minor since Defendant only received a "living area restriction" for them, and in any event, they pre-dated his entry into the program and DOC didn't regard them as serious since it recommended release. Defendant didn't have any violations in the program. There is not evidence in the record that these violations would be such that Defendant wouldn't be successful on probation. Writ granted.

State v. Garrett, 2020 WL 1860691 (Mo. App. E.D. April 14, 2020):
Holding: Where Defendant was convicted by jury of second-degree assault, but written sentence and judgment stated Defendant was convicted of first-degree assault, this is a clerical error which the appellate court corrects in modified judgment.

State v. Johnson, 2020 WL 3422108 (Mo. App. E.D. June 23, 2020):
Holding: Where the written judgment differed from the controlling oral pronouncement of sentence in that the "consecutive box" was checked, when the sentence had been orally pronounced as being concurrent, this was an error which the appellate court itself can correct without necessity of remand; judgment modified to reflect oral pronouncement.

City of Bellefontaine Neighbors v. Carroll, 2020 WL 202097 (Mo. App. E.D. Jan. 14, 2020):
Holding: Where City had announced at trial that it was abandoning a certain charge against Defendant, but trial court's judgment found Defendant guilty of that charge anyway, judgment of conviction on that count is reversed and appellate court amends the judgment accordingly.

State v. Garrett, 2020 WL 107923 (Mo. App. E.D. March 3, 2020):
Holding: Where the jury convicted Defendant of second-degree assault, but the written judgment said it was first-degree assault, this is a clerical error that can be corrected nunc pro tunc under Rule 29.12(c); remanded for correction.

State v. Thomas, 2020 WL 7349272 (Mo. App. E.D. Dec. 15, 2020):
Holding: The forcible rape statute, which imposes a 15-year minimum prison sentence, did not violate 8th Amendment as applied to Juvenile-Defendant, because the 8th Amendment protects Juveniles only from the "harshest possible penalty" (such as a death sentence or automatic life-in-prison without parole); here, Juvenile-Defendant was sentenced to a sentence that allows parole, and the trial court considered mitigating circumstances in imposing sentence.

State ex rel. Williamson v. Cardona, 2020 WL 7349475 (Mo. App. E.D. Dec. 15, 2020):
(1) Where DOC had informed trial court that Defendant had successfully competed his long-term treatment program under Sec. 217.362, trial court's decision to deny release was not supported by substantial evidence and was an abuse of discretion; and (2) even

though the statute does not require a hearing, a trial court's concerns about conduct violations listed in a release report should be addressed at an evidentiary hearing, where release report does not clearly delineate facts which the trial court could use to find probation was inappropriate.
Facts: Defendant/Petitioner was sentenced to long-term treatment under Sec. 217.362. DOC submitted a report to trial court that Defendant successfully completed treatment. However, the report listed two pre-program conduct violations and one violation during the program. Dispositions were "living area restrictions" and "activity restrictions." Based on the violations, the trial court denied release and executed Defendant's sentence. Defendant sought writ of mandamus.
Holding: After a defendant successfully completes treatment, a trial court's decision to deny release must be supported by substantial evidence in the record that probation is not appropriate. Here, the court had limited information about the violations it relied on to deny release. Even though the statute does not require an evidentiary hearing, a trial court's concerns about violations should be addressed at an evidentiary hearing, where, as here, the report does not clearly explain the violations. Writ granted to place Defendant on probation.

State v. Knox, 2019 WL 5876813 (Mo. App. E.D. Nov. 12, 2019):
(1) Even though Victim testified that phones, headphones, a watch and other miscellaneous items were taken, where Victim never testified to the value of any of them, trial court plainly erred in sentencing Defendant for Class A misdemeanor of stealing under $500, Sec. 570.030.8, because State failed to prove property was worth more than $149 but less than $750 – necessary for Class A misdemeanor -- or that Defendant had a prior stealing conviction – necessary Sec. 570.030.7 for Class A misdemeanor; and (2) even though Victim testified that he had $1200 in cash and Defendant was arrested with $1570 in cash in his pocket shortly after the offense, where Victim never testified that anyone actually took his cash (although they took other miscellaneous items), the State failed to meet its burden to prove Defendant committed the Class D felony of stealing more than $750, Sec. 570.030.4. Convictions entered for lesser-included offense of Class D misdemeanor stealing.
Facts: Defendant was charged with multiple counts of first degree robbery. Victim testified he had $1200 in cash at the time of the robbery, and that various miscellaneous items were taken. Defendant was arrested within minutes of the robbery. Defendant had $1500 in cash and other miscellaneous items. The jury convicted of the lesser-included offenses of felony stealing and Class A misdemeanor stealing.
Holding: (1) Class D felony stealing is when the value of property is $750 or more, Sec. 570.030.5(1). Class D misdemeanor stealing is when the value is less than $150 and defendant has not prior stealing convictions, Sec. 570.030.7. Class A misdemeanor stealing is when "no other penalty is specified." Here, the Victim never testified to the value of any of the stolen items. The State had the burden of proving that the items were more than $149 and that Defendant had a prior stealing conviction. The State did neither. Thus, the evidence supports conviction for the Class D misdemeanor only. (2) Even though Victim testified he had $1200, Victim never testified this was actually taken in the robbery. It was the State's burden to prove the $1200 was actually taken. Again, the

evidence supports conviction for the Class D misdemeanor only. Case remanded for entry of Class D misdemeanor convictions and sentence accordingly.

State v. Stafford, 2019 WL 6121176 (Mo. App. E.D. Nov. 19, 2019):
Holding: Even though the State failed to present any evidence that Defendant was a "prior offender" under Sec. 558.016 and he was erroneously sentenced as such, Defendant was not entitled to resentencing or jury sentencing because no manifest injustice resulted, since Defendant did not receive an enhanced sentence and failed to assert his right to jury sentencing at trial.

State v. Wolford, 2019 WL 4019906 (Mo. App. E.D. Aug. 27, 2019):
Holding: (1) Where the trial court orally pronounced that one sentence was to run "concurrently" with other sentences, some of which were concurrent and some consecutive, such sentence is legally impossible because a criminal sentence can only run concurrently if the two sentences are running, in whole or in part, at the same time; but (2) where the court pronounced a "total" sentence of 30 years, the appellate court can determine what the court intended by its oral pronouncement, and enters a written judgment to accurately reflect the court's pronouncement.

State v. Young, 2019 WL 2504783 (Mo. App. E.D. June 18, 2019):
Holding: (1) Judge's restitution order of $8500 was not supported by sufficient evidence quantifying the car-dealer-Victim's losses where the SAR's Victim Impact statement listed losses totaling only $8300, and the cars were insured, thus reducing Victim's unrecovered losses further; and (2) the State does not receive a second opportunity to prove restitution amounts on remand, so restitution order is vacated.

State v. Johnson, 559 S.W.3d 423 (Mo. App. E.D. Oct. 23, 2018):
Holding: Where the trial court had severed a charge before trial, but nevertheless sentenced Defendant for the severed count at sentencing (even though Defendant had not been tried or convicted on it), this was plain error resulting in manifest injustice; sentence vacated.

State ex rel. Cullen v. Cardona, 2019 WL 347604 (Mo. App. E.D. Jan. 29, 2019):
Where Defendant was sentenced to long-term treatment and his only violation was refusing to move a chair and leaving to use the restroom instead, the trial court's determination that Defendant was not fit for release on probation was not supported by sufficient evidence; writ of mandamus issues ordering Defendant's release on probation.
Facts: In 2016, Defendant was convicted of tampering and assault, and sentenced to long-term treatment under Sec. 217.362. In 2018, the DOC reported that he had successfully completed the program, but had one violation of refusing to move a chair and leaving to use the restroom instead. The trial court determined that Defendant was "not amendable to probation and it would be an abuse of discretion to release him based upon his conduct violation," and executed his 15-year sentence. Defendant sought a writ of mandamus.
Holding: The procedural means for challenging denial of probation is via a writ of mandamus. Defendant argues that the trial court abused its discretion in refusing to

release him based on the single conduct violation. Sec. 217.362 did not require the trial court to hold a hearing. But the trial court's determination that probation is not appropriate must be supported by evidence. The issue on appeal is whether there was competent evidence in the record to support the trial court's conclusion that Defendant was unfit for probation. Here, there isn't. DOC reported that Defendant had successfully completed the program. His one minor conduct violation for failing to move a chair is insufficient by itself to support denial of probation under 217.362.

State v. Halter, 2019 WL 278365 (Mo. App. E.D. Feb. 13, 2019):
Holding: Under the 2012 version of Sec. 557.011 (which applied because Defendant committed her crimes in 2012), a trial court cannot both sentence a person to prison and impose restitution; thus, trial court plainly erred in imposing a prison sentence and imposing restitution. Remanded for resentencing.

Bosworth v. State, 2018 WL 3977035 (Mo. App. E.D. Aug. 21, 2018):
Holding: Where (1) the trial court sentenced Movant/Defendant to prison and a written sentence and judgment was entered in accord with this oral pronouncement, and (2) the trial court later entered restitution orders which ordered Movant/Defendant to pay restitution regarding the crimes, the court exceeded its authority in ordering the restitution because its judgment was final upon sentencing, and the 24.035 motion court clearly erred in not vacating the restitution orders.
Discussion: In a criminal case, a final judgment occurs when sentence is entered. Once judgment and sentencing occur, the trial court has exhausted its jurisdiction and can take no further action except when provided by statute or rule. The trial court was without authority to later order restitution.

State v. Campbell, 2018 WL 3978146 (Mo. App. E.D. Aug. 21, 2018):
Holding: (1) Even though Defendant-Juvenile committed the charged first degree murder in 2011, and Sec. 565.033 (which specifies certain procedures and possible less than life without parole sentences for first degree murder) was not enacted until 2013, application of Sec. 565.033 to Defendant-Juvenile was not *ex post facto* because Sec. 565.033 did not increase the penalty for first degree murder in effect at the time of the offense and, in fact, created the possibility of a lower sentence (which Defendant, in fact, received); and (2) although Sec. 565.033 permits a sentence of LWOP for juveniles convicted of first degree murder, a trial court does not have authority to impose LWOP unless the State had filed a notice of intent to seek LWOP pursuant to Sec. 565.034.1.

State v. Brown, 2018 WL 4087401 (Mo. App. E.D. Aug. 28, 2018):
Holding: Where the written sentence and judgment contained numerous clerical errors which did not accurately state Defendant's counts and convictions, case is remand for entry of a nunc pro tunc order to correct the errors.

Whittaker v. State, 2018 WL 1915805 (Mo. App. E.D. April 24, 2018):
Holding: Even though the State charged and presented sufficient evidence that Defendant was a prior and persistent offender, where the trial court never made such a finding before or at sentencing, the written sentence and judgment's statement that Defendant is a prior and persistent offender is a clerical error that is corrected under Rule 30.23.

State v. Heidbrink, 2018 WL 710479 (Mo. App. E.D. Feb. 6, 2018):
(1) Where State failed to prove that Defendant either was represented by counsel or waived counsel in a prior felony case, that conviction could not be used to prove prior or persistent offender status; (2) even though certified copy of prior conviction showed that Defendant had been ordered to pay for appointed counsel, and no probable cause of ineffective assistance was found, this did not prove that Defendant either had counsel or waived counsel where there was no attorney of record listed in the prior case; and (3) State does not get a second opportunity to prove prior and persistent status because Sec. 558.021 requires this be pleaded and proven before case is submitted to jury.
Facts: The State charged Defendant as a prior and persistent offender. At the prior and persistent hearing, the State offered as an exhibit a certified copy of Defendant's prior felony conviction. Defendant objected to admission of the exhibit on grounds that it did not indicate if Defendant was represented by counsel or waived counsel, even though the exhibit showed that Defendant had been ordered to pay for the services of appointed counsel and no probable cause of ineffective assistance of counsel was shown. The trial court overruled the objection, and found Defendant to be a persistent offender.
Holding: To prove prior and persistent status, the State must prove that Defendant was represented by counsel or waived counsel. Representation by counsel or waiver cannot be presumed from a silent record. Here, the certified copy of conviction was silent was to whether Defendant was represented by counsel or waived counsel. Even though Defendant was ordered to pay for appointed counsel, the record does not show any appearance by an attorney and there is no attorney of record listed for Defendant. A conviction obtained in violation of Defendant's Sixth Amendment right to counsel cannot be used for later enhancement. Further, the State is not allowed a second opportunity to supply missing proof because Sec. 558.021 requires this be pleaded and proven before case is submitted to jury. Remanded for resentencing as non-persistent offender.

State ex rel. Caldwell v. Ohmer, 535 S.W.3d 758 (Mo. App. E.D. Oct. 31, 2017):
Holding: Where Defendant, faced with a probation violation, was eligible to be placed in 120-day program under Sec. 559.036.4 and requested placement in such program, trial court had unequivocal duty to place Defendant in 120-day program and could not revoke probation and execute underlying sentence instead; writ of mandamus issues to require trial court to place Defendant in 120-day program.

Edwards v. Steele, 533 S.W.3d 238 (Mo. App. E.D. Nov. 7, 2017):
Holding: Defendant, who was 17 years old when he was convicted of capital murder sentenced to mandatory life without parole for 50 years under Sec. 565.001 (1978), was entitled under *Miller* and *Montgomery* to resentencing under *Hart* procedure whereby consideration of his youth and related circumstances would occur.

Discussion: The State argues Defendant is not entitled to relief because the Missouri Supreme Court in *Carr* gave relief to a 16 year old. While Missouri law defines juvenile offenders to be under 17, Sec. 211.031.1(3), the U.S. Supreme Court in *Miller* defines "juvenile offenders" as "under the age of 18 at the time of the crime."

State v, Moore, 518 S.W.3d 877 (Mo. App. E.D. May 9, 2017):
Holding: Even though Judge misstated at sentencing the order in which various counts were numbered in the indictment, where it was clear what sentence judge imposed for each convicted count, this a clerical error in the written judgment that can be corrected nunc pro tunc under Rule 29.12(c). A "clerical error" can be committed by a judge or clerk, but the correction must not effect the substantive rights of a party.

State v. White, 518 S.W.3d 288 (Mo. App. E.D. May 16, 2017):
Holding: Trial judge plainly erred in sentencing Defendant to a longer sentence after trial than the pretrial plea offer because this violated 6th Amendment right to a jury trial in that judge said at sentencing that she gives longer sentences after a trial so defendants would "understand … the consequences to having [a] trial."
Discussion: The 6th amendment right to a jury trial prohibits a court from using sentencing to punish a defendant for exercising his right to trial. A court cannot enhance a sentence for exercising a right to trial. Here, trial court said at sentencing that she imposes longer sentences after trial than pretrial plea bargains so that defendants would "understand" the "consequences" of going to trial. Remanded for resentencing.

State v. Harding, 2017 WL 1485564 (Mo. App. E.D. April 25, 2017):
Holding: Where the written judgment stated an offense different from the one Defendant was actually convicted of, this was a clerical error that can be corrected nunc pro tunc under Rule 29.12.

State v. Ralph, 2017 WL 2450414 (Mo. App. E.D. June 6, 2017):
Holding: In case of first impression, State can prove up prior and persistent offender status by having court clerk testify to convictions contained in the Missouri Justice Information System (JIS).
Discussion: Sec. 490.130 allows electronic records contained in a statewide court automated record-keeping system, like JIS, to be admissible without certification. Testimony describing those records is sufficient without physical printouts, although the better practice would be to introduce a physical printout of the JIS record testified to to create a better record for appellate review of what the clerk read from.

State v. Williams, 2016 WL 6440410 (Mo. App. E.D. Nov. 1, 2016):
Holding: (1) Trial court plainly erred in entering written judgment which sentenced Defendant as prior and persistent offender where State failed to introduce any evidence of the prior convictions, as required by Sec. 558.021; but (2) even though the sentencing court was aware of the prior convictions because they were discussed in the Sentencing Assessment Report, where the trial court did not give an enhanced sentence and did not refer to Defendant as a prior and persistent offender at sentencing, Defendant was not

entitled to resentencing; instead, the prior and persistent designation in the written sentence and judgment is a clerical error, which is corrected by the appellate court.

State v. Hobbs, 2016 WL 4435689 (Mo. App. E.D. Aug. 23, 2016):
Trial court abused discretion in child molestation case in admitting at penalty phase Officer's testimony that Defendant was charged with other unadjudicated child sex offenses, because such evidence is admissible in penalty phase only if the State proves by preponderance of the evidence that Defendant committed the conduct alleged; the State offered no supporting evidence, such as testimony by Victims or admissions by Defendant.
Facts: Defendant was convicted of child molestation, and the case proceeded to a penalty phase. During penalty phase, the State presented Officer's testimony that Defendant was presently charged with other unadjudicated child sex offenses.
Holding: Although evidence pertaining to a defendant's criminal conduct may be admissible in penalty phase as history and character evidence, Sec. 577.036.3, such evidence is admissible only if the State proves by a preponderance of evidence that Defendant committed the alleged conduct. Such proof may include testimony by Victims of the alleged conduct, or Defendant's admissions to the alleged conduct. Here, however, there were no witnesses to support the alleged conduct, or admissions by Defendant. The State merely referred to additional charges without supporting evidence. Reversed and remanded for new penalty phase.

State v. Clark, 2016 WL 491850 (Mo. App. E.D. April 19, 2016):
Holding: Where sentencing court orally pronounced sentences as "life in prison" but the written judgment and sentence said, "life (999) years," the oral pronouncement controls and case is remanded to correct the written sentence and judgment.
Discussion: Secs. 566.030.2 and 566.060.2 provide that the authorized sentences for forcible rape and forcible sodomy are either life imprisonment *or* a prison term of not less than five years. By putting 999 years in the written sentence and judgment, the court changed the "life sentence" it had orally pronounced. The sentences are materially different because they have a different parole eligibility date; under Sec. 558.019.4, a life sentence is calculated to be 30 years, while any sentence greater than 75 years is calculated to be 75 years.

State v. Mendez, 2016 WL 1442437 (Mo. App. E.D. April 12, 2016):
Holding: Where the written sentence and judgment misstated the counts for which Defendant was convicted, this was a clerical error that can be corrected under Rule 29.12(c).

State v. Wilson, 2016 WL 2731975 (Mo. App. E.D. May 10, 2016):
Holding: Where the oral pronouncement of sentence was that Defendant receive "life imprisonment," but the written sentence and judgment sentenced Defendant to "999 years," the oral pronouncement controls, and appellate court amends the judgment under Rule 30.23 to reflect life imprisonment; a sentence of "life" and "999 years" are materially different from each other since they have different parole eligibility dates.

State v. Voss, 2016 WL 145727 (Mo. App. E.D. Jan. 12, 2016):
(1) Defendant can be convicted of first-degree involuntary manslaughter for involvement in a death of a Victim from a drug overdose, where Defendant's reckless conduct caused Victim's death in that Defendant supplied heroin to Victim, helped Victim ingest it, saw signs that Victim was overdosing, and failed to seek medical attention; (2) trial court abused discretion in penalty phase in admitting hearsay testimony from the mother of a different victim than the one in this case in which she claimed that Defendant had caused her son's death, too; allowing a mother of a different victim than the one in this case to read a "victim-impact" statement, because this mother was not a family member of the victim in this particular case; allowing Victim's sister to testify to hearsay that she believed Defendant was involved in five other heroin overdose deaths; and allowing a probation officer to testify to hearsay from a police report that Defendant was involved in another person's overdose death. However, the penalty phase testimony was harmless given other admissible penalty phase evidence.
Facts: Defendant was convicted at a jury trial of first-degree involuntary manslaughter for recklessly causing the heroin overdose death of Victim. During penalty phase, trial court admitted testimony by various witnesses that Defendant had also caused other people to die of heroin overdoses, though none of those witnesses had personally witnessed this. The court also allowed a mother of a victim in one of those other alleged deaths to read a victim-impact statement about her son's death.
Holding: (1) It is a matter of first impression in Missouri whether a person can be convicted of first-degree involuntary manslaughter for involvement in a victim's death from drug overdose. The involuntary manslaughter statute is not defined in terms of a Defendant's failure to act, and thus, any duty to act must be otherwise imposed by law. The comment to Sec. 562.011.4 provides an example of liability for manslaughter based on the failure to perform an act "such as supplying medical assistance to a close relative." A Defendant can be criminally liable for a failure to act where "one stands in a certain status relationship to another." Here, that standard was met because Defendant created or increased the risk of injury to Victim by providing Victim heroin, helping to prepare it for ingestion, and after observing signs of overdose, leaving Victim alone and not contacting medical help. This is sufficient evidence from which a reasonable juror could find recklessness, i.e., conscious disregard of risk of death to Victim and such disregard was a gross deviation from what a reasonable person would do in such circumstances. (2) In penalty phase, "history and character" evidence of prior unadjudicated criminal conduct is admissible under Sec. 557.036.3 if it satisfies the preponderance of evidence standard, which means it must be based on a witness' "firsthand knowledge" of the unadjudicated criminal conduct. Here, the witnesses who testified that Defendant had caused other heroin overdose deaths did not have firsthand knowledge of those incidents. Their knowledge was based on hearsay. Hearsay testimony is admissible during penalty phase only if it falls within a recognized hearsay exception, which the testimony from these witnesses did not. With regard to the mother of a victim in a different incident than the one charged who read a victim-impact statement about how her son's death affected her, this mother-witness was not a victim in the instant case and her statement did not concern

the facts of the instant case. Although Sec. 557.041 does not define the term "victim," Sec. 595.200(6) provides a definition of "victim" as a direct victim of a crime or family members of a direct victim. Sec. 557.041.2 allows the "victim of such offense" to make a victim-impact statement in a particular case. This language only authorizes a victim of *the offense at issue* (charged offense) to make a statement. Although this was a close case, the inadmissible evidence was harmless when considered with other admissible penalty phase evidence, particularly damaging admissions made by Defendant. Howver, courts should be "cautious" about admitting alleged prior unadjudicated conducted.

State ex rel. Weaver v. Martinez, 2016 WL 418131 (Mo. App. E.D. Feb. 2, 2016):
Trial court cannot revoke Defendant from a third term of probation, because court had no authority to place Defendant on third term of probation in the first instance; Missouri law permits only two terms of probation.
Facts: In 2011, following a guilty plea, Defendant was placed on probation for five years. In March 2012, probation was revoked and Defendant was sentenced to a 120-day program under Sec. 559.115. In June 2012, Defendant was released from the program and placed on a second term of probation for five years. In 2013, Defendant's probation was revoked and she was sentenced again to a treatment program under 559.115. In late 2013, Defendant was released and placed on a third term of probation. In 2015, Defendant sought to be discharged from probation on grounds that she was on an unauthorized third probationary term. The trial court denied that motion, and scheduled a probation violation hearing. Defendant sought a writ of prohibition.
Holding: Sec. 559.036.5 authorizes a court to impose a new term of probation only once. There is no authority to impose a third term of probation, and thus, no authority to revoke a defendant from a third term of probation. Writ granted. Defendant ordered discharged from probation.

State v. Sanders, 2016 WL 616433 (Mo. App. E.D. Feb. 16, 2016):
Holding: (1) Where the definition of "deviate sexual intercourse" was changed in 2006, and Defendant's pre-2006 acts did not fit within the pre-2006 definition, trial court plainly erred in giving a jury instruction based on the newer definition; and (2) where the written sentence and judgment did not conform to the oral pronouncement of sentence, case is remanded for correction of written sentence *nunc pro tunc* to conform to oral pronouncement.

State ex rel. Parrott v. Martinez, 2016 WL 1230506 (Mo. App. E.D. March 29, 2016):
(1) Trial court cannot deny Earned Compliance Credits to indigent Defendants who cannot pay restitution or court costs; (2) Monthly "compliance" with the Earned Compliance Credit statute is not defined as the strict fulfillment of each and every term of probation in a given month, but is defined as the absence of an initial violation report or motion to revoke or suspend, and (3) even though trial court purported to "suspend" Defendant's probation for failure to pay all restitution and court costs, but continued to hold payment hearings, and where Petitioner's Earned Compliance Credits gave her enough credit so that her probation had expired, trial court did not make every

reasonable effort to revoke probation within the probationary term, and could not later revoke probation.

Facts: In 2011, Defendant pleaded guilty, received an SES, and was placed on 5 years' probation. She was ordered to pay about $5,000 in restitution and $10,000 in court costs, much of which consisted of a jail board bill. In 2014, Judge suspended Defendant's probation for failing to pay all costs. By then, Defendant still owed about $2,500 in restitution and $9,800 in court costs. Defendant made $724 per month in disability income and supported two grandchildren. She had been paying approximately $125 per month. Defendant offered to do community service in lieu of payments. Judge conducted several purported "revocation" hearings thereafter, but these were, in fact, payment hearings where Defendant was ordered to continue paying. In 2015, Defendant filed a motion to discharge probation because she had earned enough Earned Compliance Credits that probation had expired. Judge denied this because of a "standing order" that Earned Compliance Credits not be awarded if court costs or restitution are owed. Subsequently, Judge revoked Defendant's probation. Defendant sought writ of prohibition, arguing that Judge lacked authority to revoke because probation had expired.

Holding: Sec. 217.703 provides for Earned Compliance Credits that shorten a probationary period by 30 days for each month in which there is no probation violation report, or motion to revoke or suspend probation filed. Monthly "compliance" with the Earned Compliance Credit statute is not defined as the strict fulfillment of each and every term of probation in a given month, but is defined as the absence of an initial violation report or motion to revoke or suspend. Here, two reports were filed against Defendant. However, because Judge never held a hearing on the first report, Defendant was deemed in "compliance" beginning the following month. Defendant stopped earning credits when Judge "suspended" probation in 2014. Nevertheless, Defendant had earned enough credits that her probation expired in early 2015. Subsequently, Judge revoked probation. Suspending probation does not toll the probation term past its expiration date. Under 559.036.8, a court can revoke after a probation term expires only where it manifested its intent to conduct a revocation hearing during the term, and made every reasonable effort to hold the hearing before the term ended. Here, Judge did not make every reasonable effort to hold the hearing before the term ended. Judge held seven purported "revocation" hearings, but never revoked. Judge's focus on Defendant's failure to pay is troubling. Defendant was ordered to pay fees amounting to 45% of her monthly income. These facts suggest an inability to pay. Furthermore, Judge appeared to be expending a huge amount of judicial system resources trying to collect a $10,000 jail board bill from a Defendant who had an inability to pay the whole amount, but who was making monthly payments; such was "astonishing." Judge's refusal to give Earned Compliance Credits to indigent defendants who cannot pay their costs effectively barred indigent probationers from obtaining credits available to affluent probations. Writ granted.

State v. Turner, 2020 WL 5793193 (Mo. App. S.D. Sept. 29, 2020):

Holding: Where Defendant was acquitted for first-degree burglary and convicted and orally sentenced for first-degree trespassing, but the written sentence and judgment said it was for first-degree burglary, this was a clerical error that can be corrected nunc pro tunc; the oral pronouncement controls.

State v. Campbell, 2020 WL 289270 (Mo. App. S.D. Jan. 21, 2020):
Holding: Even though trial court denominated its *nunc pro tunc* order (which changed the written to sentence to conform to what court had orally pronounced) an "amended judgment," this does not provide grounds for a new direct appeal of the underlying conviction because a *nunc pro tunc* order does not change the original judgment itself, but merely corrects clerical errors in that judgment; *nunc pro tunc* orders should be entitled "judgment *nunc pro tunc*" rather than "amended judgments."

State v. Friend, 2020 WL 467959 (Mo. App. S.D. Jan. 29, 2020):
Holding: Where Child-Victim was 12-years-10-months old at the time of the sexual contact at issue, trial court erred in denying motion for judgment of acquittal of second degree child molestation (Class B felony), Sec. 566.068, because that offense requires the child be "less than 12 years of age;" but because third degree child molestation (Class C felony), Sec. 566.069, is a lesser-included offense, and requires the child be "less than 14 years of age," appellate court enters conviction for third-degree molestation and remands for resentencing.

State v. Wright, 2020 WL 633588 (Mo. App. S.D. Feb. 11, 2020):
Holding: Trial court erred in sentencing Defendant as a "persistent assault offender," because Sec. 565.079.10, requires that Defendant's prior assault convictions be *before* the instant offense; here, one of Defendant's predicate assault convictions occurred one week *after* the instant offense, so should not have been counted. Remanded for resentencing.

State v. Schachtner, 2020 WL 5904455 (Mo. App. S.D. Oct. 6, 2020):
Holding: Where the written sentence and judgment was for "999 years" but the oral pronouncement of sentence was for "life," the oral pronouncement controls; case remanded for entry of corrected written judgment.

State v. Hogan, 610 S.W.3d 417 (Mo. App. S.D. Oct. 28, 2020):
Holding: (1) Even though appellate court applies "escape rule" to deny review of the trial errors in Defendant's case (because Defendant failed to appear for sentencing and absconded for eight months), the "escape rule" only applies to errors that occurred before the alleged escape; thus, Defendant can raise a post-escape sentencing error claim; (2) where the oral pronouncement of sentence differed from the written sentence and judgment, the oral pronouncement controls; case remanded for entry of corrected sentence.

State v. Marsh, 2020 WL 7395396 (Mo. App. S.D. Dec. 16, 2020):
Holding: (1) Appellate court assumes, *arguendo*, that trial court may have erred in allowing Probation Officer to testify at trial about statements Defendant made to her, because Sec. 559.125.2 states that information "obtained by a probation or parole officer shall be privileged … and shall not be receivable by any court" except to the judge supervising probation; but admission was harmless here because it was duplicative of a different Witness' testimony; and (2) where the written sentence differed from the oral

pronouncement, the oral pronouncement controls; this is a clerical error that can be corrected nunc pro tunc.

State v. Hensley, 2020 WL 7223508 (Mo. App. S.D. Dec. 8, 2020):
Holding: Where written sentence and judgment stated Defendant "pleaded guilty" but he actually was convicted after trial, this is a clerical error that can be corrected *nunc pro tunc*; case remanded for correction of judgment.

State v. Johnson, 2020 WL 7584948 (Mo. App. S.D. Dec. 22, 2020):
(1) Sec. 575.150.5 does not enhance resisting arrest for a parole violation to a felony, even if the underlying offense is a felony; thus, trial court did not err in granting Defendant's motion for judgment notwithstanding the verdict (JNOV) when jury found Defendant guilty of felony resisting, and convicting Defendant of misdemeanor resisting arrest; and (2) the State could appeal the grant of JNOV, because when a jury returns a verdict of guilty and a trial judge sets aside the verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not prevent the State from appealing to reinstate the jury's verdict.
Facts: Defendant was on parole for a felony offense. He failed to report to his Parole Officer, who then issued a warrant for his arrest. When he was arrested, he resisted arrest. He was charged with felony resisting arrest, 575.150, on grounds that he resisted arrest for a felony. Defendant was found guilty by a jury. Later, the judge granted Defendant's motion for JNOV on grounds that 575.150 doesn't enhance resisting arrest for a parole violation to a felony. The trial court entered a misdemeanor conviction. The State appealed.
Holding: As relevant here, Sec. 575.150.5 makes resisting arrest a misdemeanor unless the State proves the arrest was for a (1) felony; (2) a warrant for failure to appear on a felony case; or (3) a warrant issued for a *probation* violation on a felony case. Defendant's arrest didn't fall into any of these categories Under the statute's plain language, resisting an arrest on a parole warrant is not a felony. We presume the omission of parole warrants from the statute was intentional. And the fact that the offense underlying the parole was a felony does not make Defendant's arrest be one for a felony. He was not being arrested "because of" or "an account of" the underlying felony. He was arrested for violating conditions of parole.

State v. Thomas, 2019 WL 6872511 (Mo. App. S.D. Dec. 17, 2019):
Holding: Even though Victim was less than 12 years old, trial court plainly erred in sentencing Defendant for first-degree child molestation as a Class A felony, because Sec. 566.067.2 (2013) required that, in addition to the Victim being less than 12, the defendant had to have been previously convicted of a sexual offense, or the offense involved serious physical injury, use of a deadly weapon, or was part of a ritual or ceremony – none of which were instructed on; case remanded for sentencing as Class B felony.
Discussion: The verdict directors required the jury to find only that the Victim was less than 12 years old. The jury was not required to find any of the additional factors under Sec. 566.067.2 (2013) that would elevate the offense to a Class A felony. Thus, the verdict directors submitted the offense as a Class B felony. Case remanded for resentencing as a B felony.

State v. Smith, 2019 WL 3491237 (Mo. App. S.D. Aug. 1, 2019):
Holding: Where oral pronouncement of sentence was that Defendant receive "concurrent" sentences, but the written sentence and judgment made the sentences "consecutive," the oral pronouncement controls; remanded for entry of nunc pro tunc order to correct written sentence.

State v. Banderman, 2019 WL 1434389 (Mo. App. S.D. April 1, 2019):
Holding: (1) A defendant in a criminal case can challenge the taxation of costs via a post-judgment motion, and if the motion is denied, can pursue a direct appeal; and (2) under *State v. Richey*, 2019 WL 1247089 (Mo. banc March 19, 2019), there is no statutory authorization for a court to make a jail board bill a "court cost" in a criminal case.

State v. Sleeth, 2019 WL 1486872 (Mo. App. S.D. April 4, 2019):
Holding: Where the written sentence and judgment did not accurately record the Counts and charged Defendant was convicted of, case is remanded for correction of these clerical errors *nunc pro tunc*.

State v. Smith, 2019 WL 2710255 (Mo. App. S.D. June 28, 2019):
Holding: Where the written judgment and sentence mistakenly characterized Defendant's offense as a felony instead of a misdemeanor, this was a clerical error that should be corrected *nunc pro tunc* on remand.

In re Allen v. Norman, 564 S.W.3d 388 (Mo. App. S.D. Nov. 27, 2018):
Holding: Even though Juvenile had two consecutive "soft" life sentences which were to follow a sentence of life without parole for 50 years, Secs. 565.001 and 565.008.1 (1978), the life without parole sentence imposed without considering mitigating circumstances based on youth violates 8th Amendment and requires re-sentencing under the *Hart* procedure.
Discussion: The State contends that because Juvenile has two "soft" life sentences consecutive to the life without parole for 50 years sentence, that his case is controlled by *Willibanks v. DOC*, 522 S.W.3d 238 (Mo. banc 2017), which held that even though a juvenile may receive numerous consecutive sentences that are, *de facto*, life without parole, there is no 8th Amendment violation. *Willibanks* is distinguishable, though, becaue no single sentence imposed in *Willibanks* violated the 8th Amendment. Here, the life without parole for 50 year sentence, standing alone, violates the 8th Amendment. Juvenile has an actual LWOP 50 sentence that is separate from any of his additional sentences. He is entitled to habeas relief on that sentence, and re-sentencing under the *Hart* procedure.

State v. Ingalsbe, 2018 WL 3991235 (Mo. App. S.D. Aug. 21, 2018):
Holding: Where Defendant committed first degree sexual misconduct, Sec. 566.092, in 2016, the offense at that time was a Class B misdemeanor with a maximum punishment of six months, and the trial court plainly erred in enhancing the sentence to one year

under Sec. 566.093.2, which took effect Jan. 1, 2017, because application of the post-crime enhancement provision to Defendant was ex post facto.
Discussion: The State pleaded, and the trial court found, that Defendant was subject to enhancement under Sec. 566.093.2, effective Jan. 1, 2017, because he had previously been found guilty of another offense under Sec. 566 or an offense in another jurisdiction that would qualify as an offense under Sec. 566. But the trial court's reliance on a penalty provision that was not in effect at the time of the crime violates ex post facto and constitutes manifest injustice. Defendant can only be sentenced to the maximum in effect at the time of his offense.

State v. Liker, 2018 WL 494468 (Mo. App. S.D. Jan. 22, 2018):
Holding: Where Defendant was charged with and orally sentenced to a Class C felony, but the written sentence and judgment stated it was a Class B felony, this is a clerical error that can be corrected nunc pro tunc.

State v. McClurg, 2018 WL 1465141 (Mo. App. S.D. March 26, 2018):
Holding: Where the written sentence and judgment misstated the offense for which Defendant was convicted, this is a clerical error that can be corrected nunc pro tunc.

Miller v. State, 2017 WL 4129128 (Mo. App. S.D. Sept. 19, 2017):
Holding: Even though the motion court found that a trial court had not made every reasonable effort to hold a probation revocation hearing before the probation term expired, where Movant's counsel at the revocation hearing did not object to the timeliness of the revocation hearing and stipulated that the parties had agreed to hold it on that date, this was a judicial admission by defense counsel that forever waives all controversy on the matter. Motion court erred in setting aside the revocation.
Discussion: An admission by an attorney in open court which is against the interests of his client constitutes a judicial admission for purposes of the client. A judicial admission is conclusive on the party making it. Judicial admissions are a waiver of all controversy and, therefore, a limitation on the issue. Here, Movant's prior defense counsel made a judicial admission stipulating to the probation revocation hearing being held after the probation term expired. Thus, Movant could not later challenge the revocation.

State v. Turrentine, 2016 WL 6818938 (Mo. App. S.D. Nov. 18, 2016):
Holding: (1) Plain error resulted in convicting and sentencing Defendant for felony stealing over $500 under Sec. 570.030.3 because the offense is a misdemeanor under *Bazell*; (2) trial court plainly erred in sentencing Defendant to 5 years for the Class D felony of first degree property damage, Sec. 569.100, because this sentence exceeded the 4 years authorized for a Class D felony, Sec. 558.011.

State v. Bruce, 2016 WL 7242756 (Mo. App. S.D. Dec. 15, 2016):
Holding: Where trial court orally sentenced Defendant to "life" in prison, but the written sentence and judgment stated Defendant was sentenced "99 years," the oral pronouncement controls and the written sentence is a clerical error that should be corrected on remand.

State v. Gilmore, 2016 WL 4942437 (Mo. App. S.D. Sept. 16, 2016):
Holding: Sec. 302.321.2 enhances a driving while revoked charge from a felony to a misdemeanor if the Defendant has a "fourth or subsequent conviction for *any other offense*," which includes prior misdemeanors of any sort; the plain language fails to indicate any legislative intent to limit the term "offense" to only prior felony offenses; thus, Defendant's DWR offense was enhanced to a felony where he had five prior misdemeanor offenses for various offenses.

State v. McCauley, 2016 WL 1757464 (Mo. App. S.D. May 2, 2016):
Even though a trial court has continuing authority over its records and can enter a nunc pro tunc order in a criminal case at any time, the order (or denial of an order) relates back to the original judgment and is not a new, final judgment that can be appealed; however, an appellate remedy may be available via a writ.
Facts: Six years after conviction, Defendant filed a *nunc pro tunc* motion under Rule 29.12(c) to correct his judgment and sentence. After it was denied, he appealed.
Holding: *Nunc pro tunc* in criminal cases is governed by Rule 29.12(c), and in civil cases by 74.06(a). A trial court may grant *nunc pro tunc* relief at any time, because a court has continuing authority over its records. However, *nunc pro tunc* relief creates no new judgment, but relates back to the original judgment. Under Sec. 547.070, criminal appeals are authorized from a final judgment only. Nearly all rulings after final judgment are non-appealable. By contrast, Sec. 512.020(5) authorizes civil appeals from "special order[s] after final judgment[s]." The matter here, however, is not civil. It's criminal because it relates to a judgment in a criminal case. Thus, it is not appealable. However, a writ or "other remedies" may protect the narrowly-limited right Defendant asserts on appeal. Appeal dismissed.

Livingston v. Mo. Dep't of Corr., 2020 WL 4300833 (Mo. App. W.D. July 28, 2020):
Holding: Even though (1) the General Assembly repealed Sec. 195.291.2 (which required Defendant's possession of controlled substance offense be sentenced as a Class A felony and served without probation and parole because he was a persistent drug offender) effective January 1, 2017, and (2) Defendant was not convicted and sentenced until after January 1, 2017, where Defendant committed his offense in 2013 and his conviction and sentence were affirmed on direct appeal, the law in effect at the time of his offense controls, and he does not receive retroactive application of the repeal because parole ineligibility is part of his sentence.

West v. State, 2020 WL 4941849 (Mo. App. W.D. Aug. 25, 2020):
Holding: A prior conviction for "attempted felony theft" counts as a "stealing related offense" under Sec. 570.040.2 for purposes of felony enhancement for "stealing third offense."
Discussion: To suggest that an "attempted" felony theft does not constitute a criminal offense "related" to stealing is illogical and absurd. Sec. 570.040 intends to impose enhanced punishment on defendants who previously engaged in acts of stealing designed to complete commission of the crime. The crime of stealing and "attempted" stealing are both "stealing-related offenses."

State v. Hudson, 2020 WL 5160463 (Mo. App. W.D. Sept. 1, 2020):
Holding: (1) Trial court erred in conducting Defendant's sentencing via Polycom over Defendant's objection that he had a right to be personally present, because Sec. 546.550 and Rule 29.07(b)(2) require in-person sentencing, as does due process, and Sec. 561.031.1(6) provides for sentencing by Polycom only upon waiver of in-person appearance by Defendant; new sentencing ordered; and (2) Western District notes in footnote that even though Defendant's case arose before COVID-19, the Missouri Supreme Court has encouraged all courts to use teleconferencing during COVID, but this "does not change applicable statutory provisions," even though the Supreme Court has suspended certain court rules.

Riley v. Mo. Dep't of Corr., 2020 WL 2027342 (Mo. App. W.D. April 28, 2020):
Holding: Even though Sec. 195.291.2 RSMo. 2000 – which required Petitioner's manufacturing sentence to be enhanced to a Class A felony and, as prior and persistent drug offender, to be served without probation or parole – was repealed in 2017, where Petitioner was sentenced in 2007, he does not get the benefit of the repeal, because parole ineligibility was part of the statutory punishment. Case is governed by Supreme Court's opinions in *Mitchell v. Phillips*, 2020 WL 547402 (Mo. banc Feb. 4, 2020) and *Woods v. Mo. Dep't of Corr*., 2020 WL 548567 (Mo. banc Feb. 4, 2020).

Norman v. Mo. Dep't of Corr., 2020 WL 2027337 (Mo. App. W.D. April 28, 2020):
Holding: Even though Secs. 195.222 and 195.223 RSMo. 2000 – which enhanced Petitioner's first and second degree trafficking convictions to Class A felonies and required that they be served without probation or parole – was repealed in 2017, where Petitioner was sentenced in 2002, he does not get the benefit of the repeal because his parole ineligibility was mandated as part of the punishment in the particular statute under which he was convicted. Parole ineligibility was part of his sentence, which cannot be retroactively changed. Case is governed by Supreme Court's opinions in *Mitchell v. Phillips*, 2020 WL 547402 (Mo. banc Feb. 4, 2020) and *Woods v. Mo. Dep't of Corr*., 2020 WL 548567 (Mo. banc Feb. 4, 2020).

French v. Mo. Dep't of Corr., 2020 WL 2120897 (Mo. App. W.D. May 5, 2020):
Holding: Even though Sec. 195.233 – which made defendant's second degree drug trafficking offense not eligible for parole – was repealed in 2017, where he was convicted in 2014, his parole ineligibility was part of his sentence that cannot be retroactively changed. Case is governed by Supreme Court's opinions in *Mitchell v. Phillips*, 2020 WL 547402 (Mo. banc Feb. 4, 2020) and *Woods v. Mo. Dep't of Corr*., 2020 WL 548567 (Mo. banc Feb. 4, 2020).

State v. Wilson, 2020 WL 3421678 (Mo. App. W.D. June 23, 2020):
Holding: (1) The foundational requirements to admit a Facebook post can be met by having Witness who saw the post testify that Witness recognized the name and profile picture through personal familiarity; that Witness was friends on the platform with the poster; that Witness "talked regularly" on the platform with the poster; that Witness was familiar with the communication style of the poster; and the context and timing of the posts identifying the poster. (2) Where the written judgment did not accurately reflect

the charged Defendant was convicted of, this is a clerical error that can be corrected *nunc pro tunc* under Rule 29.12(c).

Sprofera v. State, 2020 WL 6277237 (Mo. App. W.D. Oct. 27, 2020):
Holding: Even though 29.15 Movant's counsel forfeited Movant's right to jury sentencing at trial by failing to object to improperly charging him as a prior offender, in order to demonstrate prejudice on his later ineffective assistance of counsel claim, Movant must show that but for counsel's sentencing error, he would have received a lower sentence (which here, the motion court found that Movant failed to show, so he receives no relief).

State v. Taylor, 2019 WL 5875162 (Mo. App. W.D. Nov. 12, 2019):
Holding: Trial court erred in finding Defendant to be prior and persistent offender based on Illinois convictions, because even though the Illinois records were certified by the clerk and had the seal of the court on them, they were not signed by a judge of the court as required by Sec. 490.130.
Discussion: Sec. 490.130 requires that court records from another state be (1) attested to by the clerk of the court; (2) bear the seal of the court; and (3) be certified by a judge of the court as "attested in due form." Here, the Illinois records were not signed by any Illinois judge. Thus, trial court erred in relying on them as competent evidence to prove prior and persistent status. Case remanded for resentencing without this status.

State v. Rigsby, 2019 WL 6119638 (Mo. App. W.D. Nov. 19, 2019):
(1) Illinois conviction, which despite its title of driving under the influence of drugs, did not require that a person be "impaired" by the drug did not qualify as a predicate "intoxication-related traffic offense" under Sec. 577.023.1(4), and extrinsic evidence that Defendant was impaired in his Illinois offense cannot be considered; and (2) Defendant's other prior DWI conviction which was more than 5 years old did not qualify as a predicate offense because it isn't a previous conviction "within five years of the occurrence of the intoxication-related traffic offense for which the person is charged," Sec. 577.023.1(6).
Facts: Defendant was convicted of DWI as a prior and persistent offender. He had two different Illinois convictions used for enhancement. Regarding the first conviction, the State presented Officer testimony that Defendant had, in fact, been impaired by marijuana, and had failed multiple field sobriety tests. The trial court sentenced Defendant as a prior and persistent offender. He appealed.
Holding: (1) Defendant has a 2005 Illinois conviction for "driving while under the influence of drugs." This title, standing alone, might indicate this is an "intoxication-related offense," Sec. 577.023.1(5)(a), but the title is not controlling. The Illinois statute did not require that Defendant be "impaired," only that he have cannabis in his system. By contrast, in Missouri, a person can be convicted of driving under the influence of a drug only if he is "impaired" by the drug. Defendant's Illinois conviction did not contain all the elements of the Missouri offense of DWI. Thus, it is not an "intoxication-related traffic offense" under Sec. 577.023.1(4). The State sought to use extrinsic facts to show Defendant was, in fact, impaired in Illinois. But courts use a "categorical" approach, which looks at the elements of the statute of conviction to determine if a prior conviction

qualifies, not to the facts of each defendant's conduct. The only time that courts look to the underlying conduct is if the statute defining the prior offense can be committed in multiple ways, only some of which would support enhancement. But that's not the case here. (2) Regarding Defendant's other conviction, it was more than five years old from the time of the charged Missouri offense, so it does not count either, Sec. 577.023.1(6). Case remanded for entry of DWI conviction as Class B misdemeanor and sentence accordingly.

State ex rel. Culp v. Rolf, 2019 WL 6314548 (Mo. App. W.D. Nov. 26, 2019):
Holding: Where (1) probation violation report showed that Defendant was incarcerated in Henry County Jail, (2) court issued an arrest warrant for Defendant for probation violation, but (3) court waited more than 14 months before conducting a revocation hearing (by which time Defendant's probation had expired due to earned compliance credits), court did not make every reasonable effort to hold hearing before expiration, Sec. 559.036.8; Defendant discharged.
Discussion: The State contends that every reasonable effort was made to hold a hearing before probation expired because a motion to revoke was filed; the trial court "issued a warrant" for arrest; and the trial court had no duty to go out and find Defendant. However, the court and prosecutor both knew where Defendant was because the probation report said he was in the Henry County Jail. He was later moved to DOC, but probation officer testified that Defendant could always be found. *State ex rel. Jones v. Eighmy*, 572 S.W.3d 503 (Mo. banc 2019), held that merely issuing an arrest warrant does not discharge the State's obligation to make every reasonable effort to hold a revocation hearing before probation expires when – as here – the court and prosecution know Defendant's whereabouts. Defendant discharged.

State v. Green, 2019 WL 6481423 (Mo. App. W.D. Dec. 3, 2019):
Holding: (1) Where Defendant was charged with kidnapping, Sec. 565.110, trial court plainly erred in submitting instruction for felonious restraint, because this is not a lesser-included offense of kidnapping, in that it requires proof of an element -- exposure to a substantial risk of harm -- which not included in kidnapping; manifest injustice resulted because Defendant was convicted of a crime for which he was not charged; (2) on remand, Double Jeopardy precludes retrial on kidnapping because the felonious restraint conviction (though not a lesser-included offense) served as an implicit acquittal of the charge of kidnapping; but because the jury was also given a lesser offense instruction on false imprisonment (though it did not find it), Defendant can be tried for false imprisonment on remand; and (3) even though Sec. 558.026 requires that offenses of "sodomy in the first degree, forcible sodomy, or sodomy" run consecutively, trial court plainly erred in ruling that conviction for second degree sodomy had to be consecutive to the felonious restraint conviction; the plain language of Sec. 558.026 does not include second-degree sodomy as one of the sentences which must run consecutively.

State v. Lewis, 2019 WL 4145031 (Mo. App. W.D. Sept. 3, 2019):
Holding: Where the written judgment and sentence regarding concurrent or consecutive sentencing did not match the oral pronouncement of sentence, the oral pronouncement controls, and case is remanded for entry of a nunc pro tunc order.

Jones v. Mo. Dept. of Corrections, 2019 WL 4418279 (Mo. App. W.D. Sept. 17, 2019):
Holding: Even though Sec. 558.047 grants pre-*Miller* Juveniles who were sentenced to life in prison without parole the right to a parole hearing after serving 25 years, nothing within 558.047 expunges other sentences Juvenile may be serving; thus, even though Juvenile is entitled to a parole hearing regarding his first-degree murder conviction after 25 years, he must still serve the normal three-year mandatory minimum (beyond 25 years) for each consecutive ACA sentence he was also serving.

State v. Garcia, 2019 WL 4615239 (Mo. App. W.D. September 24, 2019):
Holding: Where the evidence did not support the amount of restitution ordered, appellate court, under Rule 30.23's authority to "dispose finally of the case," can correct the judgment to the lower amount supported by the evidence.

State v. Giles, 2019 WL 4615227 (Mo. App. W.D. September 24, 2019):
Holding: Where the trial court failed to grant allocution to Defendant before sentencing, this violated Sec. 546.570 which requires that a defendant "be informed by the court of the verdict … and asked whether he has any legal cause to show why judgment should not be pronounced" and similar Rule 29.07(b)(1); the only exceptions are when defendant has been heard on a motion for new trial, or when the convictions are solely misdemeanors; since neither exception applied here, case remanded for resentencing.

State v. Bjorgo, 2019 WL 1441644 (Mo. App. W.D. April 2, 2019):
Holding: Where the oral pronouncement of sentence was that Defendant was sentenced to "life" in prison, but the written judgment said it was "life without parole," the oral pronouncement controls over the written judgment, and case is remanded for entry of *nunc pro tunc* order correcting this clerical error under Rule 29.12(c).

State v. Boss, 2019 WL 2583002 (Mo. App. W.D. June 25, 2019):
Holding: Where the written sentence and judgment misstated the crimes for which Defendant was convicted, this is a clerical error which should be corrected nunc pro tunc under Rule 29.12(c).

Newton v. Missouri Dept. of Corrections, 2019 WL 1599304 (Mo. App. W.D. April 16, 2019):
(1) The 120 day period for counting an ITC program under Sec. 559.115.3 begins on the date that a Defendant is physically delivered to DOC on that particular conviction and sentence; but (2) even though DOC wrongly made the earlier date of sentencing apply to Defendant and, thus, wrongly concluded that Defendant could not be released because he didn't have 120 actual days to complete the program, this was not a justiciable controversy in a declaratory judgment action against DOC, because Defendant didn't get a favorable recommendation for release due to the nature of his offense and conduct violations, and the DOC itself didn't have authority to conduct a release hearing.
Facts: In November 2014, Defendant's probation was revoked in Vernon County and he was sentenced to a 120-day Institutional Treatment Center program under Sec. 559.115.3.

He was delivered to DOC on December 2, 2014. Shortly thereafter, however, he was taken to the Christian County Jail on a charge in Christian County. On January 22, 2015, he was sentenced in Christian County to a 120-day ITC program and under 559.115.3. He was re-delivered to DOC on February 4, 2015. Regarding the Christian County case, DOC notified Christian County that because Defendant had already been in DOC custody on the Vernon case, DOC started the 120-day period for Defendant for Christian case on January 22 (the date of *sentencing*), not February 4 (the date of *physical delivery on the Christian case*). DOC claimed that there can be only one delivery date and that Defendant was on "out-count" when he was in the Christian Jail. DOC then claimed that since Defendant's 120th day would be May 22, 2015 (too short to complete the program), he would not be eligible for release. However, DOC also said he should not be released because of the nature of his offense and conduct violations. The Christian County court denied release. Defendant brought a declaratory judgment action, claiming he would have been released but for the erroneous way that DOC calculated the start date of his 120-day program such that he could not complete the program.

Holding: (1) Defendant is correct that the date of his physical delivery (February 4) was the beginning date of his 120-day program for the Christian case. 559.115.3 states that the sentencing court retains authority "from the date the offender was *delivered*" to DOC. Delivery means physical delivery. A prior version of 559.115.3 made the date of sentencing the relevant date, but the legislature changed that to "delivered." DOC has no legal authority for its argument that until an offender is released, they can only be delivered to DOC "one time," and that Defendant's one delivery was when he was delivered for his Vernon case, so that Defendant had to be on "out count" during the time he was in the Christian Jail. Missouri courts have repeatedly held, in the postconviction context, that delivery to DOC for a particular sentence is required to trigger the running of time limits. Thus, Defendant did have 120 days to complete his program for the Christian case because the 120 days ran from the date he was delivered to DOC on that case. (2) However, even though DOC wrongly calculated the date as applied to Defendant, Defendant cannot obtain relief via a declaratory judgment action. Any interest Defendant may have in release under 559.115.3 was contingent upon conditions that weren't met. First, Defendant did not get a recommendation for release from DOC because of the nature of his offense and his conduct violations. Second, the authority to conduct a release hearing or to ultimately grant probation was not in the control of DOC. Thus, Defendant didn't present a justiciable issue in his declaratory judgment action.

Woods v. Mo. Dept. of Corrections, No. WD81266 (Mo. App. W.D. Jan. 8, 2019) & Mitchell v. Jones, No. WD81049 (Mo. App. W.D. Jan. 8, 2019):

Holding: Western District would hold that even though the new Criminal Code effective in 2017 repealed Sec. 195.295.3, which made certain prior and persistent drug offenders not eligible for parole, this repeal is not retroactive to persons convicted under the pre-2017 statute, but transfers cases to Supreme Court due to general interest and importance.

State ex rel. Culp v. Rolf, No. WD82270 (Mo. App. W.D. Jan. 15, 2019):

Where (1) Defendant is eligible for earned compliance credits (ECC); (2) a violation report or motion to revoke is filed; but (3) the court does not suspend probation, a probation revocation hearing must be held within the time when Defendant would

otherwise be eligible for discharge based on the continued accrual of ECC, or else the court must satisfy the requirements of Sec. 559.036.8, which require that in order for a revocation hearing to be held after probation term has expired, a court must have manifested an intent to revoke and made every reasonable effort to revoke before expiration.

Facts: In October 2015, Defendant received an SES and was placed on probation for 5 years. In March and April 2017, Probation and Parole filed violation reports. In March 2017, the State filed a Motion to Revoke Probation. Nothing further happened until September 2018, when Defendant filed a Motion to Discharge from probation because, counting ECC, his probation expired in June 2018. The circuit court held that probation had not expired because the filing of the Motion to Revoke stayed the earning of further ECC. Defendant sought a writ of mandamus.

Holding: This case is decided under the pre-2018 amendments to Sec. 217.703 (ECC). "Compliance" with ECC means the absence of a violation report during a calendar month. The filing of the Motion to Revoke did not, by itself, stop the accrual of ECC for months in which no violation report was filed. Sec. 217.703.5 allows a court to suspend ECC or allows suspension if a hearing is held, but neither happened in this case. The trial court contends that it can revoke probation after June 2018. But Sec. 559.036.8 requires that, in order for a court to conduct a revocation hearing after probationary term expires, the court must have manifested an intent to revoke and made every reasonable effort to conduct a hearing before the term expired. Here, the State claims the court couldn't have a hearing because it didn't know where Defendant was, but had issued a warrant for him. Defendant argues the State could have readily found him because he was in DOC on another conviction. This is a factual issue which the circuit court must determine, so case is remanded for further proceedings.

State ex rel. Schmitt v. Hayes, 2019 WL 923642 (Mo. App. W.D. Feb. 26, 2019):

(1) Trial court had no authority to convert Defendant's unpaid court costs into "restitution" so that Earned Compliance Credits (ECC's) would not continue to accrue, because Sec. 559.105.1 requires that "restitution" be owed to a crime victim for victim's losses; and (2) even though Sec. 217.703.8 states that the award or rescission of ECC's "shall not be subject to appeal or any motion for postconviction relief," Defendant/Petitioner can pursue habeas corpus to seek release for improper denial of ECC because the legislature has no power to eliminate habeas corpus under Mo. Const. Art. I, Sec. 12.

Facts: Defendant (Petitioner) received an SES in April 2013, with probation to expire in April 2018. But with ECC's, Defendant's probation would expire in February 2016. As relevant here, Defendant violated probation multiple times, but no motion to revoke or suspend was ever filed before February 2016. However, in October 2015, Probation and Parole requested a hearing on unpaid court costs. At that hearing, no discussion was had about suspending or revoking Defendant's probation because of prior violations. The only issue discussed was unpaid court costs. The court converted those costs into unpaid "restitution." In January 2017, a revocation hearing was held and Defendant was revoked. In 2018, Defendant filed a petition for habeas corpus, claiming that his probation expired in February 2016 so he could not be revoked in 2017. The habeas court granted relief. The State appealed via writ of certiorari.

Holding: Sec. 217.703.5 provides that a Defendant shall earn ECC's unless a hearing is held on a violation report or motion to revoke. Here, the October 2015 hearing was not held for the purpose of violations. Its sole purpose was *unpaid court costs*. Although the sentencing court purported to convert those unpaid court costs into unpaid "restitution," so that ECC's would be suspended, there was no authority for such a conversion because Sec. 559.105.1 authorizes a court to order "restitution" only for a *crime victim's losses*. Defendant's probation expired in February 2016, and the court lacked authority to revoke in 2017.

State v. Cruz-Basurto, 2019 WL 1333110 (Mo. App. W.D. March 26, 2019):
Notable dissenting opinion: A dissenting judge argues that where Defendant's child sex offenses were charged as occurring between 2012 and 2014, and the pre-2013 version of Sec. 558.026.1 allowed a judge discretion to make the sentences concurrent or consecutive (whereas the post-2013 version did not), trial court plainly erred in applying the harsher post-2013 version at sentencing because this was *ex post facto*. (The majority did not address this issue because it wasn't raised by Defendant/Appellant.)

State ex rel. Hawley v. Chapman, 2018 WL 5259204 (Mo. App. W.D. Oct. 23, 2018):
Holding: (1) Even though the Earned Compliance Credit statute, Sec. 217.703.8, provides that the award or rescission of any credits "shall not be subject to appeal or any motion for postconviction relief," this section applies only to Rule 24.035 or 29.15 proceedings, and does not preclude Defendant/Petitioner from seeking habeas corpus relief on grounds that the trial court improperly denied her ECC and then revoked probation after it had expired; Mo.Const. Art. I, Sec. 12, does not allow the legislature to suspend a right to habeas corpus; and (2) where Defendant/Petitioner began earning ECC in 2012, but trial court ruled in 2013 that "no ECC in this case will be allowed," the trial court had no authority under the pre-2018 ECC statute to deny ECC once the earning of credits had commenced; counting the ECC, Defendant/Petitioner's probation expired before it was revoked, and habeas relief is granted.
Discussion: Under the pre-2018 version of the ECC statute, a court could deny ECC to a defendant only "prior to the first month in which the person may earn compliance credits." Here, the court did not deny ECC until a year after Defendant/Petitioner had begun to accrue them. The court did not have authority under the pre-2018 version of Sec. 217.703 to do this. However, the post-2018 amendments allow this. Sec. 217.703.5 states that if a hearing is held after a notice of violation, then the court may rescind ECCs and find the defendant ineligible to earn future ECCs. However, this provision was not in effect at the time of Defendant/Petitioner's case.

State ex rel. Barac v. Kellogg, 561 S.W.3d 905 (Mo. App. W.D. Dec. 11, 2018):
Where (1) Petitioner was sentenced to a 120-day program under Sec. 559.115.3; and (2) DOC reported a "notice of statutory discharge" to the court and said that Petitioner would be released on the 120th day, but (3) the trial court, without a hearing, entered an order denying release, this violated Sec. 559.115.3 which requires a hearing prior to the 120th day if the trial court chooses not to release a defendant when the DOC has recommended release; Petitioner ordered discharged from prison.

Facts: Petitioner (Defendant) was convicted of DWI and sentenced to five years with a 120-day program under 559.115.3. On approximately the 90th day, DOC reported to the court a "notice of statutory discharge" saying Petitioner would be released on the 120th day. On the same day the trial court received the DOC's notice, the trial court then entered an order denying release to Petitioner. Later, Petitioner filed a writ of mandamus, claiming that since the trial court failed to hold a hearing on the matter before the 120th day, he must be released.
Holding: 559.115.3 provides that if the DOC recommends release, the court can order execution of sentence only after conducting a hearing on the matter within 90 to 120 days from the date the defendant was delivered to DOC. *State ex rel. Mertens v. Brown*, 198 S.W.3d 616 (Mo. banc 2006), held that if the trial court fails to conduct the required hearing within the required time, the defendant must be released. *Mertens* has been consistently followed despite changes in 559.115.3. The State argues that because DOC's report listed some problems with Petitioner during Petitioner's treatment in DOC, that Petitioner did not "successfully complete" his program, so the trial court was not required to hold a hearing. But whatever reservations the report may have expressed, the report did not say that Petitioner had not successfully completed the program. Rather, the report was a "notice of statutory discharge" and said Petitioner would be released on the 120th day. If the trial court did not want to release Petitioner, it was required to hold a hearing before the 120th day. Petitioner's Writ of Mandamus is granted and he is ordered released.

<u>State ex rel. Young v. Elliott</u>, 565 S.W.3d 711 (Mo. App. W.D. Dec. 18, 2018):
Where the DOC had reported to trial judge that Defendant (Petitioner) would complete his 120-day program under Sec. 559.115.3 on the 120th day and gave "notice of statutory discharge" that Defendant would be released on the 120th day, trial court erred in denying release without holding a hearing before the 120th day, and Defendant/Petitioner was entitled to writ of mandamus ordering release.
Facts: Defendant was convicted of DWI and sentenced to a 120-day program under Sec. 559.115.3. On October 15, DOC sent the trial judge a "notice of statutory discharge," which reported that Defendant would be released on November 16. The notice and report said that Defendant had "exceeded expectations" in the program and had "no conduct violations." The trial court, without conducting a hearing, entered an order on October 16, finding that it would be an abuse of discretion to release Defendant and ordered that his 4-year sentence be executed. Defendant/Petitioner sought a writ of mandamus to order Defendant's release.
Holding: *State ex rel. Mertens v. Brown*. 198 S.W.3d 616 (Mo. banc 2006), held that under the plain language of Sec. 559.115.3, before a trial court can reject DOC's recommendation of release, the trial court must hold a hearing on the matter within 90 to 120 days before the release date. If the court fails to hold a hearing before the 120th day, the time to order execution of a Defendant's sentence expires, and Defendant must be released on probation. Here, Respondent-Judge argues that the DOC report did not say Defendant had "successfully completed" the program, but merely indicated when he would "finish" the program. But the notice sent to the judge was plainly a report of successful completion within the meaning of 559.115.3. And an offender cannot be

stripped of the right to a hearing on his probation determination simply because he doesn't complete the program until the 120th day. Writ granted ordering release.

Hill v. Mo. Dept. of Corrections, 2018 WL 6611875 (Mo. App. W.D. Dec. 18, 2018):
Holding: (1) Even though the 2003 amendment to the 85% rule, Secs. 556.061 and 558.019, provided that first-degree assault on a law enforcement officer was a "dangerous felony" for offenses "occurring on or after August 28, 2003," Defendant's conviction for first-degree assault on law enforcement officer that occurred in 2000 was subject to the 85% rule, because "assault in the first degree" was covered by the 85% rule in 2000, and Defendant's offense is simply a type of "assault in the first degree; (2) there is no "retroactive" application of the 2003 amendments to Defendant because the law in 2000 allowed the 85% rule to be applied to this offense since it is a type of "assault in the first degree;" and (3) even though Defendant claims that his guilty plea was involuntary because he was misinformed by his plea counsel about his parole eligibility, this cannot be raised in a declaratory judgment action because another potential remedy exists to Defendant, which is a habeas corpus proceeding.

Butler v. State, 2018 WL 3232627 (Mo. App. W.D. July 3, 2018):
Holding: Where Movant did not raise as an issue in his Rule 29.15 amended motion that there is a clerical error in the sentence and judgment, this cannot be reviewed on appeal or remanded to circuit court to correct because Rule 29.15 does not allow for plain error review (disagreeing with Eastern District opinion that remanded in similar situation for correction of clerical error); but Movant can file a *nunc pro tunc* motion directly in the circuit court to correct the clerical error.

Dunn v. Precythe, 2018 WL 2622028 (Mo. App. W.D. July 31, 2018):
Holding: (1) Even though Petitioner/Defendant had been on electronic monitoring/house arrest prior to his conviction and sentence to DOC, he was not entitled to jail time credit for the electronic monitoring/house arrest time under Sec. 558.031.1 because that statute applies only to people who were in jail or custody pre-trial; but (2) Sec. 221.025.2 gives a sentencing judge *discretion* to grant time spent on electronic monitoring toward a DOC sentence, but Petitioner/Defendant did not request this credit at sentencing.

Fields v. Mo. Bd. of Prob. and Parole, 2018 WL 4079423 (Mo. App. W.D. Aug. 28, 2018):
Holding: Even though the new criminal code effective Jan. 1, 2017, repealed a requirement in Sec. 565.024.2 that a defendant convicted of involuntary manslaughter serve 85% of their sentence, Sec. 1.160 prohibits retroactive application of this to Petitioner/Defendant who was convicted before the new code.
Discussion: If a repealed or amended statute affects the prosecution, penalty or punishment of an offense, then Sec. 1.160 bars retroactive application unless the change is merely procedural. The issue here is one of first impression: Does a parole eligibility provision within a statute defining an offense affect the prosecution, penalty, or punishment of that offense for purposes of Sec. 1.160? Where the statute defining the offense precludes parole eligibility for a mandatory period of time, it is implicit in term of the sentence and thus, affects the prosecution. This is because sentencing decisions under

these circumstances are likely made with the offense-specific parole eligibility restriction in mind.

State ex rel. Boswell v. Harman, 2018 WL 2203303 (Mo. App. W.D. May 15, 2018):
Even though trial court "suspended" Defendant's probation in 2011, where the probation revocation hearing wasn't held until 2015 (after probation had expired in 2014), trial court did not make every reasonable effort to conduct revocation hearing before expiration of the probation term; writ prohibiting revocation granted.
Facts: In 2009, Defendant pleaded guilty to a felony, and was placed on 5 years probation, which was to expire in 2014. In 2011, Defendant failed to report, and the trial court "suspended" his probation. Also in 2011, Defendant was arrested on unrelated charges, convicted and sent to DOC on those charges. In 2012, Defendant filed motions to continue him on probation, but no action was taken by the court. In 2015, Defendant moved to discharge himself from probation. The trial court denied this, and ultimately revoked probation. Defendant sought writ of prohibition.
Holding: Sec. 559.036.8 allows a court to revoke probation after expiration of a probation term if (1) the court manifested an intent to conduct a revocation hearing before expiration (such as by suspending probation, issuing a warrant, filing a motion to revoke or scheduling a revocation hearing), *and* (2) the court makes every reasonable effort to conduct the hearing before expiration. Here, the court manifested an intent to conduct a hearing by "suspending" probation, but did not make every reasonable effort to conduct the hearing before expiration. Sec. 559.036.7 allows a court to "suspend" probation, but this does not relieve a court from the condition of 559.036.8 which requires every effort may be made to hold a hearing before expiration. Suspension cannot last indefinitely. Trial court exceeded authority in revoking.

State v. Baker, 2018 WL 2407543 (Mo. App. W.D. May 29, 2018):
Holding: (1) Where Defendant pleaded guilty to a Class A misdemeanor, the trial court exceeded its authority and plainly erred in imposing 180 days "shock time" detention as a condition of probation because Sec. 559.026(1) provides that "in misdemeanor cases, the period of detention under this section shall not exceed the *shorter* of 30 days or the maximum term of imprisonment authorized for the misdemeanor by Chapter 558," here one year; (2) appellate court decided case in a direct appeal of the sentence following the guilty plea; (3) a sentence in excess of the maximum authorized by law is plain error and not waived by a guilty plea.

State v. Tillitt, 2018 WL 325222 (Mo. App. W.D. Jan. 9, 2018):
Holding: Where Defendant committed multiple child sex offenses, the last of which occurred in June 2013, trial court plainly erred in believing it had to impose consecutive sentences under 558.026 (effective August 28, 2013), because under Sec. 1.160(2), a defendant is sentenced according to the law in effect at the time of the offense.
Discussion: The version of Sec. 558.026 that was in effect when Defendant's offenses occurred was the version that allowed concurrent sentences. Here, the trial court erroneously believed that it was required to impose consecutive sentences. When a court sentences a defendant based on a mistaken belief as to the available range of punishment, clear error resulting in manifest injustice occurs. Remanded for resentencing.

State ex rel. Hawley v. Spear, 2018 WL 501591 (Mo. App. W.D. Jan. 23, 2018):
Even though Probationer was not "indigent" because he earned about $2,000 per month, where (1) he was required to pay $4,000 per month in restitution, and (2) was paying about $2,000 per month in restitution, trial court could not revoke probation for failing to pay the whole amount without determining whether Probationer's failure to pay was willful, and if the Probationer was making bona fide efforts to pay, whether there were alternative punishments to imprisonment.
Facts: Probationer (Defendant) pleaded guilty to financial exploitation of the elderly and was ultimately placed on probation, with a condition that he pay $242,000 in restitution in the amount of $4,000 per month. Petitioner had a job, worked overtime, and earned $11 to $14 per hour, or about $2,000 per month. He was paying about $2,000 per month in restitution. The State sought to revoke probation in October 2014 for failing to pay the full amount, but the court continued him on probation at that time. The State filed another violation in December 2014 for failing to pay the full amount. After hearing evidence and argument from counsel, the judge said he didn't know how Probationer could "possibly pay" the $4,000 restitution over the course of his probation; that it would take him 9 years to pay the full amount owed; that "there's no law in the world that allows anybody to be on probation for nine years;" and that Probationer's "stealing from folks would indicate that this is just something he's always done." Hence, the court revoked probation for failing to pay and executed a 25-year sentence. Probationer later filed a habeas corpus action. The habeas court granted relief on grounds that the trial court had not made necessary findings before revoking for failure to pay. The State appealed.
Holding: *Bearden v. Georgia*, 461 U.S. 660 (1983) and *State ex rel. Fleming v. Mo. Bd. of Prob. and Parole*, 515 S.W.3d 224 (Mo. banc 2017), require that before a court can revoke probation for failing to pay restitution, it must make Findings whether Probationer's failure to pay was willful, and if not, whether alternative punishments to prison can be implemented. Here, the trial court did not explain why it previously continued Probationer on probation for failing to pay the full amount, but later revoked. The trial court's statement that Probationer would never be able to pay the full amount, given his income, is the polar opposite from finding that he willfully refused to pay. The trial court's statements about Probationer's criminal record do not show that his failure to pay was willful. Grant of habeas relief affirmed.

Sayre v. State, 2018 WL 941822 (Mo. App. W.D. Feb. 20, 2018):
Holding: (1) Even though Movant (Defendant) admitted he was pleading guilty to the Class D felony of driving without a valid license, Sec. 302.020, where the State presented no evidence that Movant had two prior convictions for the offense, the State failed to prove the felony enhancement; and (2) under *State v. Collins*, 328 S.W.3d 705 (Mo. banc 2011), Sec. 302.020.3 and 558.021, the State is not allowed a second opportunity to prove up recidivist status, so the case is remanded for resentencing as a misdemeanor; prior Western District decisions allowing the State to prove up recidivist status on remand were overruled, *sub silentio*, by *Collins*.
Discussion: Driving without a license is a felony upon the third or subsequent conviction, Sec. 302.020.1(1). Sec. 302.020.3 requires that the prior convictions be

pleaded and proven in the same manner as under 558.021, which requires the court make findings that a defendant is a recidivist before sentencing. Even though Movant acknowledged at the plea hearing that he was pleading guilty to the Class D felony, there is nothing in the record showing that Movant was aware the offense was enhanced based on prior convictions. Even if he was aware of this, however, that does not remove the requirement that the prior convictions be proven. Here, there is nothing in the record proving up any prior convictions for driving without a license, and Movant did not admit to having any such convictions. Multiple Western District decisions hold that the State should be allowed to present proof of prior convictions upon remand. But *Collins* implicitly overruled these cases, and held that under 557.023 and 558.021, the State does not receive a second opportunity to prove its case. Felony conviction vacated under Rule 24.035 and case remanded for resentencing as misdemeanor.

Watson v. State, 2018 WL 1061729 (Mo. App. W.D. Feb. 27, 2018):
Holding: (1) Even though 24.035 motion court dismissed motion by docket entry which was not signed by judge, an order disposing of a 24.035 or 29.15 motion need not be denominated a "judgment" or signed by judge to be "final" for appeal; (2) even though the motion court did not issue Findings, and summarily denied the timely-filed Rule 78.07(c) motion requesting Findings (which would be error), appellate court will not reverse for Findings because Movant has not raised this issue on appeal; and (3) even though a claim that a sentence is "in excess of the maximum authorized by law" is procedurally cognizable under 24.035, Movant cannot prevail on his timely-filed 24.035 claim that his stealing conviction violated *Bazell* because *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017), held that *Bazell* "applies prospectively only, except in those cases pending on direct appeal."

State v. Fleming, 2018 WL 1276981 (Mo. App. W.D. March 13, 2018):
(1) Even though Defendant stole a $1250 check in a burglary, where that check was never cashed (though other checks of unknown value apparently were), trial court lacked authority under Sec. 559.105 to order $1250 in restitution because there was no evidence that Victim suffered this quantifiable loss; and (2) State is not entitled to a second opportunity to prove its case, so restitution order is stricken.
Facts: Defendant committed a burglary, during which several checks were stolen, including one for $1250. The $1250 check was never cashed, though other checks of some value not disclosed by the record apparently were cashed. The $1250 check was mentioned in the Sentencing Assessment Report, which the court used to impose $1250 in restitution.
Holding: Sec. 559.105.1 allows restitution only for losses due to the offense of conviction. Even though Defendant apparently cashed some stolen checks, there is no evidence justifying the $1250 restitution amount. The record does not indicate the amount of the other checks. There is nothing in the record showing how the $1250 was determined. The State cannot receive a second opportunity to prove its case on remand. Thus, restitution order is vacated.

State ex rel. Royal v. Norman, 2016 WL 215236 (Mo. App. W.D. Jan. 29, 2016):
Habeas relief granted reducing conviction from felony to misdemeanor, where Defendant had pleaded guilty to tampering with a victim in an underlying misdemeanor case; Sec. 575.270.3 makes witness tampering a felony only if the underlying case is a felony.
Facts: Defendant pleaded guilty to third degree domestic assault, a misdemeanor. Later, he was charged with the Class C felony of tampering with a victim, involving the victim from the misdemeanor case. He was ultimately sentenced to seven years for victim tampering. He sought a writ of habeas corpus.
Holding: Sec. 575.270.3 provides that witness tampering "is a class C felony if the original charge is a felony. Otherwise, tampering … is a class A misdemeanor." Imposition of a sentence beyond that permitted by the applicable statute may be raised via habeas corpus. Here, his sentence exceeds that permitted by Sec. 575.270.3. The lower court is ordered to amend the conviction to a misdemeanor and sentence accordingly.

State v. Davis, 533 S.W.3d 853 (Mo. App. W.D. Nov. 28, 2017):
Holding: Where Defendant was charged with first-degree burglary, but jury convicted him of lesser offense of first-degree trespassing, trial court plainly erred in entering judgment for burglary and sentencing Defendant in excess of that authorized for trespassing; being sentenced to a punishment greater than authorized is plain error resulting in manifest injustice.

Bellamy v. State, 525 S.W.3d 166 (Mo. App. W.D. Aug. 8, 2017):
The 2013 amendment to 559.015.1, which allows a court to order imprisonment and also restitution is ex post facto when applied to persons who committed their crimes before August 28, 2013, even if they are sentenced after this date; thus, where Defendant committed his stealing offenses in 2011, but he was not sentenced until 2014, he could not be sentenced to prison and ordered to pay restitution; restitution order is stricken.
Facts: Defendant/Movant committed stealing-related offenses in 2011. He was convicted in 2014, and sentenced to prison and to pay $100,000 in restitution. He filed 24.035 motion, alleging the restitution order was invalid.
Holding: Before August 28, 2013, a court could not order a person be sentenced to prison and pay restitution, too. That changed when 559.015.1 was amended, effective August 28, 2013. When a statute increases the punishment for a crime after it has been committed, that raises ex post facto concerns. An ex post facto law is one that provides for punishment for an act that was not punishable when it was committed, or that imposes additional punishment to that in effect at the time of the crime. It is an issue of first impression whether a restitution order under amended 559.015.1 constitutes additional punishment for ex post facto clause purposes. A majority of federal courts and various state courts have concluded that restitution constitutes criminal punishment. Additionally, several provisions of Sec. 559.105 demonstrate the penal nature of criminal restitution. E.g., a defendant cannot be released from probation until restitution is paid; cannot be released from parole until restitution is paid or the maximum parole term served; and prosecutors can collect unpaid restitution as a condition of conditional release or parole. The restitution here was an additional punishment, violates ex post facto, and is stricken.

State v. Johnson, 2017 WL 1650042 (Mo. App. W.D. May 2, 2017):
Holding: Where the written judgment did not accurately reflect the offense of conviction, case remanded to amend judgment nunc pro tunc.

State v. Contreras-Cornejo, 2017 WL 2332758 (Mo. App. W.D. May 30, 2017):
Holding: On plain error review, Sec. 558.026.1 requires that listed sex offenses be served consecutively.
Discussion: Sec. 558.026.1 provides that "multiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively; except in the case of multiple sentences of imprisonment imposed for any offense committed during or at the same time as or multiple offenses of [certain listed felonies]. In such case, the sentence of imprisonment imposed for any felony listed in this subsection … shall run consecutively to the other sentences. The sentences imposed for any other offense my run concurrently." This statute makes clear that sentences for the listed felonies "shall run consecutively" to each other. Even though courts held that the pre-2013 version of 558.026.1 was ambiguous and, thus, courts could run certain felonies concurrently, the 2013 amendment resolves that ambiguity. The new statute requires consecutive sentencing both when multiple sentences are imposed "for any offense committed during or at the same time as" the listed sexual offenses, and when multiple sentences are imposed for "multiple offenses of" the listed felonies. The listed felonies must run consecutively to each other, not only to the sentences for the non-listed offenses committed at the same time.

Mann v. McSwain, 2017 WL 2544060 (Mo. App. W.D. June 13, 2017):
Holding: Even though first degree assault of a law enforcement officer was not added to the statutory definition of "dangerous felony," Sec. 566.0061(8), until 2003, Defendant's pre-2003 conviction for this offense nevertheless qualified as a "dangerous felony" subject to the 85% rule because assault of a law enforcement officer constitutes a type of "assault in the first degree," which previously met the definition of "dangerous felony," and the 2003 amendment was meant to "clarify" the existing law.
Discussion: Legislative history supports the conclusion that "assault in the first degree" (which existed in 566.061(8) since 1994) includes assault of a law enforcement officer. The original "dangerous felony" statute enacted in 1977 used only the word "assault," referring to a category of offenses rather than a specific crime. The 1994 amendment added "assault in the first degree" to distinguish "assault" from second or third degree assaults, and thus, to exempt lesser assaults from the then-newly enacted 85% rule. The purpose of the legislature's creation of offense of assault on law enforcement officers was to impose *harsher* punishment for those types of assaults. To exclude this offense from the 85% rule for pre-2003 crimes would make Defendant eligible for parole after serving *less* of his sentence than offenders convicted of the lesser-included offense of first-degree assault on other persons.

State v. Raulerson, 2017 WL 2773956 (Mo. App. W.D. June 21, 2017):
Holding: A "persistent offender" finding increases the maximum possible sentence to the range for the next highest felony, but does not increase the minimum sentence;

resentencing required where trial Judge stated that minimum sentence was increased, even though defense counsel told Judge otherwise.
Discussion: Defendant was a "persistent offender" on a Class B felony. The trial court stated the range of punishment as 10 to 30 or life, but the correct range was 5 to 30 or life. Even though defense counsel corrected the judge, there is support in the record to indicate that the judge misunderstood the range of punishment when she pronounced sentence of 20 years, because judge twice misstated the range of punishment. When a court sentences a defendant based on a mistaken belief as to range of punishment, plain error occurs. Remanded for resentencing.

State v. Berry, 2016 WL 5888945 (Mo. App. W.D. Oct. 11, 2016):
Even though trial court's oral pronouncement of sentence exceeded that authorized by law, trial court violated Defendant's right to be present for sentencing when it later changed (reduced) the sentence nunc pro tunc without Defendant's presence.
Facts: The trial court orally sentenced Defendant to 30 years, but the maximum authorized by law was 15. However, the written sentence stated (apparently erroneously) 15 years. The State then filed a motion a motion to correct sentence nunc pro tunc, which was granted. Defendant appealed, claiming the court plainly erred in resentencing him to 15 years without him being present.
Holding: The oral pronouncement of sentence is the controlling sentence. A nunc pro tunc order can be used only to correct clerical errors, not to amend a rendered judgment. If the oral pronouncement contains a discrepancy, a trial court can correct it before it is reduced to writing only if the defendant is present. If the defendant is not returned for resentencing, a trial court has authority only to enter the sentence as orally pronounced. Defendant has a due process right to be present and heard at the oral pronouncement. Sentence vacated for resentencing.

State v. Pierce, 2016 WL 6081444 (Mo. App. W.D. Oct. 18, 2016):
(1) Persistent offender status increases maximum punishment for offense but not minimum punishment; trial court plainly erred in sentencing Defendant with misunderstanding as to minimum punishment; and (2) even though trial court found that Defendant was not competent to consent to police entering his house due to his mental condition, appellate court does not apply exclusionary rule to contraband found in house because police did not engage in deliberate misconduct or have significant culpability; police were trying to help a mentally-confused person, and did not deliberately violate 4th Amendment.
Facts: Defendant called police to say he was hearing voices and was suicidal. When police arrived, Defendant was emotionally disturbed. He said his cat wanted to stab him. Police said "if you'd like, we can check out [your house] for you, make sure it's safe." Defendant agreed. Police went inside and saw in plain view a computer with child pornography displayed on the screen. Defendant was convicted of Class B possession of child pornography as a prior and persistent offender. At sentencing, the asked if the range of punishment was "10 to 30." No one said the minimum was 5. The judge sentenced Defendant to 15 years.
Holding: (1) That Defendant was emotionally disturbed and experiencing auditory hallucinations may not by itself render his consent to search involuntary. Regardless of

whether the trial court correctly found that Defendant did not voluntarily consent, the exclusionary rule should be applied only when police practices are deliberate enough to yield meaningful deterrence and culpable enough to be worth the price to the justice system. Here, police did not conduct the search with the intent of finding criminal evidence. Police did not intend to violate 4th Amendment. Hence, the exclusionary rule should not apply. (2) The persistent offender statute increases the maximum punishment to that of the next higher degree of felony, but does not alter the minimum sentence. Here, the minimum for a B felony remained 5 years. Even though the court explained its sentence as protecting children, and it may be unlikely that the court would further reduce it, where the record shows the court was under a mistaken impression as to the minimum sentence, case must be remanded for resentencing.

State v. Webber, 2016 WL 7094041 (Mo. App. W.D. Dec. 6, 2016):
Where a trial court misinstructs the jury as to the maximum range of punishment, manifest injustice results, even where the jury returns a lesser sentence; a sentence based on a materially false foundation violates due process.
Facts: Defendant was subject to jury sentencing for forcible rape, 566.030 RSMo. 1986, forcible sodomy, 566.060 RSMo. 1986, and attempted forcible sodomy, Sec. 566.060 RSMo. 1986, for sex crimes that occurred in 1991. The trial court instructed the jury that the range of punishment was life imprisonment, or a term of years not less than 10. The jury imposed 24 years on each count. The actual arrange of punishment was "a term of years not less than 10 and not to exceed 30, or life imprisonment," Sec. 558.011.1(1) RSMo. 1986.
Holding: The State concedes the jury was misinstructed but contends there is no plain error (manifest injustice) because the jury imposed less than the maximum sentence. However, where the sentencer has a mistaken belief about the range of punishment, manifest injustice results. A sentence based on a materially false foundation violates due process and requires resentencing.

State v. Nelson, 2016 WL 7209823 (Mo. App. W.D. Dec. 13, 2016):
Holding: (1) Rule 23.08 allows the State to amend an information if (a) no additional or different offense is charged, and (b) defendant's substantial rights are not prejudiced; the Rule is written in the conjunctive; some cases mistakenly hold that a defendant must disprove both conjunctive components, when in fact, the Rule is violated if either of the Rule's conjunctive components is not satisfied; and (2) even though jury in case recommended a jail sentence and not a fine, the court was authorized to impose both a jail sentence and a fine; Secs. 577.036.1 and 577.036.5 limit the maximum term of imprisonment a court can impose to that recommended by the jury, but do not limit "other disposition[s]" (fines) which a court may impose.

State v. Nelson, 2016 WL 7438736 (Mo. App. W.D. Dec. 27, 2016):
Holding: (1) A denial by the trial court of a nunc pro tunc motion to correct a clerical error in a judgment under Rule 29.12(c) is not appealable; cases to the contrary are to no longer be followed, but (2) a defendant may pursue a remedy via a writ if the alleged clerical errors infringe upon his rights.

Discussion: We do not have authority to hear an appeal from a denial of a nunc pro tunc motion under Rule 29.12(c) as appeals in criminal cases may only be from a final judgment rendered upon indictment or information, Sec. 547.070. A nunc pro tunc judgment creates no new judgment from which there is a statutory right to appeal. However, Defendant is not without any avenue for relief if the clerical error actually infringes on his rights. A writ and perhaps other remedies are adequate to protect the narrowly limited right here.

State v. Skinner, 2016 WL 2339613 (Mo. App. W.D. May 3, 2016):
Holding: Where Defendant was found to be only a "prior offender," but the written judgment stated he was a "persistent offender," this is a clerical error that can be corrected nunc pro tunc under Rule 29.12.

State v. Libertus, 2016 WL 2994018 (Mo. App. W.D. May 24, 2016):
Holding: In order for a Defendant to be found to be a "dangerous offender," Sec. 558.016.4, the information must allege that the Defendant is a "dangerous offender" and must contain all essential facts necessary to prove that status, and the facts necessary for that determination must be submitted to and found by a jury.

* **Holguin-Hernandez v. U.S., 2020 WL 908880, ___ U.S. ___ (U.S. Feb. 26, 2020):**
Holding: A defendant properly preserves for appeal a claim that his sentence is unreasonable where he argued for a lesser sentence in the district court, because this falls within the first prong of Rule 51(b) of the federal rules of criminal procedure, which provides that a party preserves claims of error by (1) informing the court of the action the party wishes the court to take, or (2) making an objection to the court's action and the grounds for that objection.

*** Shular v. U.S., ___ U.S. ___, 140 S.Ct. 779 (U.S. Feb. 26, 2020):**
Holding: To decide if a prior state offense qualifies as a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. Sec. 924(e), courts must use a categorical approach based on the "conduct" specified in the state statute, not a comparison to a "generic offense."

*** Mont v. U.S., 2019 WL 2331305, ___ U.S. ___ (U.S. June 3, 2019):**
Holding: Under 18 U.S.C. §3624(e), a federal defendant's period of supervised release is tolled during pretrial incarceration for a new offense, if the later new sentence credits the period of pretrial detention as time served for the new offense.

* **Quarles v. U.S., ___ U.S. ___, 139 S.Ct. 1872 (U.S. June 10, 2019):**
Holding: "Remaining in" burglary is a "violent felony" for sentencing under 18 U.S.C. §924(e) if the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.

*** U.S. v. Davis, 2019 WL 2570623, ___ U.S. ___ (U.S. June 24, 2019):**
Holding: 18 U.S.C. §924(c)'s residual clause which mandates a higher sentence for using or possessing a firearm in furtherance of a "crime of violence," defined as a crime

"that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" is unconstitutionally vague.

*** U.S. v. Haymond, 2019 WL 2605552, ___ U.S. ___ (U.S. June 26, 2019):**
Holding: 18 USC §3583(k) that requires a judge to impose a mandatory minimum five-year term and up to life in prison for certain violations of supervised release, such as possession of child pornography, violates the Fifth and Sixth Amendment right to a jury trial; statute allows a judge (not a jury) to engage in factfinding to increase the minimum penalty, and to do so without proof beyond a reasonable doubt.

* **Stokeling v. U.S., ___ U.S. ___, 139 S.Ct. 544 (U.S. Jan. 15, 2019):**
Holding: A prior conviction for robbery, which has as an element the use of force sufficient to overcome a victim's resistance, falls within the use of physical force under ACCA, Sec. 924(e)(2)(B)(i), thus triggering an enhanced sentence.

* **Timbs v. Indiana, ___ U.S. ___, 139 S.Ct. 682 (U.S. Feb. 20, 2019):**
Holding: The 8th Amendment's excessive fines clause applies to the States through the 14th Amendment's due process clause; thus, drug Defendant can challenge the civil forfeiture of his vehicle under 8th Amendment as grossly disproportionate to his offense.

*** U.S. v. Stitt, ___ U.S. ___ (U.S. Dec. 20, 2018):**
Holding: The term "burglary" in ACCA includes burglary of a vehicle that has been adapted for or is currently used for overnight accommodation – thus triggering the 15-year mandatory minimum.

*** Lagos v. U.S., ___ U.S. ___, 138 S.Ct. 1684 (U.S. May 29, 2018):**
Holding: The Mandatory Victims Restitution Act (MVRA) does not require defendants to reimburse victims for expenses incurred in private investigations or civil proceedings arising out of the criminal offense.

*** Hughes v. United States, ___ U.S. ___, 138 S.Ct. 1765 (U.S. June 4, 2018):**
Holding: A defendant who was sentenced under a binding plea agreement is generally eligible for a sentence reduction if there is a later reduction in the Guidelines range, because their original sentence was "based on" the Guidelines range, since a judge necessarily considers the range in deciding whether to accept or reject the binding plea agreement.

*** Koons v. United States, ___ U.S. ___, 138 S.Ct. 1783 (U.S. June 4, 2018):**
Holding: Where defendants were sentenced below a mandatory minimum (which minimum was higher than the applicable Guidelines range) because they provided substantial assistance to the Government, their sentences were not "based on" the Guidelines range, and thus, they were not eligible for resentencing when the Sentencing Commission later lowered the initial range more; the initial range played no role in their original sentence.

*** Chavez-Meza v. U.S., ___ U.S. ___, 138 S.Ct. 1959 (U.S. June 18, 2018):**
Holding: Where the Sentencing Commission had lowered the Federal Sentencing Guidelines range after the defendant's original sentencing, the District Judge gave an adequate explanation for imposing a new, lower sentence by using a standard form stating that he had "considered" and "taken into account" statutory factors the court was to required consider in re-sentencing.

*** Rosales-Mireles v. U.S., ___ U.S. ___, 138 S.Ct. 1897 (U.S. June 18, 2018):**
Holding: A sentence based upon an incorrect Guidelines calculation will ordinarily constitute plain error under Rule 52(b) on appeal, and require resentencing, because such errors affect the fairness, integrity and public reputation of judicial proceedings.

*** Kernan v. Cuero, ___ U.S. ___, 138 S.Ct. 4 (U.S. Nov. 6, 2017):**
Holding: State court's ruling allowing Petitioner to withdraw his guilty plea, instead of ordering specific performance of plea agreement, after State was allowed to file an amended information after plea but before sentencing which pleaded an additional prior offense which enhanced Defendant's sentence, was not contrary to any prior holding of U.S. Supreme Court; *Santobello v. New York*, 404 U.S. 257 (1971), held that the relief in similar situations is left to the discretion of state courts; thus, Petitioner is not entitled to habeas corpus relief of specific performance.

*** Dean v. U.S., ___ U.S. ___, 137 S.Ct. 1170 (U.S. April 3, 2017):**
Holding: Federal judges can take into account the lengthy mandatory minimum sentence a defendant must serve under 18 U.S.C. Sec. 924(c) for using a firearm in connection with a violent or drug trafficking offense in deciding what sentence to impose for the predicate offense, i.e., a judge can shorten the predicate offense's sentence to arrive at a total aggregate sentence which the judge deems appropriate.

*** Nelson v. Colorado, ___ U.S. ___, 137 S.Ct. 1249 (U.S. April 19, 2017):**
Holding: Where has a defendant has a conviction set aside, procedural due process requires the government to refund restitution and court costs paid by the defendant, without the defendant having to prove actual innocence. Absent conviction of a crime, the defendant is presumed innocent, and is entitled to a refund.

*** Manrique v. U.S., ___ U.S. ___, 137 S.Ct. 1266 (U.S. April 19, 2017):**
Holding: In order to appeal an order imposing restitution in a deferred restitution case, a defendant must file a notice of appeal following that order. A prior notice appealing the conviction and sentence was not effective to also cover the restitution order.

*** Beckles v. U.S., 2017 WL 855781, ___ U.S. ___ (U.S. March 6, 2017):**
Holding: Federal sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause because the Guidelines do not fix the permissible range of sentences, but merely guide the exercise of a court's discretion in choosing an appropriate sentence; thus, even though the Guidelines' "crime of violence" residual clause was

identical to the "crime of violence" residual clause struck down as vague in *Johnson v. United States* (2015), the Guidelines' residual clause was not subject to such attack.

*** Bosse v. Oklahoma, ___ U.S. ___, 137 S.Ct. 1 (U.S. Oct. 11, 2016):**
Holding: Lower courts are not free to assume that the Supreme Court has "implicitly overruled" its holding in *Booth* that the Eighth Amendment bars admission of victims' family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence; only the Supreme Court itself can overrule its precedents.

*** Tatum v. Arizona, ___ U.S. ____, 137 S.Ct. 11 (U.S. Oct. 31, 2016)(Sotomayor, J., concurring in decision to grant, vacate and remand):**
Holding: The Supreme Court summarily vacates and remands various Juvenile life without parole cases for reconsideration in light of *Miller* and *Montgomery*. Justice Sotomayor writes concurring opinion noting that even though the judges in these cases *did consider* Juveniles' youth before imposing life without parole, such sentences still violate the 8th Amendment for children whose crimes reflect transient immaturity. "On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'"

* **Welch v. U.S., ___ U.S. ___, 136 S.Ct. 1257 (U.S. April 18, 2016):**
Holding: *Johnson v. U.S.*, which held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, is retroactive to cases on collateral review.

* **Molina-Martinez v. U.S., ___ U.S. ___, 136 S.Ct. 1338 (U.S. April 20, 2016):**
Holding: Where a defendant is sentenced under an incorrect USSG sentencing range (but this error is not noticed until appeal), the plain error rule does not require some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings; this error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome under the plain error rule.

*** Betterman v. Montana, ___ U.S. ___, 136 S.Ct. 1609 (U.S. May 19, 2016):**
Holding: The Sixth Amendment's speedy trial guarantee does not apply to sentencing; however, defendants harmed by lengthy delays in sentencing may seek relief under the due process clauses of the Fifth and Fourteenth Amendments.

*** Mathis v. U.S., 2016 WL 3434400, ___ U.S. ___ (U.S. June 23, 2016):**
Holding: The Armed Career Criminal Act compares only "elements" of offenses to determine whether a prior conviction qualifies for an enhanced sentence, even when the state law at issue lists alternative means of satisfying one or more elements.

*** Montgomery v. Louisiana, 2016 WL 280758, ___ U.S. ___ (U.S. Jan. 25, 2016):**
Holding: *Miller* (holding that automatic life without parole for juveniles is unconstitutional) is retroactive; retroactive application is given to substantive rules of constitutional law, which include rules prohibiting a certain category of punishment for a

certain class of defendants because of their status or offense; States are not required to relitigate JLWOP sentences, but may provide juveniles with parole hearings.

*** Lockhart v. U.S., ___ U.S. ___, 136 S.Ct. 958 (U.S. March 1, 2016):**
Holding: The sentencing enhancement for possession of child pornography, 18 U.S.C. 2252(a)(4), which applies to defendants who have a prior conviction for "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," applies even where the prior conviction does not involve a minor; the "involving a minor" language applies *only* to the last clause "abusive sexual conduct"; thus, Defendant, whose prior was for "sexual abuse" of his adult girlfriend, qualified for enhancement under the "sexual abuse" language of the statute.

U.S. v. Slatten, 101 Crim. L. Rep. 510 (D.C. Cir. 8/4/17):
Holding: (1) Trial court erred in excluding statements of co-Defendant that co-Defendant fired first shots in crime; (2) mandatory 30-year minimum prison sentence violated 8th Amendment ban on cruel and unusual punishment in manslaughter case.

U.S. v. Miller, 103 Crim. L. Rep. 200 (D.C. Cir. 5/18/18):
Holding: Even though licensed guns were found in Defendant's home (where he also had drugs), his sentence for drug possession could not be enhanced due to the guns without the district court articulating a connection between the guns and the possession offense.

U.S. v. Vazquez-Mendez, 915 F.3d 85 (1st Cir. 2019):
Holding: District judge improperly revoked supervised release on need for defendant's rehabilitation when he said that a prison sentence would assist Defendant in working on rehabilitation, and give him time to reflect and straighten up.

Bennett v. U.S., 101 Crim. L. Rep. 453 (1st Cir. 7/5/17):
Holding: Maine conviction for aggravated assault is not a "violent felony" under ACCA.

U.S. v. Milan-Rodriguez, 2016 WL 1612850 (1st Cir. 2016):
Holding: Sentence of 168 months for possessing firearm while being an unlawful user of controlled substance was plain error because maximum sentence is 120 months; remedy is not for appellate court to reduce to statutory maximum but to remand for appropriate sentence and explanation.

U.S. v. Alvarez-Nunez, 99 Crim. L. Rep. 545 (1st Cir. 7/8/16):
Holding: 1st Amendment prohibits using Defendant's songs with violent lyrics to increase sentence, although such lyrics can be used to show motive or state of mind in some cases.

U.S. v. Reyes-Santiago, 2015 WL 5598869 (1st Cir. 2015):
Holding: Defendant's sentence of 360 months for drug conspiracy was unreasonable because of disparity with co-Defendants' sentences; the court did not accept the

stipulated drug quantity regarding Defendant but did accept it regarding the co-Defendants.

Whyte v. Lynch, 98 Crim. L. Rep. 248 (1st Cir. 12/9/15):
Holding: Conn. conviction for third degree assault is not "crime of violence" under 8 USC 1227 (regarding deportation for aggravated felonies) because the use of force is not required under the statute.

U.S. v. Kroll, 2019 WL 1029260 (2d Cir. 2019):
Holding: New York conviction for second degree sodomy is not a "prior sex conviction" requiring enhanced mandatory life in prison for new offense, because New York's statute sweeps more broadly than the federal equivalent since it prohibited sexual conduct involving victims older than 12.

U.S. v. Jenkins, 101 Crim. L. Rep. 45 (2d Cir. 4/17/17):
Holding: Child pornography sentence of 19 years in prison followed by 25 years of supervised release was too high, where it exceeded the length of sentences given to child sex abusers; court failed to differentiate between "possession only" offense and "contact" offenses.

U.S. v. Burden, 101 Crim. L. Rep. 429 (2d Cir. 6/19/17):
Holding: Where district court sentenced Defendant to lifetime supervision for drug trafficking by emphasizing the crime, this was plain error because it suggested retribution which is appropriate for sentencing for incarceration but not for supervised release.

U.S. v. Brooks, 103 Crim. L. Rep. 145 (2d Cir. 5/2/18):
Holding: Imposing lifetime supervision on drug-Defendant because he was addicted to drugs must be justified by "extreme or unusual" behavior; mere inability to stop taking drugs does not justify such a harsh result; lifetime supervision means a never-ending possibility of prison for violation and doesn't allow for rehabilitation; it is reserved for violent offenses or child pornography.

U.S. v. Olmeda, 103 Crim. L. Rep. 332 (2d Cir. 6/22/18):
Holding: Federal sentencing guideline that a federal sentence should be concurrent to a state sentence for the same conduct applies even when the state prosecution is still pending, i.e., where state prosecution has been instituted but conviction and sentence not yet occurred.

U.S. v. Townsend, 103 Crim. L. Rep. 407 (2d Cir.7/23/18):
Holding: Prior state conviction for doesn't qualify as "controlled substance offense" for federal sentencing purposes if the state law covers a drug that isn't a controlled substance under federal law.

U.S. v. Algahaim, 100 Crim. L. Rep. 218 (2d Cir. 12/1/16):
Holding: District judge can consider a lower non-Guidelines sentence in applying "loss amount" USSG; "where the Commission has assigned a rather low base offense level to a

crime and then increased it significantly by a loss enhancement, that combination of circumstances entitles a sentencing judge to consider a [lower] non-Guidelines sentence."

U.S. v. Brown, 99 Crim. L. Rep. 397 (2d Cir. 6/14/16):
Holding: Even though 60-year sentence for producing and possessing child pornography was within the Guidelines range, appellate court reverses and remands where judge may have misunderstood facts of the case (Defendant took photos of one victim while she was asleep), and where sentence was overkill because Defendant would be unlikely to reoffend when he reaches his 60s and 70s.

U.S. v. Jones, 99 Crim. L. Rep. 569 (2d Cir. 7/21/16):
Holding: New York first-degree robbery conviction is not "crime of violence" under career-offender USSG because offense can be committed in a way that doesn't fall within the definition.

U.S. v. Viloski, 98 Crim. L. Rep. 482 (2d Cir. 2/17/16):
Holding: In deciding whether a criminal forfeiture violates the excessive fines clause of 8th Amendment, court should consider if the forfeiture is so draconian that it would deprive Defendant of the future ability to make a living; courts may consider the characteristics of the Defendant, not just the offense, in deciding on forfeiture amounts.

U.S. v. Aldeen, 2015 WL 4072106 (2d Cir. 2015):
Holding: District court failed to explain its above Guidelines sentence for Defendant who violated terms of his supervised release by speaking to a felon who attended his treatment group.

U.S. v. McCrimon, 2015 WL 3498676 (2d Cir. 2015):
Holding: Even though Defendant robbed a bank with a co-Defendant who drove a get-away car and could have reasonably foreseen that the co-Defendant might recklessly drive the car, Defendant was not subject to enhancement for reckless endangerment, since this enhancement required direct or active participation in the recklessness.

U.S. v. Grant, 103 Crim. L. Rep. 35 (3d Cir. 4/9/18):
Holding: Sentencing Juvenile to RICO sentence so long that it may be de facto life without parole violated 8th Amendment.

U.S. v. Free, 100 Crim. L. Rep. 74 (3d Cir. 10/6/16):
Holding: The enhancement for "loss" from fraud under USSG 2B1.1 must be based on victim's tangible monetary harm, not conceptual damage the fraud cases to the integrity of the judicial process; Defendant hid assets from bankruptcy court.

U.S. v. Doe, 2015 WL 5131208, 2015 WL 8287858 (3d Cir. 2015):
Holding: *Begay* error, asserting that prior convictions were not "crimes of violence" for career offender enhancement under USSG, was cognizable in motion to vacate, even though the claim was not a constitutional one.

U.S. v. Moreno, 98 Crim. L. Rep. 309 (3d Cir. 1/5/16):
Holding: Prosecutor cannot cross-examine Defendant during sentencing allocution; allocution is designed to give Defendant chance to raise personal and mitigating circumstances and allow judge to show mercy.

U.S. v. Concha, 101 Crim. L. Rep. 433 (4th Cir. 6/26/17):
Holding: Judge cannot consider that other defendants' "average sentence" for cooperation was higher than what Defendant was being offered; any factor considered must relate to cooperation in analyzing downward departure.

U.S. v. Slappy, 101 Crim. L. Rep. 661 (4th Cir. 9/22/17):
Holding: Maximum sentence of 3 years for violating supervised release by using drugs, stealing shoes and leaving the area was "plainly unreasonable" where judge did not address Defendant's leniency arguments (such as positive employment and rehab efforts) and did not make clear the reasoning for imposing the maximum sentence.

U.S. v. McCollum, 102 Crim. L. Rep. 593 (4th Cir. 3/20/18):
Holding: Federal crime of conspiracy to commit murder in aid of racketeering isn't a crime of violence, because such crime is broader than generic conspiracy.

Fontanez v. O'Brien, 98 Crim. L Rep. 226, 2015 WL 7753142 (4th Cir. 12/2/15):
Holding: Petitioner could challenge via federal habeas the way the Bureau of Prisons took money from his inmate account to pay court-ordered restitution; the payments qualified as a challenge to "execution" of sentence for purposes of 28 USC 2241.

U.S. v. Parral-Dominguez, 97 Crim. L. Rep. 557 (4th Cir. 7/23/15):
Holding: Even though Defendant shot into a building full of people, this was not a "crime of violence" against "a person" under USSG 2L.1.2, the application note for which defines "crime of violence" as having an element of physical force "against the person of another;" the North Carolina discharging-a-firearm statute at issue did not contain an element of force against a person, but only force against property.

U.S. v. Flores-Alvarado, 2015 WL 877390 (4th Cir. 2015):
Holding: District court was required to make particularized findings in response to Defendant's objection at sentencing to inclusion of certain drug seizures in the drug totals.

U.S. v. Shell, 2015 WL 3644036 (4th Cir. 2015):
Holding: North Carolina's second-degree rape offense, which did not require use of physical force, was not "crime of violence" under "residual clause" of career-offender sentencing guideline.

U.S. v. Fuertes, 2015 WL 4910113 (4th Cir. 2015):
Holding: Sex trafficking by force, fraud or coercion was not categorically a "crime of violence," where the statute specified sex trafficking could be committed by nonviolent fraudulent means.

U.S. v. Barcenas-Yanez, 2016 WL 3408889 (4th Cir. 2016):
Holding: Mere fact that Texas assault statute set out alternative means of the mens rea requirement, whether by acting intentionally, knowingly, or recklessly, did not render it divisible and allowing a modified categorical approach in determining if prior conviction was "crime of violence;" under categorical approach, the offense could be committed recklessly and was not a crime of violence.

U.S. v. Martinovich, 2016 WL 80555 (4th Cir. 2016):
Holding: Where sentencing judge erroneously treated the USSG as mandatory, this required resentencing by a different judge.

U.S. v. Hankton, 102 Crim. L. Rep. 230 (5th Cir. 11/16/17):
Holding: The rule for correcting federal sentences within 14 days after sentencing for "clear error" did not authorize court, on Gov't's motion, to set aside sentences which had been reduced to give credit for time served in state prison; the "clear error" rule is "probably the single most confusing and least understood federal sentencing issue;" the initial sentences were not "clear error" where there is no agreed upon standard for "clear error."

U.S. v. Herrold, 102 Crim. L. Rep. 513 (5th Cir. 2/20/18):
Holding: Texas' burglary statute is broader than the "generic" crime of burglary (because it criminalizes entry and subsequent intent to commit a crime, rather than enry with intent to commit a crime), and thus cannot be used for enhancement under federal ACCA.

U.S. v. Williams, 2016 WL 2640563 (5th Cir. 2016):
Holding: Where Gov't breached plea agreement calling for Gov't to recommend sentence at low end of sentencing range, Defendant was entitled to choice of remedy of resentencing before a different judge with Gov't making the low end recommendation, or withdrawal of his guilty plea.

U.S. v. Jimison, 2016 WL 3199735 (5th Cir. 2016):
Holding: District court violated Defendant's confrontation rights by allowing Officer to testify at revocation to hearsay statements of confidential informant; the hearsay was the only evidence that Defendant violated his supervised release.

U.S. v. Heredia-Holguin, 99 Crim. L. Rep. 342, 2016 WL 2957853 (5th Cir. 5/20/16):
Holding: Even though alien-Defendant was deported, this did not moot his appeal of his supervised release terms, because he continued to be subject to the terms of release.

U.S. v. Benns, 2016 WL 80559 (5th Cir. 2016):
Holding: The Dept. of Housing and Urban Development was not a "victim" within the meaning of MVRA entitled to receive restitution from Defendant who was convicted of making a false statement on a mortgage application; even though HUD had to pay the lender $54,000, which was the difference obtained between the price of sale of the

property following foreclosure and the loan, HUD's loss was not a foreseeable result of Defendant's false credit application.

U.S. v. Hornyak, 98 Crim. L. Rep. 139 (5th Cir. 10/30/15):
Holding: Holding of *Johnson v. U.S.* (U.S. 2015), which struck down residual clause in ACCA, applied to cases pending on direct appeal under plain error rule; keeping a defendant in prison for an extra 68 months because of a clause declared unconstitutional during the pendency of his direct appeal would "cast significant doubt on the fairness of the criminal justice system."

U.S. v. Lozano, 97 Crim. L. Rep. 511 (5th Cir. 6/23/15):
Holding: Defendant's health-care fraud restitution amount reduced where the original restitution amount included losses outside the time scope of Defendant's plea agreement; the plea agreement had specified when the fraud began.

U.S. v. Caravayo, 98 Crim. L. Rep. 270 (5th Cir. 12/17/15):
Holding: Supervised release condition which prohibited child pornography Defendant from dating any person with children violated First Amendment.

U.S. v. Haines, 2015 WL 6080523 (5th Cir. 2015):
Holding: Mandatory minimum sentence for two defendants convicted of drug conspiracy should be based on drug quantity attributed to them individually, not to the entire conspiracy.

Brumfield v. Cain, 2015 WL 9213235 (5th Cir. 2015):
Holding: Even though one IQ test indicated Defendant had IQ of 80-89, Defendant was intellectually disabled under *Atkins* because four other IQ tests showed scores below 70.

U.S. v. Jackson, 102 Crim. L. Rep. 258 (6th Cir. 12/5/17):
Holding: Selling guns and drugs in two separate transactions does not qualify as "using or possessing" a firearm "in connection with another felony" for sentence enhancement.

U.S. v. Gillespie, 102 Crim. L. Rep. 158 (6th Cir. 11/9/17):
Holding: Trial court erred in enhancing Defendant's assault sentence as "aggravated" where he simply had a gun, but did not point it directly at the Officer-victim.

U.S. v. King, 101 Crim. L. Rep. 10 (6th Cir. 3/30/17):
Holding: Sentencing court can't rely on bill of particulars to determine that Defendant committed three prior offenses different from each other under ACCA.

U.S. v. Brown, 101 Crim. L. Rep. 159 (6th Cir. 5/15/17):
Holding: Even though Defendant was convicted of extortion for demanding money to not release (fake) tax returns of Mitt Romney, his sentence could not be enhanced for obstruction of justice because he didn't lie and didn't impede the investigation of him.

Hill v. Snyder, 103 Crim. L. Rep. 517 (6th Cir. 8/14/18):
Holding: Where a sentence is struck down as unconstitutional and a new sentence imposed, Defendant must be given the "good time credits" that accrued during first sentence; law taking them away was ex post facto.

Raines v. U.S., 103 Crim. L. Rep. 461 (6th Cir. 7/31/18):
Holding: Defendant, who was sentenced for extortion, was entitled to resentencing after U.S. Supreme Court case which struck down ACCA's residual clause; case also deals with burden of proof Defendant must show to obtain relief.

Harrington v. Ormond, 103 Crim. L. Rep. 484 (6th Cir. 8/13/18):
Holding: Supreme Court's decision in *Burrage* (2014), holding that sentencing enhancement for drugs applies only if the drugs distributed by Defendant were a but-for cause of death, rather than merely a contributing cause, applies retroactively.

U.S. v. Pawlak, 2016 WL 22802723 (6th Cir. 2016):
Holding: Residual clause of career offender USSG is unconstitutionally vague.

U.S. v. Hollis, 99 Crim. L. Rep. 306 (6th Cir. 5/25/16):
Holding: Even though Defendant delayed in deciding to plead guilty and caused the Gov't to have to prepare for trial, just must still consider his "acceptance of responsibility" under USSG.

U.S. v. Cabrera, 2016 WL 279438 (6th Cir. 2016):
Holding: Where the sentencing court increased Defendant's sentence because the court said that Defendant had never put himself on record as supporting his defense, this violated Defendant's 5th Amendment right against self-incrimination and right not to testify.

U.S. v. Henry, 2016 WL 1392480 (6th Cir. 2016):
Holding: USSG enhancement for firearms trafficking did not apply to Defendant who sold a gun to an informant and another gun to an agent; the Guideline requires that a defendant transfer multiple guns to a single individual.

U.S. v. Cover, 2015 WL 5103009 (6th Cir. 2015):
Holding: Even though a child pornography video showed a 13-year old or younger girl engaged in oral sex with an adult male, this did not support a four-level sentencing enhancement for material portraying sadistic conduct or violence, since there was no indication the minor Victim was experienced pain or violence or that she was prepubescent.

In re Watkins, 2015 WL 9241176 (6th Cir. 2015):
Holding: *Johnson v. U.S.*, which held that ACCA's residual clause is unconstitutionally vague, is retroactive.

U.S. v. Carter, 2015 WL 967758 (6th Cir. 2015):
Holding: Defendant's intent to distribute suboxone in an unrelated enterprise was not probative of intent to join a conspiracy to distribute methamphetamine, an entirely different drug.

U.S. v. Amerson, 103 Crim. L. Rep. 10 (6th Cir. 3/27/18):
Holding: A defendant's possession of guns three months apart does not, by itself, show the possessions were part of the same conduct so as to allow sentence enhancement; there must be substantial similarity between the possessions to justify a course-of-conduct finding.

U.S. v. Briggs, 2019 WL 1375506 (7th Cir. 2019):
Holding: Court's finding that Defendant's possession of firearm was in connection with felony of possession of cocaine for enhancement purposes was clearly erroneous, because court assumed that firearms are connected with drug trafficking; this is different than analyzing whether firearms are connected with possessing a small amount of drugs.

D'Antoni v. U.S., 916 F.3d 658 (7th Cir. 2019):
Holding: The list of qualifying crimes in an application note for the residual clause in the USSG general career offender provision does not provide a basis for applying the career-offender enhancement, because the list only interprets the residual clause, which has been found too vague.

U.S. v. Gates, 100 Crim. L. Rep. 302 (7th Cir. 1/4/17):
Holding: Even though Defendant traded a gun to buy drugs, this didn't qualify for enhanced sentence when the gun wasn't used in commission of the drug crime, but to satisfy a debt.

U.S. v. Sandidge, 101 Crim. L. Rep. 480 (7th Cir. 7/17/17):
Holding: Release condition prohibiting any use of alcohol that "adversely affects" Defendant's employment, relationships or ability to comply with release was too vague.

U.S. v. Patterson, 101 Crim. L. Rep. 631 (7th Cir. 9/18/17):
Holding: Even though Defendant's conviction arose out of a fake, sting operation to rob a house of drugs, Judge was still required to specify a hypothetical amount drugs involved in order to sentence.

U.S. v. Canfield, 103 Crim. L. Rep. 330 (7th Cir. 6/25/18):
Holding: Probation condition which required child-pornography-Defendant to "notify any individuals or entities of any risk associated with his history" was unduly vague as to who he was required to notify.

U.S. v. Phelps, 2016 WL 3004551 (7th Cir. 2016):
Holding: Even though Defendant had previously had his sentence reduced for providing substantial assistance, where the Sentencing Commission later lowered the sentencing range, Defendant was eligible for a further reduction due to substantial assistance.

U.S. v. Tate, 2016 WL 2909249 (7th Cir. 2016):
Holding: Illinois conviction for attempted procurement of anhydrous ammonia was not a "controlled substance offense" under USSG career offender provision because the Ill. conviction did not involve actual possession of a controlled substance, anhydrous ammonia was not a listed precursor chemical, and the Ill. statute did not prohibit the manufacture, import, export or distribution of a controlled substance.

U.S. v. Seals, 2016 WL 716021 (7th Cir. 2016):
Holding: A sentencing increase under the USSG for reckless endangerment during flight and an increase under USSG for use of a firearm in connection with another felony both require a showing that such conduct was related to an offense of conviction.

U.S. v. Neal, 98 Crim. L. Rep. 419, 2016 WL 258622 (7th Cir. 1/21/16):
Holding: A challenge to conditions of supervised release may be brought "at any time" under 18 USC 35483(e)(2) even if not raised on direct appeal.

U.S. v. Lawler, 2016 WL 1055857 (7th Cir. 2016):
Holding: USSG providing base offense level of 38 for Defendant convicted of drug trafficking if the offense of conviction establishes that death or serious bodily injury resulted from use of the controlled substance applies only when the elemental facts supporting the offense of conviction show beyond a reasonable doubt that death or serious bodily injury resulted.

McKinley v. Butler, 98 Crim. L. Rep. 306 (7th Cir. 1/4/16):
Holding: 8th Amendment prohibits de facto juvenile LWOP unless judge considers mitigating circumstances; juvenile who received 100 year sentence must be resentenced with consideration of his youth.

U.S. v. Hines-Flagg, 2015 WL 3683219 (7th Cir. 2015):
Holding: Even though Defendant temporarily traveled to other states to buy goods from stores using fake documents, this was not a "relocation" of her fraudulent scheme to support enhancement under the USSG for "relocating" a fraud scheme to evade law enforcement.

U.S. v. Warner, 97 Crim. L. Rep. 507 (7th Cir. 7/10/15):
Holding: Even though Defendant evaded $5M in taxes, probation sentence was reasonable where Defendant had unsuccessfully attempted to disclose the account at issue to the IRS, paid back taxes and a civil penalty of $53M, and had given $140M to charity.

U.S. v. Glover, 103 Crim. L. Rep. 331 (8th Cir. 6/21/18):
Holding: Even though trial court suspected that Defendant's fiancé was involved in his crime, trial court could not impose a sentence condition that Defendant not have contact with fiancé absent explanation why this condition was added or how it advances sentencing goals.

U.S. v. Washington, 103 Crim. L. Rep. 357 (8th Cir. 6/27/18):
Holding: Release condition that prohibited Defendant from having "gang associations" was unconstitutionally vague, because there is no legal definition of "gang" and Defendant could be revoked for merely incidental contacts with someone.

U.S. v. Bertucci, 97 Crim. L. Rep. 558 (8th Cir. 7/23/15):
Holding: (1) Even though Defendant convicted of unlawfully killing a bald eagle had had prior assault charges (that were dismissed), district court could not order anger management counseling as part of the sentence, because such counseling was not reasonably related to the crime of killing the eagle, nor did it address concerns regarding deterrence, public safety or Defendant's correctional needs; (2) the district court used a wrong valuation process to calculate the "market value" of the eagle when it quintupled the Fish and Wildlife Service's valuation of the bird without explanation, and then used that to enhance Defendant's sentence under USSG; and (3) the district court had authority to order a fine but generally did not have authority to order restitution.

U.S. v. Campos, 98 Crim. L. Rep. 592 (8th Cir. 3/22/16):
Holding: Court cannot impose supervised release condition in felon-in-possession case that Defendant not get any more tattoos; this bears no connection to the sentencing factors in 18 USC 3553(a).

U.S. v. Laws, 2016 WL 1013084 (8th Cir. 2016):
Holding: Even though Defendant-Mother lived with her adult-children-codefendants and they used her internet account to commit tax fraud, this was not enough by itself to subject Mother to a four-level increase for being the "organizer or leader of a criminal activity;" although these facts give rise to a suspicion that Mother was the leader, they did not prove that she was the main organizer or directed others to do the crime.

U.S. v. Taylor, 803 F.3d 931 (8th Cir. 2015):
Holding: USSG 4B1.2(a)(2), which defense "crime of violence" as conduct that potentially creates a risk of physical injury to another may be unconstitutionally vague after *Johnson*.

U.S. v. Taylor, 2015 WL 5918562 (8th Cir. 2015):
Holding: Challenge to "crime of violence" language in career offender USSG is remanded to determine if language violates due process vagueness in light of Supreme Court's *Johnson* decision striking down the "violent felony" language of ACCA as vague.

U.S. v. Harris, 97 Crim. L. Rep. 559 (8th Cir. 7/21/15):
Holding: Judge exceeded his authority when he imposed special supervision condition that required Defendant convicted as armed career criminal to obtain a probation officer's approval for having sex with women without using birth control; even though the court was concerned about Defendant having children he would not care for and burdening women with this, such concern was not related to the statutory sentencing factors under 18 USC 924(e) for violent, recidivist offenders.

U.S. v. Brown, 2015 WL 4286847 (8th Cir. 2015):
Holding: Plea agreement for cocaine base, which called for the greater of 100 months or the court-determined Guidelines minimum, used the Guidelines sentencing range; thus, Defendant was eligible for relief under statute permitting defendants sentenced based on a sentencing range that has been modified to move for a reduced sentence.

U.S. v. Vederoff, 2019 WL 406734 (9th Cir. 2019):
Holding: Washington conviction for second degree murder was not "crime of violence" because it allowed felony murder based on any felony; generic federal felony murder was limited dangerous felonies.

U.S. v. Kovall, 101 Crim. L. Rep. 245 (9th Cir. 5/30/17):
Holding: A crime victim cannot appeal a restitution order from Defendant's sentencing.

U.S. v. Geozos, 101 Crim. L. Rep. 599 (9th Cir. 8/29/17):
Holding: Florida robbery conviction was not a "violent felony" since it allows a person to be charged with robbery for carrying a gun or weapon, even if it is not used.

U.S. v. Campbell, 102 Crim. L. Rep. 534 (9th Cir. 2/28/18):
Holding: After a term of supervised release has expired, it can only be revoked if the violation was alleged before the term expired or was based on a related act raised in a court order issued before expiration.

U.S. v. Evans, 102 Crim. L. Rep. 532 (9th Cir. 2/28/18):
Holding: Supervised release conditions which required Defendant to "work regularly" at a job; "meet family responsibilities"; and notify third parties of risks stemming from his criminal record or personal history were unduly vague; e.g., there was no definition of what "regularly" means.

U.S. v. Benally, 99 Crim. L. Rep. 585 (9th Cir. 8/1/16):
Holding: The sentencing enhancement for using a firearm in a crime of violence, 18 USC 924(c)(3)(B) is inapplicable to the predicate crime of involuntary manslaughter, because a "crime of violence" requires a mental state higher than recklessness.

U.S. v. Hernandez-Lara, 2016 WL 1239199 (9th Cir. 2016):
Holding: The Immigration and Nationality Act's definition of "aggravated felony," as incorporated into USSG for illegal reentry, is unconstitutionally vague.''

U.S. v. Pete, 99 Crim. L. Rep. 70 (9th Cir. 4/11/16):
Holding: Juvenile who won resentencing under *Miller* was entitled to an expert to show that he had matured and been rehabilitated in prison.

U.S. v. LaCoste, 99 Crim. L. Rep. 181 (9th Cir. 5/12/16):
Holding: (1) Judge lacked authority to impose supervised release condition that securities-fraud-Defendant have no internet access without prior approval of probation officer was unreasonable; such conditions should only be imposed where use of the internet was integral to the charged offense; Defendant's internet use in the offense was tangential, and no more integral to his fraud than using the telephone or postal service; cutting off internet access makes it difficult for defendants to participate in "society and the economy;" (2) Judge lacked authority to impose supervise release condition that Defendant not live in certain counties to avoid his "old behaviors."

U.S. v. Parnell, 2016 WL 1633167 and 2016 WL 1425781 (9th Cir. 2016):
Holding: Under categorical approach, Mass. Offense of armed robbery does not have an element of use, attempted use, or threatened use of physical forces, so is not a "violent felony" under ACCA.

Pensinger v. Chappell, 2015 WL 3461989 (9th Cir. 2015):
Holding: Felony-murder aggravator for death penalty requires a narrowing construction of proof that the felony was committed for an independent felonious purpose and not merely incidentally to the murder.

U.S. v. Garcia-Jimenez, 2015 WL 7292604 (9th Cir. 2015):
Holding: N.J. aggravated assault conviction was not crime of violence under categorical approach for purposes of USSG sentencing enhancement for unlawful reentry because N.J. statute required mens rea of extreme indifference recklessness but the federal generic definition of aggravated assault did not incorporate that mental state.

U.S. v. Aquino, 97 Crim. L. Rep. 562 (9th Cir. 7/20/15):
Holding: Even though Defendant-Probationer admitted smoking "spice," Gov't failed to prove the "spice" was a controlled substance that violated probation conditions where a drug test came back negative for synthetic marijuana; further, since the Gov't couldn't prove the substance was illegal, Defendant could not have probation revoked for lying to a probation officer when she denied using "illicit drugs."

U.S. v. Galan, 98 Crim. L. Rep. 140 (9th Cir. 11/4/15):
Holding: Restitution based on Defendant's online distribution of child pornography is limited to damages relating to the distribution, not to the Victim's "on-going losses" stemming from the actions of the original abuser.

U.S. v. Haymond, 101 Crim. L. Rep. 597 (10th Cir. 8/13/17):
Holding: 18 USC 3583(k), which provides for harsher penalties for violation of supervised release for certain child pornography defendants, is unconstitutional because it increases the applicable mandatory minimum penalty on the basis of facts found by a lesser standard than a jury trial, and violates the 5th and 6th Amendment by punishing the release violation as if it were an additional crime.

Budder v. Addison, 100 Crim. L. Rep. 603 (10th Cir. 3/21/17):
Holding: Even though a state appellate court changed Juvenile's sentence from life without parole to life with parole plus 20 years, this did not comply with *Miller* where it was still effective life without parole since the state had an 85% service requirement.

U.S. v. Jordan, 101 Crim. L. Rep. 66 (10th Cir. 4/18/17):
Holding: Even though Defendant's plea agreement did not explicitly state that it was "based on" the Guidelines, Defendant was entitled to sentence reduction when Guidelines later changed.

U.S. v. Ferrrell, 102 Crim. L. Rep. 532 (10th Cir. 3/2/18):
Holding: Defendant's gun possession sentence should not have been enhanced merely because he was arrested in a garage that contained drugs, where Defendant did not own the garage and there was no evidence connecting Defendant to the drugs.

U.S. v. Salas, 103 Crim. L. Rep. 145 (10th Cir. 5/4/18):
Holding: 18 U.S.C. 924(C)(3)(B)'s definition of "crime of violence" is unconstitutionally vague.

U.S. v. Melgar-Cabrera, 103 Crim. L. Rep. 283 (10th Cir. 6/8/18):
Holding: Aggravated murder with a firearm, 18 U.S.C. 924(j), is a separate crime, not merely a sentencing provision.

U.S. v. Melgar-Cabrera, 103 Crim. L. Rep. 283 (10th Cir. 6/8/18):
Holding: Aggravated murder with a firearm, 18 U.S.C. 924(j), is a separate crime, not merely a sentencing provision.

U.S. v. Rodebaugh, 2015 WL 5011174 (10th Cir. 2015):
Holding: Remand was required for court to make specific findings to support supervised release condition that Defendant was banned from guiding or outfitting anywhere in the U.S. for a Lacey Act (conservation law) violation.

U.S. v. Madrid, 2015 WL 6657060 (10th Cir. 2015):
Holding: Applying "crime of violence" sentencing enhancement under residual clause of career offender USSG was plain error because it is unconstitutionally vague.

U.S. v. Martinez, 2015 WL 9009626 (10th Cir. 2015):
Holding: Where trial court set restitution at 25% of Defendant's net monthly income until a total amount was reached, this did not create an immediately enforceable debt for the total amount; thus, Gov't could not garnish Defendant's retirement account to obtain full amount.

In re Encinias, 2016 WL 1719323 (10th Cir. 2016):
Holding: Petitioner can file second habeas petition to allege that residual clause of USSG regarding "crimes of violence" is unconstitutionally vague after *Johnson*.

U.S. v. Von Behren, 99 Crim. L. Rep. 182 (10th Cir. 5/10/16):
Holding: Supervised release condition, which required sex-Defendant to submit to a sexual history polygraph about prior sex crimes he had committed but which were never discovered, violated 5th Amendment privilege against self-incrimination.

U.S. v. Gibbs, 2018 WL 5096319 (11th Cir. 2018):
Holding: Mere proximity between gun and two pills did not support enhancement for use or possession of firearm in connection with another felony.

U.S. v. Doyle, 101 Crim. L. Rep. 208 (11th Cir. 5/27/17):
Holding: Defendant should have been allowed to speak at this sentencing.

Griffith v. U.S., 102 Crim. L. Rep. 10 (11th Cir. 9/26/17):
Holding: Unuseable waste from making meth can't be included in the weight of the product to determine Defendant's sentence for illegal manufacturing.

U.S. v. Clarke, 2016 WL 2754018 (11th Cir. 2016):
Holding: Defendant did not have a prior "conviction" for felon-in-possession statute, where the alleged prior conviction was a felony guilty plea for which adjudication was "withheld" under Fla. law, and Fla. law did not consider the prior adjudication to be a felony conviction.

U.S. v. Martin, 2015 WL 5711980 (11th Cir. 2015):
Holding: Amount of restitution owed to successor lenders is the amount the lenders paid to acquire the mortgages less the principal payments received and the amount recouped in short sales.

U.S. v. Marsh, 99 Crim. L. Rep. 568 (D.C. Cir. 7/19/16):
Holding: Federal law that extends judge's authority over supervised release when a person "is imprisoned in connection with a conviction" doesn't apply to pretrial detention on unrelated charges.

U.S. v. Williams, 2019 WL 126120 (D.D.C. 2019):
Holding: Courts have authority to reduce the amount of restitution based on Defendant's current and future economic circumstances under the Victim and Witness Protection Act.

U.S. v. Galaviz, 2015 WL 54422371 (D.D.C. 2015):
Holding: Negotiated plea of 30 months shorter than applicable USSG range was "based on a sentencing range" so that Defendant was eligible for sentence reduction under 18 USC 3582(c)(2).

Gilman v. Brown, 2014 WL 9953246 (E.D. Cal. 2014):
Holding: A ballot initiative which granted Governor power to reverse Parole Board decisions was ex post facto as applied to inmates convicted before passage of the initiative; although the State claimed the initiative merely transferred power from the

Parole Board to the Governor, the Governor in practice had reversed 70% of grants of parole, and the ballot summary stated its purpose was to allow Governor to block parole.

U.S. v. Harris, 2019 WL 415243 (D. Colo. 2019):
Holding: District judge did not have authority under Rule 35(a) to resentence Defendant more than 14 days after sentencing hearing, despite later misgivings about the substantive reasonableness of the sentence.

U.S. v. Hill, 2016 WL 29372023 (N.D. Ill. 2016):
Holding: Statute and USSG which allow a concurrent sentence with an undischarged term of imprisonment on related charges, but not with a discharged term of imprisonment on related charges is an arbitrary distinction that violates due process; court can take account of time Defendant served in state prison, and adjust his federal sentence below the statutory minimum, even though his state sentence had been served.

U.S. v. Roybal, 2016 WL 3129624 (D.N.M. 2016):
Holding: Even though Defendant had two guns in his home, the two-level USSG enhancement for possession of a dangerous weapon in connection with drug trafficking offense did not apply because Defendant presented evidence that the guns were shotguns with scopes, and these would be used for hunting, not drug trafficking.

U.S. v. Matusiewicz, 2015 WL 9205641 (D. Del. 2015):
Holding: For enhanced penalty following conviction for surveillance and harassment under federal interstate stalking and cyberstalking statute, Gov't must prove Victim's death was the result of Defendant's conduct in a real and meaningful way.

Mack v. U.S., 2015 WL 5092027 (D. Md. 2015):
Holding: Even though Defendant's crimes preceded the enactment of the Fair Sentencing Act, she was entitled to sentencing under the Act where she was sentenced after the Act's effective date.

U.S. v. Harris, 2015 WL 5330964 (N.D. Miss. 2015):
Holding: Upward enhancement for sentence based on race of victim was duplicative where race of victim was an element of the crime.

U.S. v. Johnson, 2015 WL 8330542 (D.N.M. 2015):
Holding: USSG Sec. 5K2.1, which allows a court to increase a sentence above Guidelines "if death resulted," requires that the death be reasonably foreseeable; Victim's death was not a foreseeable consequence of Defendant's actions where Defendant stealthily pickpocketed a wallet from an elderly Victim, and Victim, after discovering the theft, chased Defendant, had a heart attack and died.

U.S. v. Ulibarri, 2015 WL 4461294 (D.N.M. 2014):
Holding: Even though Defendant told an undercover officer about his plans to murder a witness, where Defendant did not expect or intend for the officer to communicate the threat to the witness, Defendant was not subject to the obstruction of justice enhancement

of 2J1.2(b)(1)(B); further, Defendant's guilty plea to obstruction of justice under 18 USC 1512(c)(2) did not automatically establish an intent to obstruct justice since the statute has no intent element.

U.S. v. Aguilar, 2015 WL 4774507 (E.D. N.Y. 2015):
Holding: General and specific deterrence for alien Defendant's document forgery was achieved by sentence of time served.

U.S. v. Mays, 2016 WL 3041862 (E.D. Pa. 2016):
Holding: Even though (1) Defendant unloaded packages he believed contained cocaine, and (2) was paid $24,000 to unload the packages, the drug quantity for sentencing purposes was zero in attempted possession case, because there was no agreed-upon quantity between Defendant and the informant, and there was no evidence that the amount he was paid had any relationship to the amount of drugs.

U.S. v. Lopez-Correa, 2016 WL 828567 (D.P.R. 2016):
Holding: Defendant was entitled to early termination of 30-year supervised release term for aiding in production of child pornography, where Defendant had been subjected to physical and sexual abuse by her co-defendant, who exercised near total control over her, and likelihood of recidivism was low.

Lucas v. U.S., 2016 WL 552471 (D.S.D. 2016):
Holding: Even though Defendant had previously been convicted in Colorado of vehicle theft and theft from a person, these were not "violent felonies" under ACCA in light of U.S. Supreme Court's ruling that residual clause of ACCA is unconstitutionally vague.

Dumas v. Clarke, 2018 WL 6379074 (E.D. Va. 2018):
Holding: Even though state's courts would view Juvenile-Defendant's life plus multiple consecutive terms of years independently, where habeas court granted relief under *Miller* on the life sentence, it was appropriate to resentence on all counts.

U.S. v. Blankenship, 2016 WL 1337247 (S.D. W.Va. 2016):
Holding: Even though a successor corporation took over a prior company whose chief executive had engaged in illegal mining activity that cost the successor corporation money, the successor corporation was not entitled to restitution from the former executive because, when the successor corporation bought the company, it knew of the illegal activity and the purchase price reflected that the company would face criminal and civil penalties.

Estopellan v. Mroz, 98 Crim. L. Rep. 284 (Ariz. 12/31/15):
Holding: Capital Defendant must be allowed in penalty phase to present as mitigation that he took responsibility for his actions by offering to plead guilty in return for a life sentence.

People v. Le, 2015 WL 3650083 (Cal. 2015):
Holding: Where there were two applicable sentencing enhancements for use of a gun and also for commission of a serious felony for the benefit of a gang, and the gang enhancement was based on use of the gun, Defendant was subject to only a single enhancement, not both.

Graham v. Exec. Dir. Of Colo. Dept. of Corr., 455 P.3d 776 (Colo. 2020):
Holding: Maximum period of confinement for parole violation was 90 days, not remainder of parole period, under statute governing parole board's authority to revoke parole.

People v. Roberson, 2016 WL 2860520 (Colo. 2016):
Holding: Polygraph question to sex-crime probationer whether he had viewed child pornography while on probation violated 5th Amendment privilege against self-incrimination.

Corbin v. U.S., 2015 WL 4477811 (D.C. 2015):
Holding: Offense of attempted unarmed carjacking was punishable under the general attempt statute, rather than the carjacking statute, pursuant to rule of lenity, since it was not clear which punishment statute applied.

State v. Barnes, 2015 WL 3473382 (Del. 2015):
Holding: Even though Truth in Sentencing statute purported to eliminate parole for "all crimes," the statute did not eliminate parole for DWI offenses where none of the key legislative, executive or judicial backers of the statute had intended that result.

Atwell v. State, 2016 WL 3010795 (Fla. 2016):
Holding: Juvenile's sentence for murder resembled a life without parole sentence in that it resulted in prospective release dates decades beyond a natural lifespan, and failed to account for individualized sentencing required under 8th Amendment.

Landrum v. State, 2016 WL 3191099 (Fla. 2016):
Holding: Non-mandatory life without parole imposed on Juvenile for second-degree murder violated 8th Amendment because court did not provide for individualized sentencing and consideration of youth required by *Miller*.

Williams v. State, 2016 825242 (Fla. 2016):
Holding: Where a statute contained qualifying and non-qualifying felonies and required only that qualifying felonies run consecutively to a non-qualifying felony, the qualifying felonies were not required to run consecutively to each other.

Noel v. State, 2016 WL 1592703 (Fla. 2016):
Holding: Judge's use of an "incentive" whereby if a Defendant paid restitution within 60 days, his sentence would be reduced from 10 to 8 years violated due process, because if Defendant failed to pay, he would receive a harsher sentence due to lack of financial resources.

McFadden v. State, 2015 WL 6514301 (Fla. 2015):
Holding: An order denying a reduction or suspension of sentence for providing substantial assistance is an appealable final order.

Oats v. State, 2015 WL 9169766 (Fla. 2015):
Holding: Even though Defendant had not been diagnoses with intellectual disability before age 18, this did not preclude a finding of intellectual disability under *Atkins*.

State v. Auld, 2015 WL 7459130 (Haw. 2015):
Holding: Defendant was entitled to have a jury find all the necessary facts to support a sentencing enhancement based on prior convictions; jury was required to find that Defendant had a prior, that it was a specifically enumerated prior, that it occurred within a certain time frame, and that Defendant was represented by counsel or waived counsel.

People v. Holman, 101 Crim. L. Rep. 657 (Ill. 9/21/17):
Holding: Trial court must consider Juvenile's youth even when imposing discretionary life sentence.

People v. Williams, 2016 WL 280627 (Ill. 2016):
Holding: Drug statute, which provided that any person convicted of a second offense be subject to a prison term twice the term "otherwise authorized," referred to the term provided by the drug statute only, and did not allow doubling of other statutes' prior offender penalties.

State v. Covel, 2019 WL 1302388 (Iowa 2019):
Holding: Trial court erred in finding that Defendant was reasonably able to pay restitution when court didn't know full amount of restitution or other costs.

State v. Sweet, 2016 WL 3023726 (Iowa 2016):
Holding: Iowa Const. categorically prohibits LWOP for juveniles; courts should not be required to make speculative up-front decisions about whether Juvenile can be rehabilitated when the lack adequate predictive information supporting such a conclusion; Parole Bd. is in best position to determine rehabilitation and irreparable corruption after passage of time.

State v. Hill, 2016 WL 1612950 (Iowa 2016):
Holding: Sentencing courts must give detailed reasons specific to the individual defendant for sentences they impose, including reasons for imposing consecutive sentences.

State v. Seats, 2015 WL 3930169 (Iowa 2015):
Holding: Where judge has discretion to sentence juvenile to LWOP, judge must consider mitigating circumstances before doing so.

Weida v. State, 103 Crim. L. Rep. 57 (Ind. 4/12/18):
Holding: Even though a probation condition for child sex Defendant could include prohibiting him from accessing websites that would allow contact with children, a condition that required permission from a judge or probation officer to use the internet at all unduly burdened his First Amendment rights; a broad internet band would violate First Amendment.

State v. Jamerson, 2019 WL 324767 (Kan. 2019):
Holding: Where appellate court vacated one (but not all) sentences on appeal, trial court on remand did not have authority to resentence Defendant on all the sentences – only the vacated one.

State v. Logsdon, 2016 WL 1265785 (Kan. 2016):
Holding: Sentencing scheme for imposing life without parole for 50 years violated 6th Amendment right to jury trial, where scheme allowed Judge to find certain facts by preponderance of evidence, rather than jury find them beyond a reasonable doubt.

State v. Hankins, 2016 WL 1612856 (Kan. 2016):
Holding: An Oklahoma deferred judgment entered after a guilty plea could not be used in calculating criminal history score; the Kan. statutory definition of "conviction" included a guilty plea, but Oklahoma law specifically provided that a judgment of guilt not be entered for defendants who successfully completed the deferred judgment program.

State v. Dickey, 2015 WL 2445810 (Kan. 2015):
Holding: Defendant's challenge to trial court's classification of his prior juvenile adjudication for burglary as a person felony for criminal history and sentencing enhancement purposes could be raised for first time on appeal, under statute allowing court to correct illegal sentences at any time.

Brewer v. Com., 2015 WL 5667020 (Ky. 2015):
Holding: A "trifurcated" trial with three phases (including two penalty phases) was necessary to deal with factual issues jury must make regarding guilt and sentencing enhancements.

State v. Coleman, 2016 WL 765557 (La. 2016):
Holding: Where State gave numerous assurances that its penalty phase evidence would be the same as at a prior trial, State failed to provide notice that its expert had changed his opinion as to who had shot victim.

State v. Mosby, 98 Crim. L. Rep. 202 (La. 11/20/15):
Holding: Imposition of a mandatory 30-year minimum sentence on a 73-year-old Defendant in drug sale case would be cruel and unusual punishment.

Buckman v. Com. of Corr., 2020 WL 428656 (Mass. 2020):
Holding: Medical parole statute did not require prisoners to file a doctor's diagnosis with their release petitions, so administrative regulation requiring this was void as contrary to statute.

Scione v. Com., 114 N.E.3d 74 (Mass. 2019):
Holding: The residual clause of pretrial detention statute which defined "crime of violence" as any felony that by its nature involves a substantial risk of physical force was unconstitutionally vague.

Com v. Feliz, 119 N.E.3d 700 (Mass. 2019):
Holding: Statute mandating GPS monitoring as probation condition for Defendant convicted of child pornography offense was unreasonable search under State constitution where Defendant had no history of violating probation or geographic proximity to child pornography victim.

Deal v. Comm'r of Corr., 102 Crim. L. Rep. 182 (Mass. 11/9/17):
Holding: Juveniles serving life sentences for murder are entitled to detailed written explanation why they are ineligible for minimum security imprisonment.

Com. v. Beal, 2015 WL 10895015 (Mass. 2016):
Holding: State residual clause that enhanced punishment for those previously convicted of a "violent crime that posed serious risk of physical injury" was unconstitutionally vague because statute did not provide guidance in determining how to estimate the risk posed by the crime or how much risk it took for a crime to qualify.

Goe v. Com. of Probation, 46 N.E.3d 997 (Mass. 2016):
Holding: Where Probationer had his probation transferred to Mass. from another State under Interstate Compact for Adult Offender Supervision, Probationer can file declaratory judgment in Mass. to challenge a special condition of probation added by Mass.

Com. v. Didas, 26 N.E.3d 732 (Mass. 2015):
Holding: Statute changing mandatory minimum sentences to the benefit of Defendant applied retroactively and applies to Defendant whose case was pending when new law became effective.

State v. Knight, 99 Crim. L. Rep. 608 (Me. 8/4/16):
Holding: Police are not "victims" of Defendant's burglary and, thus, are not entitled to restitution for damages caused to a private road while investigating the burglary.

People v. Lockridge, 2015 WL 4562293 (Mich. 2015):
Holding: Sentencing guidelines which increased the mandatory minimum sentence violated 6th Amendment right to jury trial to the extent that they required judge to make factual findings not admitted by Defendant or found by a jury.

State v. Jones, 2015 WL 5081133 (Minn. 2015):
Holding: Violation of probation is not, standing alone, subject to criminal contempt because of term of probation is not a court mandate.

State v. Duncan, 2016 WL 2638047 (Neb. 2016):
Holding: Where statute imposed enhanced penalties if Defendant assaulted someone "because of" their sexual orientation, this required the State to prove that Defendant would not have assaulted victim but for their sexual orientation.

State v. Boston, 98 Crim. L. Rep. 308 (Nev. 12/31/15):
Holding: 8th Amendment prohibits "functional equivalent" of LWOP for juveniles for non-homicide offenses.

State v. Folley, 2020 WL 122727 (N.H. 2020):
Holding: Even though assisted living Facility voluntarily reduced the amount it was charging for caring for Defendant's sister after Defendant stole sister's money, Facility's financial loss was not a "direct result" of Defendant's crime, so court could not order restitution to Facility; Facility's loss was, at most, a collateral consequence of Defendant's conduct.

State v. MacFarlane, 99 Crim. L. Rep. 49 (N.J. 4/7/16):
Holding: Even though 13 months after sentencing, Judge said in a different case that he "always gives 60 years" for murder, Defendant, who had previously received 60 years, was entitled to resentencing on grounds that the judge "arbitrarily imposed a predetermined sentence;" this was true even though Judge in Defendant's case had specifically cited aggravating and mitigating factors in sentencing Defendant.

State v. Hand, 99 Crim. L. Rep. 655 (Ohio 8/25/16):
Holding: Because Ohio does not have a constitutional right to jury trial in juvenile adjudications, it violates due process to allow a juvenile adjudication to later be used to enhance an adult sentence.

State v. Bevly, 2015 WL 571503 (Ohio 2015):
Holding: Statute which imposed a mandatory minimum for child sex crimes which were "corroborated" by other evidence but did not impose mandatory minimum for "uncorroborated" crimes violated due process; the existence of corroborating evidence was irrelevant to the purpose of felony sentencing.

State v. Andrews, 2020 WL 241010 (Or. 2020):
Holding: Where it could not be determined from the record or from Defendant's harassment conviction whether jury had necessarily found that Defendant was the actor who had punched out Victim's tooth bridge, court lacked authority to order Defendant to pay restitution for this.

State v. Ramos, 2016 WL 746422 (Or. 2016):
Holding: Statutory provision for economic damages as restitution requires that economic damages have been reasonably foreseeable from Defendant's conduct.

Com. v. Sandusky, 2019 WL 440996 (Pa. 2019):
Holding: Defendant was entitled to re-sentencing where the statute imposing mandatory minimums for certain sex offenses was declared unconstitutional before his direct appeal was final.

Com v. Batts, 101 Crim. L. Rep. 429 (Pa. 6/26/17):
Holding: Where court found that Juvenile could be rehabilitated but still sentenced him to life without parole, this violated *Miller*.

Com. v. Wolfe, 2016 WL 3388530 (Pa. 2016):
Holding: Statute which provided mandatory minimum 10-year sentence where the sentencing court found certain facts violated 6th Amendment right to have a jury determine all facts necessary to increase the penalty for a crime, even though statute stated that the facts to be found were not elements of the crime.

Com. v. Hopkins, 2015 WL 3949099 (Pa. 2015):
Holding: Sentencing statute which increased mandatory minimum sentence for selling drugs within 1000 feet of a school violated Defendant's 6th Amendment right to fact-finding by a jury because it required judge to make certain fact determinations.

Com. v. Rose, 2015 WL 7283338 (Pa. 2015):
Holding: Where there was a 14-year delay between assault on Victim and Victim's death, Defendant charged with murder must be sentenced under law in effect at time of the assault; to apply later sentencing laws would be ex post facto.

State v. Houston, 2015 WL 773718 (Utah 2015):
Holding: Even though Juvenile did not preserve his claim that he could not be sentenced to LWOP, the claim was reviewable on appeal under rule allowing court to correct an illegal sentence; this was a legal issue only, that did not require the appellate court to delve into the record or make findings of fact.

Hamilton v. State, 2015 WL 1005033 (Wyo. 2015):
Holding: A Rule which authorized a court to reduce, modify or correct a judgment did not authorize a court to increase a previously-imposed sentence, even though Defendant later violated a plea agreement requiring cooperation with the Government.

State v. Shingleton, 2016 WL 1192921 (W.Va. 2016):
Holding: When a statutory amendment lowering punishment becomes effective before sentencing, defendants can seek application of the lower punishment.

Lindsay R. v. Cohen, 2015 WL 161147 (Ariz. App. 2015):
Holding: Even though Victim's Rights provision gives victims the right to have counsel present, victim's counsel invaded the province of the State by filing memos of law and notice of intent to introduce records regarding restitution.

People v. Bryant, 101 Crim. L. Rep. 29 (Cal. Ct. App. 4/3/17):
Holding: Mandatory probation condition that required Defendants to consent to search of all electronic devices was unconstitutionally overbroad.

People v. Anna C., 99 Crim. L. Rep. 627 (Cal. App. 8/10/16):
Holding: (1) Probation condition barring possession of any electronic device that "automatically" deletes data was too broad, since every device has some sort of delete function; (2) probation condition banning possession of "drug paraphernalia" must make clear that Defendant can possess common items with legitimate purposes if he is unaware someone else might use the item for drugs.

People v. Nice, 2016 WL 3024406 (Cal. App. 2016):
Holding: Probation condition barring Defendant from going anywhere illegal drugs were used or sold was overbroad, and impinged on lawful travel and movement more than necessary to enforce the purpose of the probation condition.

People v. Garcia, 2016 WL 881114 (Cal. App. 2016):
Holding: A Defendant who received an SIS and probation is eligible for resentencing under voter-approved reform law, just as defendants who received an SES and probation; to deny relief to those who received an SIS would create an incongruity the voters would not have anticipated or approved.

People v. Sanchez, 99 Crim. L. Rep. 11 (Cal. App. 3/28/16):
Holding: Where Defendant's case is remanded for resentencing, Defendant has right to be present at the resentencing.

People v. Lozano, 2016 WL 164133 (Cal. App. 2016):
Holding: In resentencing a Juvenile under *Miller*, trial court must consider Defendant's post-offense rehabilitative conduct in prison.

People v. Superior Court of Riverside County, 196 Cal. Rptr.3d 921 (Cal. App. 2016):
Holding: A statute which provided that excess credits from actual confinement can be used to reduce a parole period but not a community supervision period violated equal protection rights of defendants on community supervision.

People v. Gonzalex, 2016 WL 542842 (Cal. App. 2016):
Holding: Where a new sentencing reform law allowed Defendant to receive a favorable resentencing to a misdemeanor, Defendant was entitled to relief even though his plea agreement expressly called for a felony sentence; further, the State could not vacate the conviction and reinstate more serious charges, because nothing in the sentencing reform

law allowed a trial court to vacate a conviction or allow Prosecutor to withdraw from a plea agreement.

People v. Ricardo P., 98 Crim. L. Rep. 120 (Cal. App. 10/22/15):
Holding: Where Defendant was convicted of burglary, a probation condition that required him to submit to warrantless searches of all electronic devices and surrender all passwords was impermissibly overbroad because it impinged on rights to privacy and speech, and was not likely to reveal whether Defendant was complying with other probation conditions or not.

Santos v. Brown, 2015 WL 4035246 (Cal. App. 2015):
Holding: Victim's Bill of Rights Act (requiring advance notice to victims and victim input) did not apply to Governor's executive decisions on clemency.

People v. Gaines, 195 Cal. Rptr.3d 842 (Cal. App. 2015):
Holding: Probation condition prohibiting Defendant from having "dangerous drugs" was vague; term should be "controlled substances" and should include provision that Defendant can use prescription drugs with a prescription.

People v. Denard, 2015 WL 7774288 (Cal. App. 2015):
Holding: Trial court could not rely on the facts stated in probable cause affidavit from Florida to find a prior conviction for "strike" purposes, because the affidavit contained multiple hearsay, Defendant was not ultimately convicted of that offense, and reliance of the affidavit constituted judicial fact-finding in violation of 6th Amendment right to jury trial.

People v. Rebulloza, 2015 WL 848555 (Cal. App. 2015):
Holding: Defendant's Fifth Amendment rights were violated by a probation condition that required Defendant to participate in a sex offender program that required him to waive his privilege against self-incrimination.

People v. Chung, 2015 WL 3507254 (Cal. App. 2015):
Holding: Where Defendants sold three different drugs to a single buyer in a single transaction, consecutive sentences for each drug were barred by statutory ban on consecutive sentences for a single act, absent evidence of multiple different objectives in the sale.

People v. Lopes, 2015 WL 4397765 (Cal. App. 2015):
Holding: Even though Defendant had prior "felony" DWI as a juvenile and was committed to DWI Youth Program, this was not a "prior violation punished as a felony" that would enhance a later adult DWI charge; the juvenile violation and sentence to the Youth Program was not a true prior felony conviction, even though it was labeled as such.

People v. House, 2015 WL 9428803 (Ill. App. 2015):
Holding: Imposition of mandatory natural life sentence on 19-year-old Defendant for murder as an accomplice violated 8th Amendment, where Defendant was not present at scene of murder, did not help plans the crimes, but only acted as a lookout and took orders from higher gang members.

People v. Smith, 2016 WL 486201 (Ill. App. 2016):
Holding: Where a provision of Illinois' unlawful use of weapon statute had been ruled unconstitutional as violating Second Amendment, a trial court could not use a Defendant's prior conviction under that unconstitutional provision to later enhance a sentence.

People v. Pace, 2015 WL 5316768 (Ill. App. 2015):
Holding: Where trial judge said at sentencing that he would consider defendant's "allocution, which he did not avail himself of," this showed that Defendant was being improperly punished for exercising his right to silence and privilege against self-incrimination at allocution, and warranted resentencing.

Helms v. Com., 2015 WL 3429126 (Ky. App. 2015):
Holding: The zero-tolerance provision of a pretrial diversion agreement, which stated that any violation would result in the agreement being set aside, did not relieve the court of the duty to consider the statutory requirements for revocation from supervision, such as danger to the community and rehabilitation; commitment to a predetermined outcome for violation of the diversion agreement without consideration of the statute would be an abuse of discretion.

State v. Aguiliar-Benitez, 2018 WL 6444396 (La. App. 2018):
Holding: Defendant's maximum 99-year sentence for child sex offense was disproportionate under 8th Amendment, where Defendant had no prior criminal record, the abuse was not part of a prolonged pattern, and similar crimes received 35 and 50 year sentences.

State v. Woods, 2018 WL 6627304 (La. App. 2018):
Holding: Defendant's 100 year sentence for distribution of heroin was excessive, where it was greater than life sentences imposed for the most violent crimes.

State v. Ladd, 2016 WL 1449391 (La. App. 2016):
Holding: Defendant who was in his 20s and had tiny amount of marijuana was entitled to hearing on whether he qualifies for sentence below statutory minimum; his sentence of 17 years "shocked the conscience;" appellate court notes that Louisiana "has some of the harshest sentencing statutes … [y]et … also has one of the highest rates of incarceration, crime and recidivism. It would appear that the purpose of the habitual offender statutes to deter crime is not working and the State's finances are being drained by excessive incarceration … for non-violent crimes."

People v. Skinner, 2015 WL 4945986 (Mich. App. 2015):
Holding: 6th Amendment right to jury trial was violated by statute which allowed trial court to enhance a sentence from a term of years in murder cases to a life without parole sentence upon motion by the prosecutor; any fact which exposes a defendant to a greater sentence must be found by a jury.

People v. Hutcheson, 2014 WL 588126 (Mich. App. 2014):
Holding: Defendant's use of his hands to attack Victim did not constitute touching Victim "by any other type of weapon" as needed for sentence enhancement; Defendant's hands are not distinct from the body like a gun or knife.

State v. Fichtner, 2015 WL 4171399 (Minn. App. 2015):
Holding: The presence of one or more children in a Defendant's DWI car constitutes only one aggravating factor, not a separate, stackable factor for each child.

State v. Begay, 2016 WL 166624 (N.M. App. 2016):
Holding: State statute, which allows tolling of probation after a probation violation when Defendant cannot be immediately located, by its terms applies only in district court, and not to those on probation in magistrate court.

People v. Ramsundar, 2016 WL 1442005 (N.Y. App. 2016):
Holding: 10-20 year sentence and $180,000 fine was excessive sentence in financial fraud scheme for a Defendant who was relatively young, lacked prior convictions, and was pressured into the scheme by her co-defendant parents.

Hawkins v. New York Dept. of Corrections and Comm. Supervision, 2016 WL 1689740 (N.Y. App. 2016):
Holding: Defendant who was convicted of murder as Juvenile was entitled to a parole hearing which gave him a meaningful opportunity for release and consideration of his youth and mitigating circumstances, as required by *Miller*; Parole Bd. had denied release based on "seriousness of the offense."

People v. Cesar, 2015 WL 4450401 (N.Y. App. 2015):
Holding: Even though Defendant was an illegal alien, trial court's refusal to consider a sentence of probation violated due process and equal protection.

State v. Singletary, 2016 WL 1742818 (N.C. App. 2016):
Holding: Statute that allowed court to lengthen sentence based on severity of crime and other aggravating factors violated *Apprendi*, which requires any fact (other than prior conviction) that increases punishment be found by a jury.

State v. Jefferies, 776 S.E.2d 872 (N.C. App. 2015):
Holding: Jury cannot find habitual felon status for a Defendant based on a prior felony that wasn't alleged in the indictment.

State v. Davidson, 2015 WL 3771486 (Or. App. 2015):
Holding: LWOP sentence violated State constitution's proportionality clause as applied to Defendant convicted of masturbating in public; even though Defendant had three prior convictions for public masturbation and his behavior caused alarm to women and children who witnessed it, Defendant did not commit violent acts or engage in nonconsensual touching of anyone.

Com. v. Ali, 2015 WL 926952 (Pa. App. 2015):
Holding: Daycare facilities and preschools are not "elementary schools" which trigger enhancements for drug offenses committed nearby.

Simpson v. State, 2020 WL 220102 (Tex. Crim. App. 2020):
Holding: Even though Defendant pleaded "true" to various probation violations related to assaults, collateral estoppel did not bar defendant from asserting self-defense in his later trial for assault, because there were additional probation violations, any one of which could have supported revocation, and burdens of proof and procedural protections are different in revocation proceedings and trials.

Nixon v. State, 2016 WL 735867 (Tex. App. 2016):
Holding: Where jury returned verdict form with a note saying that its sentences should be consecutive, this was an unauthorized verdict, not an "informal verdict," and so court was required to reform the verdict to comport with the law by omitting the unauthorized portion (that sentences be consecutive), rather than sending the jury back to resume deliberations.

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State v. McGuire, 2020 WL 427326 (Wash. App. 2020):
Holding: Domestic violence no contact order which prohibited Defendant from having any contact with Victim was unconstitutional to extent it limited Defendant's right to parent.

State v. Flores, 2016 WL 2756431 (Wash. App. 2016):
Holding: Where a statute provided only a $50 fine as punishment, the statute's silence regarding other punishments meant that it did not permit any other sentence, and that statute prevailed over the specific punishment statute for misdemeanors; rule of lenity required that the statute be interpreted favorably for Defendant.

State v. Mullen, 2015 WL 1035633 (Wash. App. 2015):
Holding: Where Defendant's prior offense was for reckless driving – which may or may not have involved alcohol or drugs – Defendant had 6th Amendment right to a jury finding that the prior offense involved alcohol or drugs before it could be used as an enhancer for a new DWI charge.

State v. Rose, 2015 WL 9203927 (Wash. App. 2015):
Holding: Even though Defendant's marijuana prosecution was pending when voter-approved initiative took effect which legalized marijuana, the prosecution "savings statute" did not apply to allow the prosecution to proceed; by legalizing marijuana, voters were making a common law assumption that prosecutions would be "stopped" on the effective date of the legalization, not that prosecutions would be "saved" by a contrary law.

State v. Elward, 2015 WL 238292 (Wis. App. 2015):
Holding: A $200 DNA surcharge on misdemeanor defendants who committed their crimes before the effective date of the surcharge was a fine, not a fee, and was ex post facto as applied to them; the surcharge bore no relation to the cost of a DNA test because the defendants were not required to take a DNA test, and so the State was receiving money for nothing, which made the surcharge a punishment without any type of regulatory goal.

H.R. v. New Jersey State Parole Bd., 2018 WL 6683915 (N.J. Super. Ct. App. 2018):
Holding: Where sex Defendant had completed his sentence and was not subject to any period of parole supervision, he could not be subjected to GPS monitoring because this was an unreasonable search under state constitution.

State v. Mahoney, 2016 WL 687142 (N.J. Super. Ct. 2016):
Holding: Jurors from trial are not permitted to participate in Defendant's sentencing hearing; thus, jurors could not testify that they believed Defendant needed treatment, instead of punishment.

Sex Offense Issues – Registration

Bacon v. Mo. State Hwy. Patrol, 2020 WL 1682884 (Mo. App. E.D. April 7, 2020):
Where (1) Petitioner was convicted of possession of child pornography in 2002, and (2) he was convicted of a second offense of possession of child pornography in July 2004, he is considered a Tier I offender eligible for removal from registry after 10 years and not a Tier II offender which lengthens that period for second offenders, because at the time of his two convictions, he was not required to register for either offense. Sec. 589.414.6(2) states that a person is Tier II if they were "already required to register as Tier I" at time of second conviction. Petitioner removed from registry.
Facts: Petitioner was convicted of possession of child pornography in 2002, and again in July 2004. At that time, SORA did not make these offenses registerable. SORA made these offenses registerable in August 2004. Petitioner registered. In 2018, he sought to be removed from registry as a Tier I offender who had served more than 10 years on the registry.
Holding: Sec. 589.400 makes possession of child pornography a Tier I offense, and allows petitioning off registry after 10 years. The State argues Petitioner is really a Tier II offender because Tier II applies to an offender "*who is already required* to register as a Tier I offender due to having been adjudicated of a Tier I offense on a previous occasion." The State contends that second offenders are all Tier II. But the language of Tier II, 598.414.6(2), means the requirement to register must exist *at the time of the second adjudication*. When Petitioner was convicted of his second offense, he was *not* "already" required to register for the first offense, or even the second offense. Thus, he is Tier I, and is eligible to be removed from registry. Removal affirmed.

Hixson v. Mo. State Hwy. Patrol, 2020 WL 6573326 (Mo. App. E.D. Nov. 10, 2020):
Holding: Even though Petitioner, who had been convicted of a sex offense in Illinois and then moved to Missouri, was removed from the Illinois sex offender registry under Illinois law after 10 years, Petitioner was not eligible for removal from Missouri's sex registry, because his Illinois offense was a "Tier III" offense under Missouri law, which requires lifetime registration here.
Discussion: Petitioner argues that in order to "honor" or "give full faith and credit" to Illinois' order removing him from the Illinois registry, Missouri must, upon registration of the Illinois removal order, remove him from the Missouri registry. However, because Petitioner resides in Missouri, he is subject to Missouri's registration law, not by whether he is still required to register in Illinois. This puts foreign offenders on level ground with all other sex offenders in Missouri. Foreign offenders can still register their foreign judgment and seek removal, but only after the amount of time required by Missouri's registration law.

In the Interest of A.C.C., 561 S.W.3d 425 (Mo. App. E.D. Oct. 2, 2018):
Holding: (1) In case of first impression, appellate court holds that Juveniles who are admitting to facts in a delinquency proceeding (guilty plea) are entitled by due process to the same rights afforded adults at a guilty plea; i.e., the plea must be knowing and intelligent and done with sufficient awareness (warnings by the court) of the relevant

circumstances and likely consequences of the plea; (2) even though Juvenile was convicted for deviate sexual intercourse with a child not yet age 14, Sec. 566.062, this offense, using the "categorical approach," is not equal to or more severe than aggravated sexual abuse in 18 U.S.C. Sec. 2241, so plea court did not incorrectly advise Juvenile that he would not have to register as a sex offender after age 21.

Discussion: Sec. 211.425.1 provides that a Juvenile who is 14 or older is required to register after age 21 if the offense "adjudicated" would be considered a felony under chapter 566 if committed by an adult, which is "equal to or more severe than aggravated sexual abuse under 18 U.S.C. 2241." In deciding this question, the "categorical approach" looks only to the statutory offense. The "non-categorical" approach looks at the underlying facts of the offense. Here, the "categorical approach" would result in the offense being less severe than the federal offense, but the "non-categorical approach" would result in the offense being more severe. The use of the term "adjudicated" in the statute is key because it requires courts to look at what has been judicially decided, not at the underlying facts of the offense. The Eastern District had previously ruled that a "non-categorical" approach be used when dealing with adult sex offenders. But the statutory language for adults is different than the language for Juveniles. Also, the U.S. Attorney General guidance on SORNA says that States should have some discretion on how to deal with registration for Juveniles. Sec. 566.062 "adjudicated" Juvenile guilty of having deviate sexual intercourse with a child "not yet age 14." 18 U.S.C. 2241 describes aggravated sexual abuse as having sex with a victim under "age 12." Thus, using the categorical approach, Juvenile's offense was "not equal to or more severe" than the federal offense. The trial court did not incorrectly advise Juvenile that he would not have to register after age 21.

Doe v. Belmar, 564 S.W.3d 415 (Mo. App. E.D. Dec. 26, 2018):

Even though (1) Petitioner pleaded guilty to attempted endangering the welfare of a child, purportedly as part of a plea agreement that did not require him to register, and (2) attempted endangering did not itself involve a sexual element, Petitioner was required to register because his offense involved sexual conduct with a minor and courts use a non-categorical approach (which looks at the conduct rather than the statutory elements of a convicted offense) in determining whether registration is required under SORNA.

Facts: In 1997, Petitioner was charged with misdemeanor second-degree sexual abuse for subjecting a child to sexual contact. He pleaded guilty to attempted endangering the welfare of a child, for making a child disrobe in front of him. The plea agreement purportedly did not require Petitioner to register. In 2014, Petitioner was told by authorities that he had to register. He brought a declaratory judgment action to be removed from the registry. The trial court looked to the underlying conduct of the offense, and denied removal.

Holding: 34 USC Sec. 2091(7)(1) requires a person to register for "any conduct that by its nature is a sex offense against a minor." Petitioner claims that a categorical approach – which looks only to whether the offense of conviction contains a statutory sexual element – must be used rather than a non-categorical approach, which looks to the underlying conduct in the specific case. Prior Missouri appellate decisions use a non-categorical approach. SORNA's language is broad and indicates that Congress intended for courts to examine an offender's underlying conduct. Petitioner also argues that he

should not be required to register because his plea bargain called for non-registration, and the "whole point" of plea bargaining was to avoid registration. Other cases using a non-categorical approach have involved guilty pleas. But assuming, *arguendo*, that a party can include such a provision in a plea agreement, there is nothing in the record of this case showing there was any such provision here.

Khatri v. Trotter, 2018 WL 3153461 (Mo. App. S.D. June 28, 2018):
Holding: Even though Petitioner is ostensibly eligible for removal from the registration law under Secs. 589.400.3(4) and .7 because he no longer has to register under the federal tiered registration law, he cannot be removed because SORA, Secs .589.400.1(7) and .2, also provides that a person must register if *at any time* he was required to register under federal law.

Strosnider v. Replogle, 2016 WL 6610343 (Mo. App. S.D. Nov. 9, 2016):
Holding: Where Defendant was convicted of a sex offense in 2006, but failed to register as a sex offender until 2014, he was not eligible for removal from the registry because he could not demonstrate that he "complied with the provisions" of the registration law, which is a prerequisite for removal under Sec. 589.400.9(1). This is true even though Defendant claimed he did not know he had to register until 2014.
Discussion: Sec. 589.400.8 allows a person to petition off the registry in certain circumstances. However, 589.400.9(1) states that relief can be granted only if the person "has complied" with the registration law. Here, Defendant failed to timely register before 2014. Essentially, Defendant would have the appellate court rewrite the statute to say that Defendant has not "knowingly" failed to comply with the registration law. But the statute is clear and unambiguous. Defendant is presumed to know the law. His failure to timely register in the past precludes granting removal from the registry.

Selig v. Russell, 2020 WL 1918707 (Mo. App. W.D. April 21, 2020):
(1) Even though Missouri's SORA made Defendant's conviction for furnishing pornographic materials to a minor exempt from registration, Defendant may still be subject to registration under federal SORNA; case remanded to determine if Defendant required to register under SORNA; (2) even though Defendant has not yet registered, his declaratory judgment motion to determine if he must register is ripe and not premature.
Facts: Defendant (Petitioner), a high school student, was convicted of furnishing pornographic materials to minors, after he sent a picture of his penis via Snapchat to other high school students. He petitioned to not have to register as a sex offender because his offense is exempt from registration under Missouri's SORA, Sec. 589.40.9(2)(c). The State claimed he nevertheless had to register under the federal SORNA, and that his petition was not ripe because he had never registered in the first place. The trial court granted relief on the basis of SORA, but did not address SORNA. The State appealed.
Holding: The State agrees that Defendant is exempt from registering under Sec. 589.400.9(2)(c) because his offense is exempt from registration under that provision. Regardless of that provision, however, the State claims Defendant is required to register under the federal SORNA, which requires registration of persons convicted of a "specified offense against a minor" which includes "any conduct that by its nature is a sex offense against a minor," 34 USC Sec. 20911(7)(1). SORA Sec. 589.400.1(7)

requires anyone who has "has been or is required to register" under SORNA to register under SORA. Defendant contends this creates an illogical result, in that the Missouri legislature exempted his offense from registration under 589.400.9(2)(c), but he then is required to register anyway under 589.400.1(7). He contends the specific provision should control over the more general one, or that the rule of lenity should apply, or that recent legislative changes to SORA should exempt him from registration. But it is not unreasonable that Missouri would adopt a "catch-all" provision allowing Missouri to comply with SORNA without having to amend SORA every time the federal government chose to amend SORNA. And the legislative changes to SORA did not change Sec.589.400.1(7). There may be cases where a person will be exempt under SORA and exempt under SORNA, but Defendant's case does not appear to be one of them. While it is "troubling" that Defendant may be expressly exempt from registration under SORA, 589.400.9(2)(c), and yet have lifetime registration requirements pursuant to 589.400.1(7), that is the current state of the law that only the legislature can remedy. Case remanded to determine if Defendant must register under SORNA.

Dixon v. Missouri State Highway Patrol, 2019 WL 4615204 (Mo. App. W.D. Sept. 24, 2019):

Where Petitioner was convicted of sexual misconduct in the third degree, a Class C misdemeanor, in 2003, and has been registered as a sex offender since, his offense is a Tier I offense which allows him to petition off the registry after 10 years from the offense, even though the offense was renamed in 2013, and does not appear on the list of Tier I offenses under its former name; the renaming of the offense did not change its elements or punishment; judgment allowing Petitioner off registry is affirmed.

Facts: In 2003, Petitioner was convicted of sexual misconduct in the third degree, a Class C misdemeanor. He registered as a sex offender and has been registered since. In 2018, he petitioned to be removed from the registry as a Tier I offender. The trial court removed him from the registry. MSHP appealed.

Holding: MSPD argues that because Petitioner's offense is not listed among the Tier I offenses (least serious offenses) in Sec. 589.400 et seq., he falls within the "catch-all" provision of Tier III (most serious offense) that require lifetime registration. Petitioner was convicted under Sec. 566.095 (2000). In a 2013 legislative revision, that offense was renamed sexual misconduct in the second degree. Although the name of the offense was altered, the elements remained the same, the classification as a Class C misdemeanor remained the same, and the punishment remained the same. Sexual misconduct in the second degree is listed as a Tier I offense. Although Sec. 589.400 et seq. refers to Petitioner's offense by its current name, that provision must be read to include people convicted under the offense's former name. Merely changing the name of the offense has no substantive effect. It would lead to absurd results to allow people convicted post-2013 to petition off the registry for this least serious offense, but not to allow people convicted pre-2013 to petition off, based solely on the name of the offense.

Carr v. Missouri Attorney General Office, 2018 WL 4412248 (Mo. App. W.D. Sept. 18, 2018):

(1) Trial court erred in looking at the facts of Petitioner's offense in determining what Tier he was under federal SORNA because SORNA looks only to the elements of the

offense; (2) Petitioner's 1980 offense was, at most, a Tier II offense under SORNA (requiring 25 years registration), but because SORNA applied only to offenses beginning in 2007, Petitioner was never "required to register" under SORNA, and thus, not required to register under Missouri's SORA.

Facts: In 1980, Petitioner, who was then 17, was convicted under Sec. 566.040 (1979), which prohibited "sexual intercourse with another person…who is 14 or 15 years old." Petitioner filed a petition to be removed from Missouri's sex offender registry. The trial court denied removal on grounds that he had used or threatened to use physical force in the offense, which made him a Tier III offender under federal SORNA (requiring lifetime registration), and his required registration under SORNA required him to register under SORA.

Holding: (1) The trial court erred in looking at the underlying facts of the offense to determine what federal Tier Petitioner fell under. The federal Tier is determined by the "categorical approach," which considers only a "generic" version of the offense by comparing the elements of the state offense to the applicable federal offense. The "categorical approach" does not look at the individual facts of Petitioner's offense. Sec. 566.040 (1979) criminalized having sex with a 14 or 15 year old; the elements do not include any threat or use of force. Federal Tier III requires threat or use of force. Thus, Petitioner cannot be a Tier III, and is, at most, a Tier II. (2) However, Tier II requires registration only for 25 years. This means that if registration was required under SORNA, it would have expired in 2005. But there is a further issue in that SORNA only applies to offenses for which registration was required as of February 28, 2007. Petitioner was never required to register under SORNA because his registration period expired in 2005. Since he was not "required to register" under SORNA, he is not required to register under SORA either. Remanded with instructions to remove Petitioner from sex offender registry.

State v. Graham, 2018 WL 2922031 (Mo. App. W.D. June 12, 2018):

Holding: Where (1) Defendant had been required to register as a sex offender under Iowa law for 10 years; (2) after the 10-year period expired, Defendant was notified by Iowa that he no longer had to register; and (3) Defendant subsequently moved to Missouri, the evidence was insufficient to convict of failure to register as sex offender in Missouri because the State did not show that Defendant "knowingly" failed to register.

Discussion: The parties agree that Defendant was, in fact, required to register in Missouri under Sec. 589.414, but failure to register is not a strict liability offense. Because the failure to register statute, Sec. 589.425, does not specify a mental state, Sec. 562.021.3 applies and requires "purposely or knowingly" as the mental state. Here, the State presented no evidence that Defendant ever knew he had to register in Missouri. The State claims Defendant should have known this because a witness testified that registration is a "big deal" and "gets a lot of publicity in the news," but Defendant had been affirmatively told by Iowa that he no longer had to register. Although ignorance of the law is generally not an excuse, it can act as a defense where it negates "the existence of the mental state required by the offense," Sec. 562.031.1. Conviction reversed.

Petrovick v. State, 2018 WL 325219 (Mo. App. W.D. Jan. 9, 2018):
Holding: Where (1) Petitioner pleaded guilty to a sex offense in 1991 (which would allow him to petition off sex offender registry due to his and victim's age at time of offense) under Sec. 589.400.8, *if* he never had an independent duty to register under the federal SORNA, Sec. 589.400.1(7); (2) under SORNA, Petitioner would have had to register for 15 years (i.e., through 2006); but (3) even though SORNA was enacted in July 2006, it was not made retroactive to people such as Petitioner until the Attorney General promulgated certain retroactivity regulations, which occurred in 2007 at the earliest when interim regulations were implemented, or possibly as late as 2008 when final regulations were implemented. Since Petitioner's duty to register under SORNA, if any, would have ended in 2006 – before SORNA's retroactivity occurred – he *never* was required to register under SORNA, and thus, he is eligible to successfully petition off the registry.
Discussion: The question is whether Petitioner "has been or is required to register" under SORNA. If Petitioner was ever required to register under SORNA, he has to register under Missouri's SORA, Sec. 589.400.1(7). SORNA was enacted in July 2006. The State erroneously assumes that SORNA applied to pre-enactment offenders immediately upon enactment. But SORNA is unusual in that it provides that the U.S. Attorney General would determine whether it would be retroactive. There is some uncertainty when the Attorney General determined that SORNA would be retroactive. It may have been in 2007, when interim rules were adopted, or as late as 2008, when final rules were adopted. In Petitioner's case it, doesn't matter whether the 2007 or 2008 date is correct, because Petitioner's SORNA registration period would have ended in 2006, at the end of 15 years. SORNA wasn't retroactive until at least 2007. Thus, Petitioner never had a duty to register under SORNA, and may be removed from the registry.

Peters v. Jackson County Sheriff, 2018 WL 1472747 (Mo. App. W.D. March 27, 2018):
(1) Trial court erred in dismissing Petitioner's petition to be removed from sex offender registry without allowing Petitioner an opportunity to respond to State's motion to dismiss, because the State's motion referred to matters outside the record, which converted it to a motion for summary judgment, which requires that Petitioner be given an opportunity to respond; (2) where Petitioner was convicted of third-degree assault in 2001 and the State's alleged reason why he has to register is that the federal SORNA requires registration since Petitioner touched Victim's vagina in the assault, it is arguable that SORNA does not allow looking to the individual facts of the crime to require registration, and, thus, arguable that Petitioner does not have to register; and (3) where the basis for Petitioner's removal had nothing to do with Sec. 589.400, that statute's time limitations for bringing a second removal petition do not apply.
Facts: Petitioner was convicted of third-degree assault, Sec. 565.070, in 2001. In 2016, the State informed Petitioner that he had to register as a sex offender for this conviction, because the conviction was for touching a victim's vagina. Petitioner registered, but then filed a declaratory judgment action to be removed from the registry on grounds that he was not required to register. That first petition was dismissed without prejudice. Petitioner then refiled a second petition. The State moved to dismiss on grounds that Petitioner was required to register under the federal SORNA. Without giving Petitioner

any opportunity to respond, the trial court dismissed the petition on the merits, and found that Petitioner was required to register.
Holding: (1) Because the State's motion to dismiss referred to matters outside the pleadings, the court was required under Rule 55.27 to treat it as a motion for summary judgment and dispose of the matter as provided in Rule 74.04. Rule 74.04(c)(2) gives a party 30 days to respond to a motion for summary judgment. The trial court erred in ruling on the State's motion without giving Petitioner 30 days to respond. (2) Although not deciding the matter, appellate court notes that Petitioner would have an argument that U.S. Supreme Court precedent requires looking only to the generic offense, and not the underlying facts, to determine if a person has to register under the federal SORNA, and that his third-degree assault offense – when viewed only as a generic offense – does not require registration under SORNA. This is further reason why Petitioner should have been given the opportunity to respond. (3) Sec. 589.400 requires that if a removal petition is "denied," a person must wait at least 12 months before filing a second petition. The State argues that Petitioner's second petition is time-barred under 589.400. However, because Petitioner did not based his petition for removal on anything in 589.400, its time limitation does not apply. Appellate court also questions whether the prior "dismissal" constitutes a "denial."

Wilkerson v. State, 533 S.W.3d 755 (Mo. App. W.D. Oct. 3, 2017):
Even though Petitioner was otherwise eligible to be removed from the sex offender registry under Sec. 589.400.8 (which allows for removal because of her age and victim's age at time of offense), Petitioner was not eligible for removal because she had been required to register under federal SORNA, which provides an independent basis from the prior conviction to require registration.
Facts: In 2010, Petitioner, then 18 years old, was convicted of sexual misconduct for having consensual sex with a 13-year old boy. She registered as a sex offender. In 2015, she petitioned for removal from the registry under Sec. 589.400.8, which allows removal for someone who committed an offense when 19 years old or younger, and the victim was 13 years old or older. The trial court granted removal. The State appealed.
Holding: The State does not contest that Petitioner proved her entitlement to removal under Sec. 589.400.8. The "complicating factor" in Petitioner's case is that she was *also* required to register under 589.400.1(7) because she "has been or is required to register" under the federal SORNA. Petitioner is required to register because of her *present* status as someone who was required to register under SORNA, not because of her prior conviction. Because she is subject to an independent State registration requirement under 589.400.1(7), she is not eligible for removal. "The result we reach in this case is troubling." Even though Petitioner was otherwise eligible for removal after 2 years under 589.400, and even though SORNA only requires registration for 15 years, Missouri law subjects Petitioner to lifetime registration because she has been required to register under SORNA. "It is not clear that the General Assembly intended that an offender's registration obligation would 'ratchet up' this way." Judgment granting removal reversed.

In re: Kersting v. Replogle, 2016 WL 3166226 (Mo. App. W.D. June 7, 2016):
Defendant, who was convicted of felonious restraint against a 15-year-old child which did not involve a sexual component, was not required to register as sex offender and was eligible to be removed from registry; this is because "child" is not defined in 589.400.1, and most Missouri statutes define "child" as less than 14; rule of lenity requires that "child" be defined favorably for Defendant.
Facts: Defendant (Petitioner), age 18 at the time, drove a knife through a door behind which his 15-year-old brother was hiding. There was no allegation the offense was sexual. Defendant pled guilty to felonious restraint. Defendant was then required to register as a sex offender because Sec. 589.400.1(2) requires registration for conviction of "felonious restraint when the victim was a child." Later, Defendant petitioned to be removed from the requirement to register and the registry.
Holding: The phrase "felonious restraint when the victim was a child" must be interpreted to mean child under age 14. Neither the registration law nor felonious restraint law defines "child." However, numerous other statutes define "child" as a person less than 14. E.g., "child kidnapping," Sec. 565.115, is a child less than 14; Sec. 491.075 allows statements of a child less than 14. The sex registration law itself, Sec. 589.425.1, makes it a Class D felony to fail to register unless the underlying crime was for a child less than 14, in which case it is a Class C felony. While there are some statutes that arguably define "child" differently, the word "child" is at least ambiguous, which means the rule of lenity must apply. Defendant is not required to register and should be removed from registry.

* **Gundy v. U.S., 2019 WL 2527473, ___ U.S. ___ (U.S. June 20, 2019):**
Holding: A plurality of four justices holds that the federal Sex Offender Registration and Notification Act's (SORNA's) provision that gives the Attorney General authority to determine how to apply registration requirements to people convicted before the Act is not an unconstitutional delegation of legislative authority; Alito concurs only because of 84 years of precedent upholding broad delegation of such authority, but states he would revisit the issue if a majority of the Court would; three justices dissent and oppose such broad delegation of authority and invite reconsideration of issue; Kavanaugh did not participate.

*** Packingham v. North Carolina, ___ U.S. ___, 137 S.Ct. 1730 (U.S. June 19, 2017):**
Holding: Statute which made it a felony for registered sex offenders to access websites which permit minor children to become members (which, as written, might include Facebook, Twitter, Linked-In, Amazon.com, Washingtonpost.com, Webmd.com, etc.) impermissibly restricts lawful speech under First Amendment; even assuming the statute is content neutral and thus subject to intermediate scrutiny, it is not narrowly tailored to serve a significant governmental interest; while the First Amendment allows specific, narrowly tailored laws that prohibit sex offenders from engaging in conduct like contacting a minor or using a website to gather information about a minor, the statute here prohibits any access or communication whatsoever, including what for many people are principal sources for knowing current events, checking employment ads, speaking and listening in the modern public square, and exploring vast realms of human knowledge.

* **Nichols v. U.S., ___ U.S. ___, 136 S.Ct. 1113 (U.S. April 4, 2016):**
Holding: SORNA does not require a sex offender who leaves a jurisdiction to move to a foreign country to register his departure in the State he left. The Supreme Court expressly noted, however, that the new "International Megan's Law," to be codified at 18 U.S.C. Sec. 2250(b), now requires such departure registration.

U.S. v. Morales, 2015 WL 5042809 (1st Cir. 2015):
Holding: Court plainly erred in sentencing Defendant as Tier III offender under SORNA; Defendant had been convicted of Rhode Island child molestation, but under the categorical approach, the R.I. statute was not comparable to the offenses listed under Tier III; the R.I. statute criminalized sexual penetration with a child under 14, but the SORNA offenses required additional elements, such as threat of force, or crimes with a child under 12.

U.S. v. Berry, 98 Crim. L. Rep. 508, 2016 WL 692978 (4th Cir. 2/19/16):
Holding: When sentencing a Defendant for failure to comply with SORNA, judges must use the "categorical approach" in determining the base offense level, which limits the court's review to the statutory elements of the offense; New Jersey's child endangerment statute did not create a tier III offense because the state law encompassed less serious conduct that falls outside the generic federal sex abuse crimes.

Does v. Snyder, 99 Crim. L. Rep. 653 (6th Cir. 8/25/16):
Holding: Retroactive application of sex offender amendments which prohibited living, working or loitering near schools imposed "punishment" and was ex post facto; this case is first federal circuit appellate court to hold that registration requirements constitute "punishment."

A.W. v. Nebraska, 101 Crim. L. Rep. 511 (8th Cir. 7/31/17):
Holding: Even though Juvenile who as adjudicated a "delinquent" in Minnesota was ordered by Minnesota to register as sex offender, where Juvenile moved to Nebraska before the order, he was not required to register in Nebraska because a "delinquent" is not a sex offender under either Nebraska or Minnesota law.

Meredith v. Stein, 2018 WL 5839380 (E.D. N.C. 2018):
Holding: North Carolina's procedure for determining if an out-of-state conviction required sex registration violated due process, where it largely allowed local sheriffs unbridled discretion to determine this without any statute or regulations guiding it, without a hearing, and the sheriff's decision was not appealable.

Belleau v. Wall, 97 Crim. L. Rep. 739 (E.D. Wis. 9/21/15):
Holding: Where (1) Defendant was convicted of sex offense in 1994, (2) after he finished his sentence, he was civilly committed as a sexually violent person (SVP), and (3) three years before his SVP release, the State enacted a law requiring lifetime GPS monitoring of those released from SVP commitment, application of GPS law to him was ex post facto since it increased the punishment for the 1994 offense; like probation,

parole or supervised release, GPS tracking constitutes "punishment" through technology, not a nonpunitive civil purpose; GPS tracking also implicates 4th Amendment issues.

State v. Obas, 98 Crim. L. Rep. 460 (Conn. 2/9/16):
Holding: Where sex registration statute provided that a court "may exempt" offenders who committed their crimes when under age 19, there was no time limit within which offenders must seek exemption, and an offender is not precluded from seeking exemption even though the plea bargain called for a longer registration period.

Doe v. Thompson, 2016 WL 1612872 (Kan. 2016):
Holding: State registration law, as amended in 2011 to require longer registration terms and burdensome penalties for violation, had punitive effect and, thus, violated Ex Post Facto Clause of U.S. Const.; amended law cannot be applied retroactively to defendants who committed their crimes before July 1, 2011.

Com v. Feliz, 119 N.E.3d 700 (Mass. 2019):
Holding: Statute mandating GPS monitoring as probation condition for Defendant convicted of child pornography offense was unreasonable search under State constitution where Defendant had no history of violating probation or geographic proximity to child pornography victim.

In re State ex rel. C.K., 103 Crim. L. Rep. 114 (N.J. 4/24/18):
Holding: A categorical requirement of lifetime sex offender registration for persons who committed their offenses as Juveniles violates due process clause of New Jersey Constitution.

A.S. v. Pa. State Police and Com. v. Lutz-Morrison, 99 Crim. L. Rep. 641 (Pa. 8/15/16):
Holding: Penn. statute that required lifetime registration for defendants convicted of "two or more" sex offenses applies only to recidivist, not sex offenders whose multiple offenses arise out of a single prosecution.

People v. Garcia, 100 Crim. L. Rep. 564 (Cal. 3/20/17):
Holding: Requiring sex offenders on probation to disclose incriminating information as part of their treatment doesn't violate 5th Amendment rights where law enforcement cannot use the information to charge them with more crimes.

People v. Toloy, 97 Crim. L. Rep. 668 (Cal. App. 8/26/15):
Holding: Crime of failing to register as sex offender requires actual knowledge of the duty to register, though, here, Defendant had such knowledge.

People v. Rebulloza, 2015 WL 848555 (Cal. App. 2015):
Holding: Defendant's Fifth Amendment rights were violated by a probation condition that required Defendant to participate in a sex offender program that required him to waive his privilege against self-incrimination.

People v. Segura, 2016 WL 529889 (N.Y. App. 2016):
Holding: Under State registration law, assessment of additional risk level points without prior notice to Defendant violated due process.

State v. Young, 2016 WL 1295951 (Ohio App. 2016):
Holding: Evidence was insufficient to convict of failure to report a change of address for moving from a "current address" to a "secondary address" as identified on the registration form; the form and statute did not define "current address" or "secondary address," and, in any event, the State had actual notice of Defendant's actual address during the entire reporting period.

State v. Powell, 2016 WL 1212574 (Wash. App. 2016):
Holding: Compelling a sex offender to disclose his sexual history in the course of sex treatment violates 5th Amendment privilege against self-incrimination; the State had refused to grant immunity to Defendant for disclosure.

In re Wheeler, 2015 WL 3982859 (Wash. App. 2015):
Holding: Defendant could not be convicted for failing to register as a sex offender for an offense that was subsequently repealed by Legislature.

State v. Oatman, 2015 WL 5554299 (Wis. App. 2015):
Holding: Statute prohibiting sex offenders from photographing minors without their parents' permission was overbroad under 1st Amendment; statute was not content neutral, and statute did not further any Gov't interest in protecting children, because children are not harmed by nonpornographic photos taken in public places.

Taylor v. Penn. State Police of Com., 2016 WL 119972 (Pa. Commw. Ct. 2016):
Holding: Sex Offender properly alleged a claim that SORNA's irrebuttable presumption that all sex offenders pose a heightened risk of recidivism violates due process; the claim alleged that the irrebuttable presumption denied Offender the opportunity to prove his rehabilitation and that he no longer posed a threat to the public, so that he could obtain relief from registration; Offender pointed to studies showing such offenders have very low rates of recidivism.

H.R. v. New Jersey State Parole Bd., 2018 WL 6683915 (N.J. Super. Ct. App. 2018):
Holding: Where sex Defendant had completed his sentence and was not subject to any period of parole supervision, he could not be subjected to GPS monitoring because this was an unreasonable search under state constitution.

Sexual Predator

In the Matter of Care and Treatment of D.N., 2020 WL 1861426 (Mo. banc April 14, 2020):

Holding: Even though State's Expert testified that Defendant had three disorders which, taken together, constitute a "mental abnormality," the jury instruction which required jury to find "a mental abnormality" which makes him "more likely than not to engage in predatory acts" did not violate the juror unanimity requirement, because unanimity is not required as to the precise means by which an essential element of the offense is established.

Discussion: "[F]urther guidance on the issue of juror unanimity may be helpful for legal practitioners." Jurors must be unanimous in their verdict. But jurors are not required to be unanimous as to the precise means by which an essential element of an offense is established. They only need to be unanimous on the ultimate issue. E.g., where the essential element of robbery is use of force, some jurors could believe a defendant used a gun and others believe he used a knife. That disagreement – about means – would not matter as long as all 12 jurors unanimously concluded defendant used force. Here, the jury was required to find that Defendant has "a mental abnormality" that makes him a sexual predator. Sec. 632.480(2) requires a jury to find only the existence of a mental abnormality. The jury need not be unanimous on the precise nature of the abnormality. Even so, here, Expert testified that the three disorders individually were not abnormalities, but only if taken together. Thus, there was no possibility of a non-unanimous verdict. The trial court did not plainly err in submitting the instruction here.

In the Matter of the Care and Treatment of Grado, 2018 WL 4572722 (Mo. banc Sept. 25, 2018):

Holding: (1) Sexually Violent Predator Defendants have due process right under 14th Amendment to effective assistance of counsel, because their liberty interest is at stake in SVP proceedings; (2) ineffective counsel issues which are apparent from the record may be raised on direct appeal; but (3) Supreme Court does not decide how issues occurring off the record or on appeal itself may be raised, but will resolve that issue in the future if the legislature does not adopt a statutory procedure for such claims; and (4) Supreme Court does not decide whether the standard for SVP ineffectiveness claims is whether there was a "meaningful hearing based on the record" (which is the standard in termination of parental rights cases), or the *Strickland* standard applicable in criminal cases.

In the Matter of Care and Treatment of D.N., 2019 WL 2943377 (Mo. App. E.D. July 9, 2019):

Trial court abused discretion, in sexually violent predator trial, in prohibiting Defendant from telling jurors the ages of Defendant's young victims (4 and 8) and asking if their young ages would cause bias or prejudice.

Facts: During voir dire, Defendant sought

to ask venire about the specific ages of the victims and how this would impact them. The State objected that this was "too inflammatory." The trial court sustained the objection.
Holding: A defendant is entitled to inquire about "critical facts" in a case to uncover disqualifying bias and prejudice. Child abuse evokes strong emotional reactions in society. Defendant was denied his right to a fair and impartial jury when he was prohibited from asking jurors about these critical facts. He was prejudiced because State emphasized young ages of victims throughout its case.

In the Matter of the Care of Treatment of P.L., 2018 WL 3978273 (Mo. App. E.D. Aug. 21, 2018):
Holding: A Colorado felony offense of attempted sexual assault on a child is a "sexually violent offense" which triggers the SVP commitment law, because the Colorado offense falls within the catch-all provision of Sec. 632.480(4), which defines sexually violent offenses as a list of Missouri offenses, and "any felony offense that contains elements substantially similar to the offenses listed above."
Discussion: The SVP law is remedial and must be construed so as to meet the cases that are within the spirit or reason of the law and the evil it was designed to remedy (protecting society against sexually violent predators), *resolving all reasonable doubts in favor of applicability of the statute*. No Missouri case has interpreted the catch-all provision of Sec. 632.480(4). The plain language, "contains elements substantially similar to," indicates that there be a high degree of likeness between the elements of the predicate offense, but they need not be identical. Comparing the elements, the Colorado offense is similar to the Missouri offense of attempted statutory sodomy, which is one of the listed offenses in Sec. 632.480(4). Even though the Colorado offense carried a much lower punishment than Missouri's sodomy offense, the range of punishment is not an element, and is not to be considered.

In the Matter of Care and Treatment of Jones, 565 S.W.3d 704 (Mo. App. S.D. Dec. 5, 2018):
Holding: Rule 51.05, allowing automatic change of judge without cause, applies to sexually violent predator proceedings under Sec. 632.480.

In the Matter of Care and Treatment of White v. State, 2019 WL 2256863 (Mo. App. W.D. May 28, 2019):
Holding: Claim of ineffective assistance of SVP counsel is judged under the *Strickland* standard.

In re King v. State, 2019 WL 345115 (Mo. App. W.D. Jan. 29, 2019):
Holding: (1) In determining whether a person committed as a sexually violent predator is entitled to a merits trial on petition for conditional release, the proper legal standard is whether Petitioner shows by a preponderance of evidence that he no longer suffers from a mental abnormality that makes him likely to engage in acts of sexual violence if released pursuant to the supervised (conditional) conditions specified in Sec. 632.505; the standard is not whether the person presented a risk of committing future acts of sexual violence if released without restrictions; and (2) where circuit court applied wrong legal

standard, case is remanded to circuit court to apply correct standard and weigh evidence under preponderance of evidence standard, Sec. 632.498.4.

In the Matter of the Care and Treatment of Parr v. State, 2016 WL 787983 (Mo. App. W.D. March 1, 2016):
Even though Defendant had been found not to be a sexually violent predator (SVP) at a commitment trial in 2009, collateral estoppel did not preclude the State from seeking to commit him in 2012 (after his parole was revoked) because there had been a material change in circumstances, and whether Defendant met the SVP criteria in 2009 is not the same question as to whether he met the criteria in 2012.
Facts: In 2009, as Defendant's prison release date approached, the State sought to commit Defendant under the SVP statute. However, the trial court found that Defendant did not meet the criteria for commitment in 2009. Defendant was conditionally released from prison. Subsequently, his parole was revoked, largely because he wrote a letter to a fellow sex offender with sexual references to minors. In 2012, the State again sought to commit Defendant. Following a jury trial, he was determined to be SVP.
Holding: It is an issue of first impression whether collateral estoppel barred the 2012 trial. Although Defendant does not raise this issue directly, his argument that the State could not rely on pre-2009 events to prove its case implicitly raises the issue. Collateral estoppel only applies where the issue decided in the prior adjudication was *identical* with the issue in the new case. Sec. 632.480(5) defines an SVP as a person who "suffers" from a mental abnormality; the present tense indicates it is a *current* mental condition that is considered. Whether Defendant met the SVP criteria in 2009 is not the same question as to whether he met it in 2012. Collateral estoppel also will not apply where there has been a material change in facts between the first and second adjudications. Here, Defendant's letter provided a material change in facts because it provided multiple new facts showing Defendant was SVP. However, the State does not have carte blanche ability to file a new petition whenever an earlier SVP case is unsuccessful; to avoid issue preclusion, the State must identify subsequent events, which have create a new legal situation or alter the legal rights of the parties.

U.S. v. Wooten, 103 Crim. L. Rep. 58 (4th Cir. 4/10/18):
Holding: Even though Petitioner for SVP release has intellectual disability (formerly mental retardation), trial court did not clearly err in finding that Petitioner had learned to control his behavior and had developed mental maturity to no longer be a danger.

Karsjens v. Jesson, 2015 WL 3755870 (D. Minn. 2015):
Holding: Civil commitment (SVP) law violated 14th Amendment substantive due process because it was not narrowly tailored to treat defendants or protect society from danger of mental illness; law failed to require periodic risk assessments to see if continued commitment was still necessary; failed to provide an adequate mechanism by which someone who satisfied the discharge standard could obtain timely release; placed the burden on defendant to demonstrate they could be placed in a less restrictive setting, but failed to provide a less restrictive setting; and did not require State to seek release of anyone who no longer met criteria for continued commitment.

Belleau v. Wall, 97 Crim. L. Rep. 739 (E.D. Wis. 9/21/15):
Holding: Where (1) Defendant was convicted of sex offense in 1994, (2) after he finished his sentence, he was civilly committed as a sexually violent person (SVP), and (3) three years before his SVP release, the State enacted a law requiring lifetime GPS monitoring of those released from SVP commitment, application of GPS law to him was ex post facto since it increased the punishment for the 1994 offense; like probation, parole or supervised release, GPS tracking constitutes "punishment" through technology, not a nonpunitive civil purpose; GPS tracking also implicates 4th Amendment issues.

Specific Performance

People v. Stapinski, 98 Crim. L. Rep. 50 (Ill. 10/8/15):
Holding: Even though Prosecutor had not previously approved a cooperation agreement with Defendant, where (1) police told Defendant that if he cooperated in a drug investigation by helping arrest other people that then police would not indict him on certain charges and (2) Defendant upheld his part of the deal, Defendant's right to substantive due process was violated when Prosecutor then charged him; due process requires the State to honor a cooperation agreement whenever a defendant fulfills his portion of the deal and the cooperation involved surrendering constitutional rights.

State v. King, 97 Crim. L. Rep. 696 (N.M. 9/10/15):
Holding: Where Officer conveyed offer from Prosecutor to Defendant that if Defendant would produce a murder weapon then Prosecutor would "talk dismissal" about an evidence tampering charge, Defendant was entitled to specific performance of dismissal when he produced weapon; although a "finely-parsed" reading of the phrase "talk dismissal" might mean Prosecutor promised only to "talk" about possibility of dismissal, this was not a fair reading of the phrase in the context of the case.

Statute of Limitations

Laramore v. Jacobsen, 2020 WL 6733487 (Mo. App. E.D. Nov. 17, 2020):
Holding: (1) Where Petitioner's property was seized by Sheriff during his arrest, the statute of limitations for a replevin action to seek return of the property begins to run three years from the date the property is no longer needed as evidence, under Sec. 516.130(1) for an action against officers; where Petitioner still had a pending postconviction or criminal case where the property may be needed as evidence, the statute of limitations had not yet run; (2) although an inmate has no constitutional right to be present for a civil proceeding, Sec. 491.230 authorizes a writ of habeas corpus ad testificandum where the inmate will be "substantially and irreparably prejudiced" by failure to attend; inmate must petition circuit court for issuance of such a writ and demonstrate necessity to attend; circuit court is not requires to issue writ *sua sponte*.

State ex rel. Parton v. Eighmy, 524 S.W.3d 204 (Mo. App. S.D. July 21, 2017):
Even though (1) Bazell makes felony stealing under 570.030.3 a misdemeanor, and (2) the State did not file its information charging stealing within one year of the offense as required by Sec. 556.036.2(2) for misdemeanors, where the State filed a complaint within one year of the offense which substantively met all the requirements under Rule 23.01 to be an information, the legal character of the pleading is determined by its subject matter not its title and it would be considered a timely-filed information.
Facts: In October 2013, the State filed a "felony complaint" alleging that Defendant had committed a stealing earlier that year. In April 2014, the State filed a "felony information" charging felony stealing. Later, *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016) was decided, which made the offense a misdemeanor. After *Bazell*, Defendant filed a motion to dismiss on grounds that the offense was a misdemeanor, and the State had not filed an information within one year of the offense, as required for misdemeanors, under Sec. 556.036.2(2). The trial court denied the motion. Defendant sought a writ of prohibition.
Holding: While the charging document filed within one year was titled "felony complaint," it met all the requirements for an "information" under Rule 23.01(a) in that it was in writing, signed by the prosecutor, and filed with the court; it also met all the substantive requirements for an information under Rule 23.01(b) in that it alleged the Defendant's name and specifically described the offense. The legal character of a pleading is determined by its subject matter, not its designation. Courts ignore the title and look to the substance. Here, the "felony complaint" filed within one year was, in substance, an "information" charging stealing under 570.030. Writ denied.

State v. Filbeck, 2016 WL 6804412 (Mo. App. S.D. Nov. 17, 2016):
Holding: (1) Where Defendant had been convicted at trial of felony stealing under Sec. 570.030.3(3)(j) for stealing "animal considered livestock," Defendant's conviction was a misdemeanor pursuant to *Bazell*, and his conviction must be reversed and remanded for misdemeanor sentencing; but (2) even though Defendant claimed his conviction should be dismissed because he was not charged within the one-year statute of limitations for a misdemeanor, Sec. 556.036.2, Defendant waived this claim by not raising it in the trial court.

State v. Seymour, 570 S.W.3d 638 (Mo. App. W.D. March 26, 2019):
Holding: (1) Even though, at the conclusion of trial, court grant judgment of acquittal on grounds that the statute of limitations had expired, State could appeal without violating Double Jeopardy because the acquittal was not based on Defendant's factual guilt or innocence; and (2) where (a) the Labor and Industrial Relations' Fraud and Noncompliance Unit began investigating Defendant's lack of worker's comp insurance in February 2014 but then inexplicably stopped the investigation for months before referring the matter to the Attorney General in June 2014, and (b) the Attorney General filed the charge of failure to maintain worker's comp insurance in May 2017, the charge was barred by the three-year statute of limitations in Sec. 287.128.11 which requires a charge be brought within three years of "discovery of the offense."

Discussion: This case turns on the meaning of "discovery of the offense." This is determined by an objective standard. So long as an ongoing investigation is objectively reasonable, the statute of limitations will not begin to run until the investigation is complete. But here the Fraud Unit discovered the violation in February 2014 and inexplicably stopped the investigation for several months. Thus, the time taken to complete the investigation was not objectively reasonable. Thus, the accrual period began in February 2014, and the charge filed in May 2017 was more than three years later.

State v. McMillian, 2016 WL 6081923 (Mo. App. W.D. Oct. 18, 2016):
Holding: Where Defendant was charged with felony stealing over $500, Sec. 570.030.3, more than one year after the offense, the offense was a misdemeanor under *Bazell*, so the one-year statute of limitations for misdemeanors applies, and the case must be dismissed.
Discussion: The State argues that *Bazell* does not apply to stealing over $500. The State is wrong. *Bazell* found that Sec. 570.030.1 does not contain as an element "the value of property or services." Sec. 570.030.3 applies *only* where "the value of property or services is an element." The State claims *Bazell* doesn't apply since the verdict director for the enhanced offense includes value over $500 as an element. But what a verdict director incorporates as an element of the offense is inconsequential, since the law does not provide for the enhancement. Since by law Defendant's offense was only a misdemeanor, the one-year statute of limitations for misdemeanors, Sec. 566.036.2, applied. Even though the trial court dismissed the charge on other grounds, if the trial court reaches the correct result but for the wrong reason, the appellate court can affirm. Trial court's dismissal of indictment affirmed.

State v. Frese, 2016 WL 1579071 (Mo. App. W.D. April 19, 2016):
Holding: Statute of limitations for failing to have worker's comp insurance, Sec. 287.128.11, begins to run when State investigators discover the violation, not when a later probable cause statement may be prepared or when the Attorney General is informed of the violation.
Discussion: Sec. 287.128.8 provides that the worker's comp Fraud Unit shall investigate noncompliance with the worker's comp law, and further provides that the attorney general may prosecute violations. Sec. 287.128.11 provides that prosecution for violations of the worker's comp law shall be commenced within three years "after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party." Reading the statutes together, the statute of limitations begins to run when the Fraud Unit discovers the violation, not when a later probable cause statement is prepared or the case referred to the Attorney General. If the limitations period did not begin until the case was referred to the Attorney General, then a discovered violation could sit dormant indefinitely until the Attorney General was informed. Thus, the relevant date is when State investigators discovery the violation. Here the statute of limitation had run by the time the prosecution was commenced.

* **U.S. v. Briggs, ___ U.S. ___, 141 S.Ct. 467 (U.S. Dec. 10, 2020):**
Holding: Under the Uniform Code of Military Justice, there is no statute of limitations for prosecution of rape, i.e., prosecution can be brought at any time after the offense.

* **McDonough v. Smith, 2019 WL 2527474, ___ U.S. ___ (U.S. June 20, 2019):**
Holding: The statute of limitations for a §1983 suit against a prosecutor for fabricating evidence begins to run when the plaintiff's prosecution is terminated in plaintiff's favor by acquittal or invalidation of conviction.

*** Musacchio v. United States, 2016 WL 280757, ___ U.S. ___ (U.S. Jan. 25, 2016):**
Holding: (1) Even though a jury instruction contains an extra element, sufficiency of the evidence should be assessed only against the statutory elements of the charged crime; (2) a statute-of-limitations defense under 18 U.S.C. Sec. 3282(a), the general federal criminal statute of limitations, cannot be raised for the first time on appeal; it must have been raised in the district court in order to be considered on appeal; the issue cannot be considered as plain error.

U.S. v. Tavarez-Levario, 2015 WL 3540743 (5th Cir. 2015):
Holding: Crime of knowing use of counterfeit immigration documents (social security and green cards) to obtain employment is not a continuing offense; thus, the five-year statute of limitations began to run when Defendant used the fake cards to obtain employment, even though Defendant's employment continued afterwards; the use of the fake documents was a single, one-time event, not an ongoing criminal activity.

State v. Swebilius, 101 Crim. L. Rep. 206 (Conn. 5/30/17):
Holding: Where an arrest warrant was issued 19 days before statute of limitations on crime expired, but police did not serve the warrant until 13 days after the period expired, State had burden to show that delay in executing the arrest warrant was justified to avoid dismissal of case.

State v. Walden, 2015 WL 6553037 (Iowa 2015):
Holding: The 3-year general statute of limitations for felonies applies to charge of kidnapping with intent to commit sexual assault, not the longer limitations period for sexual abuse offenses; kidnapping was not listed as an exception to the 3-year period.

State v. Baxter, 2015 WL 5554645 (Ga. App. 2015):
Holding: Statutory time limit of 180 days for State to obtain an indictment of a juvenile was a mandatory requirement that could not be waived by the juvenile, since statute uses the word "shall."

Statutes – Constitutionality -- Interpretation – Vagueness

State v. Barnett, 2020 WL 1861732 (Mo. banc April 14, 2020):
Holding: Sec. 565.020, which mandates life without parole for first-degree murder, is not unconstitutional as applied to Defendant, who was 19 years old at the time of his offense; the U.S. Supreme Court's jurisprudence on the necessity to consider mitigating circumstances for juveniles before sentencing them to life in prison without parole applies only to persons younger than 18 years old.

State v. Shaw, 2019 WL 6710411 (Mo. banc Dec. 10, 2019):
Proof of resisting arrest, Sec. 575.150.1, requires only that the State show that Defendant resisted arrest for an offense and that that offense constituted a felony as a matter of law; the statute does not require proof that Officer subjectively contemplated arresting Defendant for a felony; cases to the contrary are overruled.
Facts: Defendant got into a fight at a church. Officer and other parishioners struggled with Defendant, and he was arrested. Defendant was charged with first-degree assault on a parishioner and resisting arrest. Officer testified at trial he arrested Defendant for "attempted assault on me." Defendant was convicted of assault on the parishioner and resisting arrest.
Holding: Defendant claims the evidence is insufficient to support felony resisting arrest because State didn't prove that Officer subjectively contemplated arresting Defendant for a felony offense at the time of the arrest. Sec. 575.150.5(1) enhances resisting arrest from a misdemeanor to felony if the person resisting an arrest "for" a felony. This means an offense that legally constitutes a felony. This is purely a question of law for the court, not fact-finder to determine. The statute enhances resisting to a felony if the State shows Defendant resisted Officer's attempt to make an arrest "because of" or "on account" of an offense, and the offense constitutes a felony as a matter of law. The statute does not require the State to produce evidence of Officer's subjective understanding of the specific offense prompting the arrest, or Officer's subjective understanding of whether that offense was a felony or misdemeanor. All the statute requires is for the State to establish to the fact-finder that Defendant resisted an arrest. It is then up to the court, not the fact-finder, to determine whether the offense constitutes a felony as a matter of law. The Officer's subjective understanding might aid the fact-finder in determining if Defendant was arrested "because of" or "on account of" an offense, but the subjective understanding has no bearing on whether resisting is a felony or misdemeanor. Cases which relied on the subjective intent of Officer are overruled.

Alpert v. State, 543 S.W.3d 589 (Mo. banc April 3, 2018):
Holding: (1) Even though Petitioner (who had been convicted of felonies and wanted to possess firearms) had not been charged with violation of Sec. 571.070, his declaratory judgment action that Sec. 571.070 was unconstitutional as applied to him was "ripe" because he need not violate the law and subject himself to prosecution in order to assert a constitutional claim for declaratory relief; but (2) even though Petitioner had been convicted of felonies in the 1970s, and in 1983 had had his rights to possess a firearm restored by the Attorney General under 18 U.S.C. 925(c), Sec. 571.070 (2008) makes it

unlawful for anyone convicted of a felony to possess a firearm, and this does not violate Mo. Const. Art. I, Sec. 23, or the Second Amendment.

State v. Williams, 2018 WL 2016084 (Mo. banc May 1, 2018):
Holding: (1) Mo. Const. Art. I, Sec. 18(c), allowing propensity evidence in child sex cases, does not violate due process because federal and state courts have historically allowed propensity evidence in sex cases with the protection that a trial court can exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice; (2) a trial court is not required to make an express finding on-the-record that evidence is more probative than prejudicial, where the record indicates a sound basis for the trial court's actions (indicating that a balancing occurred); (3) a trial court should consider a variety of factors in conducting a balancing test, including the similarity of prior acts; the lapse in time between the prior acts and the charged offense; the State's need for the prior act evidence to prove its case; and the amount of time the State spends at trial proving the prior act; and (4) trial court did not abuse discretion in admitting, by stipulation, evidence that Defendant had previously been convicted of a child sex offense; the use of the stipulation limited the prejudice of the prior offense more than, e.g., having the prior victim testify.

State v. Shanklin, 534 S.W.3d 240 (Mo. banc Dec. 5, 2017):
Holding: The right to farm amendment, Art. I, Sec. 35, does not create a new constitutional right to cultivate marijuana or render unconstitutional the state's laws against producing marijuana.

State v. Johnson, 524 S.W.3d 505 (Mo. banc Aug. 22, 2017):
(1) The predatory sexual offender statute, Sec. 558.018.5(3), allows a defendant to be found to be a predatory sexual offender based on committing acts against more than one victim in the charged offense; the acts need not be prior to the charged offense; (2) even though the statute allows a judge to find a defendant to be a predatory sexual offender for current acts, this does not necessarily render the statute unconstitutional as violating the Sixth Amendment right to a jury finding of predicate facts necessary to increase punishment, where the jury also convicts based on more than one victim; however, the statute may be unconstitutional, as applied, if the jury does not convict based on multiple victims; and (3) even though the trial court violated the timing requirements of Sec. 558.021.2 by not finding the Defendant to be a predatory sexual offender before the case was submitted to a jury, this was not plain error where Defendant had waived jury sentencing before trial.
Facts: Defendant was charged with various sex offenses against three children. The State charged him with being a "predatory sexual offender" under Sec. 558.018.5(3), because he "[h]as committed an act or acts against more than one victim" in the instant offense. Defendant argued the statute applies only to prior acts, not acts that form the basis for the current offense. The State sought to have the trial court find Defendant to be a predatory sexual offender before the case was submitted to the jury, but the trial court initially agreed with Defendant's interpretation of the statute and denied the State's request. At sentencing, the State again requested that Defendant be found to be a predatory sexual offender. The trial court then agreed with the State's interpretation of

the statute, and found and sentenced Defendant as a predatory sexual offender to life in prison without parole for 25 years.

Holding: (1) Regarding Defendant's claim that the statute only applies to prior offenses, this is belied by the plain language of Sec. 558.018.5(3), which declares a person to be predatory sexual offender if they have "committed an act or acts against more than one victim." The statue is unambiguous. Nowhere does subdivision 3 refer to "prior" or "previous" acts. Those are dealt with in Sec. 558.018.5(2). (2) Defendant claims the statute is unconstitutional under *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013), which requires that any fact, other than prior conviction, that increases the penalty for a crime must be submitted to the jury and determined by the jury. Here, however, both the judge and jury found the necessary facts of acts committed against more than one victim. *Alleyne* held only that the jury must find the necessary facts, not that a statute may not require a trial court to also find the facts. The trial court's pre-submission findings of predicate facts does not necessarily preclude the jury from also having to later find the same predicate facts. If either the circuit court or jury would fail to find the required facts, the defendant could not be sentenced as a predatory sexual offender. That the statute could be unconstitutional *as applied* when the jury does not also find the predicate facts does not render it facially unconstitutional. (3) The trial court violated the timing requirements of Sec. 558.021.2 because it did not find Defendant was a predatory sexual offender before the case was submitted to the jury, as required by Sec. 558.021.2. However, because Defendant did not object to violation of the timing requirements, this can only be reviewed for plain error. Here, no manifest injustice resulted from the violation of the timing requirements. The trial court's error did not deprive Defendant of any possible benefit of jury sentencing (because he waived jury sentencing prior to trial), did not give the State an unfair advantage, and did not lack foundational support in the evidence. Sentence as predatory sexual offender affirmed.

Concurring opinion: Judge Breckenridge would find that Sec. 558.018.5(3) is unconstitutional under *Alleyne*, as applied, when used to classify a defendant as a predatory sexual offender based on acts committed against multiple victims for which the defendant has not been previously convicted, as occurred here. However, under the facts here, she would not reverse for the *Alleyne* error.

Dissenting opinion: Judges Stith and Draper would reverse the sentence because of the violation of the timing requirements of 558.021.2, and because allowing a trial judge to designate a defendant as a predatory sexual offender based on current acts against multiple victims violates *Alleyne*. The majority's holding means the enhanced mandatory minimum applies in every case with more than one victim, since it requires trial judges to make the predatory sexual offender finding before submission to the jury. If the judge does not so find, the judge would have to refuse to submit the charges to the jury at all and instead submit a judgment of acquittal on them. This is because the defendant could not be convicted of an act based on evidence insufficient to support such a finding. For each charge submitted, the defendant would either be acquitted and so subject to no sentence, or be convicted and automatically subject to the enhanced mandatory minimum. The one thing that will *never* happen is for the defendant to receive the sentence actually prescribed by the statute based on the jury's verdict. This cannot be what the legislature intended.

State v. Bazell, 2016 WL 4444392 (Mo. banc Aug. 23, 2016):
Sec. 570.030.3 does not enhance any of its stealing provisions to a felony because it only applies to "offenses in which the value of property or services is an element," and the stealing statute, Sec. 570.030.1, does not include the value of property or services appropriated as an "element."
Facts: Defendant was convicted of felony stealing from theft of two firearms during a burglary.
Holding: Sec. 570.030.3(3)(d) provides that "*any offense in which the value of property or services is an element* is a class C felony if … the property appropriated consists of … any firearms." Under Sec. 570.030.1 a person commits the crime of stealing "if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." The definition of stealing in Sec. 570.030.1 does not include "the value of property or services appropriated" as an *element* of the offense. Thus, enhancement pursuant to Sec. 570.030.3 does not apply to Defendant's convictions for stealing firearms. The offenses must be classified as misdemeanors. Reversed and remanded for sentencing as misdemeanors.

Editor's Note: This opinion clearly invalidates *all* of the felony stealing enhancements in Sec. 570.030.3(1), (2) and (3), and the enhancement in 570.030.8, because it also contains the "value of property or services is an element" language. The opinion's effect – if any -- on Secs. 570.030.6 and .7 (which refer to Sec. 570.030) is uncertain.

Hill v. Boyer, Sheriff of Jefferson County, 2016 WL 502881 (Mo. banc Feb. 9, 2016):
Holding: (1) Where Petitioner had been convicted of a felony in 1973, he was not eligible for a concealed carry permit under Sec. 571.101.2(3) because he had "pled guilty to" a felony, even though his civil rights had been "restored" pursuant to a 1975 statute; the "restoration" of rights did not negate the fact that he had pled guilty to a felony; and (2) Petitioner was not subject to an unconstitutional retrospective law under Art. I, Sec. 13 of the Missouri Constitution because the concealed carry permit law does not create a new legal "disability" or impose any affirmative duty on Petitioner, but merely takes prior conduct into account in determining whether a person can have a permit; in the 1970s, when Petitioner had his civil rights "restored," it was a violation of Missouri law to carry a concealed weapon; Missouri did not permit carrying a concealed weapon with a permit until 2003.

State v. Clay, 2016 WL 503216 (Mo. banc Feb. 9, 2016):
Amendment 5 (the "gun amendment" to Article I, Sec. 23) does not prohibit the Legislature from banning nonviolent felons from possessing guns.
Facts: In 2015, Defendant, who had a prior nonviolent felony conviction, was charged with unlawful possession of a firearm in violation of Sec. 571.070.1(1). The trial court dismissed the charge under the amended version of Article I, Sec. 23. The State appealed.
Holding: Restrictions on the right of felons to possess guns have long been recognized as an exception to the right to bear arms. Amendment 5 did not substantially change Article I, Sec. 23, but simply was an expression or declaration of existing rights. The amendment simply enshrined the status quo as to the right to bear arms. The amendment

did not bar the Legislature from adopting laws regulating the possession of guns by nonviolent felons. Even though Amendment 5 requires strict scrutiny of gun laws, laws against nonviolent felons' possession of guns survive strict scrutiny because they are narrowly tailored to serve a compelling government interest in public safety.

State v. Robinson, 479 S.W.3d 621 (Mo. banc Feb. 9, 2016):
Holding: The applicable version of Article I, Sec. 23 (the "gun amendment") is the one in effect at the time of the charged crime; thus, Supreme Court does not address the merits of Defendant's argument that Amendment 5, which took effect after the charged crimes, prohibits the Legislature from banning nonviolent felons from possessing guns.

State v. S.F., 2016 WL 1019211 (Mo. banc March 15, 2016):
Holding: (1) Sec. 191.677, which prohibits recklessly exposing another person to HIV without that person's consent, does not violate the First Amendment because it does not compel disclosure; instead, the statute prevents conduct that could spread HIV to nonconsenting persons; while people may have to disclose their HIV status if they choose to engage in activities covered by the statute, any speech compelled is incidental to the statute's regulation of the targeted conduct; and (2) Sec. 191.677 does not violate a fundamental right to privacy, because it does not criminalize consensual, *non-harmful* sexual conduct; instead, the statute regulates only sexual conduct that would expose another person to a life-jeopardizing disease when that person has not given consent.

Townsend v. Jefferson Cnty. Sheriff's Dep't., 2020 WL 1921075 (Mo. App. E.D. April 21, 2020):
Holding: (1) Even though (a) Sec. 571.101.2(3)'s exception for obtaining a concealed weapon permit states that a prior crime that is classified as a misdemeanor in another state does not disqualify an applicant, and (b) some states classify nonsupport as a misdemeanor, where Petitioner had been convicted in Missouri of *felony* non-support, he was not eligible for a permit. (2) Even though Petitioner had received a pardon from the Governor for his felony nonsupport conviction, Petitioner was not eligible for a permit because the pardon did not remove the "fact" of his prior guilty plea.

State v. Jones, 2020 WL 890999 (Mo. App. E.D. Feb. 25, 2020):
Holding: Offense of abuse of child resulting in death can serve as predicate offense to support second-degree felony murder; Defendant's conviction for both offenses does not violate felony-murder statute, the merger doctrine, or Double Jeopardy.

State ex rel. Gardner v. Carmody, 2020 WL 7034421 (Mo. App. E.D. Dec. 1, 2020):
Holding: Even though Attorney who was appointed as "special prosecutor" in case assigned his Attorney-children (who were members of his law firm) to help prosecute the case, Attorney did not violate Missouri's constitutional ban on nepotism, because a trial court has inherent and statutory authority to appoint more than one attorney, including an entire law firm, as "special prosecutors" on a case; here, the court expressly appointed

Attorney "*and*" his named law firm (which included the Attorney-children) as the "special prosecutor."

State v. Byington, 2019 WL 1120269 (Mo. App. E.D. March 12, 2019):
Holding: (1) In case of first-impression, "intent to defraud" under the lien fraud statute, Sec. 429.014, means the intent to defraud a subcontractor, materialman, supplier or laborer; thus, where Defendant-Contractor took money from Homeowner allegedly to buy drywall at Store, but Defendant never paid Store, the "intent to defraud" must be of Store, which had placed a lien on Homeowner's house for non-payment of the drywall; but (2) the evidence here was sufficient to show Defendant-Contractor intended to defraud Store.

Bennett v. St. Louis County, 2017 WL 7038175 (Mo. App. E.D. Dec. 19, 2017):
Holding: Ordinance which made it unlawful for any person "to interfere in any manner with a police officer … in the performance of his official duties or to obstruct him in any manner whatsoever while performing any duty" was not unconstitutionally vague or overbroad.

State v. Clark, 524 S.W.3d 609 (Mo. App. E.D. Aug. 15, 2017):
Holding: Defendant's claim that the 2008 version of Sec. 571.070 (unlawful possession of firearm) in House Bill 2034 violated Art. III, Sec. 21's original purpose provision and Art. III, Sec. 23's prohibition on a bill containing more than one subject was moot, because the 2008 version was repealed in 2010 in House Bill 1692 and replaced with a new Sec. 571.070, under which Defendant was charged in 2015.

State v. Harding, 2017 WL 1485564 (Mo. App. E.D. April 25, 2017):
A felon-in-possession felony can serve as the underlying felony for the offense of felony murder because Sec. 565.021.1(2) provides that a person commits felony murder if he commits "any" felony in which a person is killed, but a court must still apply a foreseeability-proximate cause analysis to the underlying felony in order to sustain a conviction.
Facts: Defendant, who had previously been convicted of a felony, owned a gun that was kept between couch cushions. He got into an argument with his girlfriend. She grabbed the gun. They struggled for control of the gun, and it fired, killing the girlfriend. Defendant was charged with felony murder, with the underlying felony being a felon-in-possession.
Holding: Whether a felon-in-possession felony can support felony murder is a matter of first impression in Missouri. Sec. 565.021.1(2) provides that a person commits felony murder if he commits or attempts to commit "any" felony, and in the perpetration thereof, another person is killed as a result. The use of the word "any" indicates that the legislature intended "every" felony to serve as the underlying felony. Thus, felon-in-possession can serve as the underlying felony. But a court must still apply a "foreseeability-proximate cause" concept to the underlying felony. A defendant may be responsible for any death that is the natural and proximate result of the crime unless there is an intervening cause of that death. To test causation, courts look at the underlying felony, as well as all the facts of the particular case. A death is foreseeable if the

underlying felony and killing were part of a continuous transaction, closely connected in time, place and causal relation. Under the facts here, a rational juror could find that Defendant's unlawful possession of a firearm was the proximate cause of death, because he knew he was not allowed to own a gun, but he bought one "off the street" and kept it at home, in a couch, where he knew he and Victim were prone to argue. It is Defendant's fault that this gun became part of the altercation that resulted in Victim's death; it was completely foreseeable that such an incident would occur. Evidence was sufficient to convict.

State v. McCord, 2020 WL 1873237 (Mo. App. S.D. April 15, 2020):
Holding: In case of first impression, Sec. 566.147.1 (2016) -- which prohibits a sex offender from living within 1,000 feet of a school -- measures distance from school's property line to Defendant's property line; thus, even though the school building may have been more than 1,000 feet from Defendant's house or outbuilding in which Defendant lived, the evidence was sufficient to convict where Defendant's property line was within 1,000 feet of the school's property line.
Discussion: A common sense understanding of the word "school" includes not only the physical building but also the grounds. Likewise, a common sense understanding of the location where a sex offender resides includes not only the house, but the yard. The property lines of the school and Defendant's residence best define the places of concern to the legislature in keeping offenders away from schools. Thus, the statutorily prescribed minimum distance between the school and the location where a sex offender may reside is measured from property line to property line. This conclusion is consistent with the 2018 amendment to Sec. 566.147 that requires the minimum distance be from the "edge of the offender's property nearest" the school to the "nearest edge" of the school.

State ex rel. Patterson v. Holden, 2019 WL 4439486 (Mo. App. S.D. September 17, 2019):
Holding: Where circuit judge unilaterally established a "Domestic Abuse" "treatment court" and ordered Defendants to participate in it as part of their sentence, this was unauthorized under Secs. 478.001 to 478.009 (governing creation of treatment courts) and local court rules, which generally require that such courts be created by a majority of judges in the circuit and certain judges be designated by that majority to preside over the courts.

State v. Champagne, 561 S.W.3d 869 (Mo. App. S.D. Oct. 17, 2018):
Holding: Even though Defendant had one of three brake lights on her car which was operable, this violated Sec. 304.019.1(4) which language regarding "a signal light" requires that all lights be operable, and trial court erred in finding the stop was invalid.

State v. Shaw, 535 S.W.3d 391 (Mo. App. S.D. Dec. 12, 2017):
Holding: Even though Sec. 565.050 provides that a person commits the Class B felony of first degree assault if he "attempts" to cause serious physical injury, the use of the "attempt" language does not make the offense of first degree assault punishable under the

general attempt statute, Sec. 564.011, which would lower the offense to a Class C felony; Sec. 565.050 makes the attempted crime have the same punishment as the completed crime.

State v. Gilmore, 2016 WL 4942437 (Mo. App. S.D. Sept. 16, 2016):
Holding: Sec. 302.321.2 enhances a driving while revoked charge from a felony to a misdemeanor if the Defendant has a "fourth or subsequent conviction for *any other offense*," which includes prior misdemeanors of any sort; the plain language fails to indicate any legislative intent to limit the term "offense" to only prior felony offenses; thus, Defendant's DWR offense was enhanced to a felony where he had five prior misdemeanor offenses for various offenses.

R.F. v. Owen, 2020 WL 1150286 (Mo. Ap. W.D. March 10, 2020):
Holding: Even though Sec. 571.101.2 disqualifies a person from getting a concealed carry permit if they have a prior felony conviction, where Petitioner subsequently had his conviction expunged under Sec. 610.140, Petitioner was not "automatically" disqualified but Sec. 610.140.9 specifically allows a Sheriff to use an expunged offense as "a factor" to consider in whether to grant or deny a permit.

State v. Fikes, 2019 WL 7340515 (Mo. App. W.D. Dec. 31, 2019):
Even though Defendant (mistakenly) did not "know" he had a prior felony conviction because he had received a suspended execution of sentence (SES) for it, the knowledge element for felon-in-possession, Sec. 571.070, goes to knowingly possessing the gun, not knowing of the prior felony conviction.
Facts: Defendant was found during a traffic stop with a gun. He told police he did not have a prior felony conviction, because he had received an SES in a prior felony case. At his later felon-in-possession trial, he claimed the evidence was insufficient to convict because he didn't know he was a felon.
Discussion: Unlike a suspended imposition of sentence (SIS), which is not a conviction under Missouri law, a suspended execution of sentence (SES) is. Defendant claims the State failed to prove he knowingly violated Sec. 571.070, because he didn't know his prior SES was a felony conviction. The elements of unlawful possession are (1) knowing possession of a firearm, (2) by a person who has been convicted of a felony. The "knowingly" mental state applies only to the possession element, not the fact of a prior felony conviction. Defendant cites *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019), which held that under federal statute, a defendant has to both knowingly possess the firearm and know of their prohibited status. But Missouri statute is different.

State v. Fanning, 2018 WL 3539849 (Mo. App. W.D. July 24, 2018):
Holding: Sec. 167.031.1 is not ambiguous as to whether a parent's failure to cause a child between the ages of seven and 16 to regularly attend school is a misdemeanor; trial court erred in finding the statute ambiguous and dismissing the charge against Defendant-Parent.

State v. Crider, 2018 WL 2304163 (Mo. App. W.D. May 22, 2018):
Holding: Even though Sec. 1.205.1(1) states that life begins at conception, the "age" of a victim in a child sex case is determined by the victim's date of birth, not conception date; date of birth is the traditional meaning of a person's "age" and can be determined with certainty, unlike date of conception.

Stallsworth v. Sheriff of Jackson County, 2016 WL 3069427 (Mo. App. W.D. May 31, 2016):
Holding: (1) Even though Petitioner for concealed gun permit had received a pardon from the Governor for a prior guilty plea to a felony, he was not eligible for a permit because Sec. 571.101.2(3) disqualifies a person who has "pled guilty … *or* been convicted" of a felony; the pardon eliminated the conviction, but did not eliminate the fact that Petitioner previously "pled guilty"; and (2) Even though this outcome creates a disparity whereby pardoned persons who "pled guilty" cannot obtain permits but pardoned persons convicted after a trial can, this disparity was created by the Supreme Court's opinion in *Hill v. Boyer*, 480 S.W.3d 311 (Mo. banc 2016), and the Western District is bound to follow that decision.

* **McGirt v. Oklahoma, ___ U.S. ___, 140 S.Ct. 2452 (July 9, 2020):**
Holding: Land in Oklahoma given to Creek Nation (including much of Tulsa) is "Indian country," and Native-Americans within it can be prosecuted under federal law only; State lacked jurisdiction to prosecute Native-American Defendant for state sex offense.

*** Kelly v. U.S., ___ U.S. ___, 140 S.Ct. 1565 (U.S. May 7, 2020):**
Holding: The federal wire fraud and program fraud statutes, 18 USC Secs. 1343 and 666(a)(1)(A), only prohibit government officials from taking public money and property; they do not prohibit general government dishonesty or corruption; thus, defendant-employees of Governor did not violate statutes by closing off bridge lanes to cause traffic backups in town whose Mayor did not support Governor's reelection.

* **Kansas v. Garcia, ___ U.S. ___, 140 S.Ct. 791 (U.S. March 3, 2020):**
Holding: The Immigration Reform and Control Act, 8 U.S.C. 1324(a), does not preempt state criminal laws for identity theft and fraud for conduct related to obtaining employment; thus, even though defendant-alien could not be prosecuted under state law for providing false information on an I-9 form (because that is preempted by IRCA), defendant-alien can be prosecuted under state law for providing false information on W-4 and state tax forms in connection with obtaining employment.

*** Rehaif v. U.S., 2019 WL 2552487, ___ U.S. ___ (U.S. June 21, 2019):**
Holding: The "knowingly" element of the federal gun law, 18 USC §922(g) and 924(a)(2), that prohibits certain people – such as those convicted of felonies and aliens – from possessing firearm requires the Government to prove that a defendant both knew he possessed the firearm and knew of his relevant status when he possessed it.

*** Minnesota Voters Alliance v. Mansky, ___ U.S. ___, 138 S.Ct. 1876 (June 14, 2018):**
Holding: Even though a State may impose reasonable restrictions on speech inside polling places, statute which made it a misdemeanor to wear a "political badge, political button, or other political insignia" violated First Amendment Free Speech Clause, because it did not sufficiently define what apparel was "political" and, by being vague, failed to prevent arbitrary enforcement.

*** Marinello v. U.S., ___ U.S. ___, 138 S.Ct. 1101 (U.S. March 21, 2018):**
Holding: The Omnibus Clause of the Internal Revenue Code, 26 U.S.C. Sec. 7212(a), which makes it a felony to "corruptly or by force" "obstruct or imped[e] the due administration of this title," requires intent by a taxpayer to obstruct a particular investigation, audit or similar IRS proceeding; the Court rejected a broad interpretation of the statute, which would have made it a felony to engage in virtually any activity that improperly avoided any tax, because the broad interpretation did not give defendants fair notice of conduct that is prohibited.

*** Packingham v. North Carolina, ___ U.S. ___, 137 S.Ct. 1730 (U.S. June 19, 2017):**
Holding: Statute which made it a felony for registered sex offenders to access websites which permit minor children to become members (which, as written, might include Facebook, Twitter, Linked-In, Amazon.com, Washingtonpost.com, Webmd.com, etc.) impermissibly restricts lawful speech under First Amendment; even assuming the statute is content neutral and thus subject to intermediate scrutiny, it is not narrowly tailored to serve a significant governmental interest; while the First Amendment allows specific, narrowly tailored laws that prohibit sex offenders from engaging in conduct like contacting a minor or using a website to gather information about a minor, the statute here prohibits any access or communication whatsoever, including what for many people are principal sources for knowing current events, checking employment ads, speaking and listening in the modern public square, and exploring vast realms of human knowledge.

*** Salman v. U.S., ___ U.S. ___, 137 S.Ct. 420 (U.S. Dec. 6, 2016):**
Holding: Under Sec. 10(b) of the SEC Act, a tippee is criminally liable for trading on inside information if the tipper "personally benefitted" from disclosing the information; "personal benefit" includes not just financial benefit, but includes a "gift of confidential information to a trading relative or friend"; thus, even though tipper, who gave confidential information to family members did not personally benefit financially from giving the information, the family member (tippee-Defendant) was criminally liable for using the information to trade.

*** Shaw v. U.S., ___ U.S. ___, 137 S.Ct. 462 (U.S. Dec. 12, 2016):**
Holding: 18 U.S.C. Sec. 1344(1), which makes is a crime to "defraud a financial institution," applies to scheme in which Defendant defrauded depositors' accounts; a

scheme to fraudulently obtain funds from a bank depositor's account is a scheme to obtain property from a "financial institution."

*** United States v. Bryant, ___ U.S. ___, 136 S.Ct. 1954 (U.S. June 13, 2016):**
Holding: Prior uncounseled tribal court convictions can be used as predicate offenses to prosecute domestic violence cases involving Native American defendants in federal court under 18 U.S.C. Sec. 117(a), provided that the right-to-counsel provisions of the Indian Civil Rights Act (ICRA) were followed in the prior cases.

*** Birchfield v. North Dakota, 2016 WL 3434398, ___ U.S. ___ (U.S. June 23, 2016):**
Holding: States can criminalize refusal to take a breath test without a warrant after an arrest for drunk driving, because a breath test is categorically a search incident to arrest. However, States cannot criminalize refusal to submit to a blood test without a warrant, due to the blood test's more intrusive nature.

* **RJR Nabisco v. European Community, 2016 WL 3369423, ___ U.S. ___ (U.S. June 20, 2016):**
Holding: RICO can be applied to conduct that occurs outside the U.S., but that a private plaintiff seeking to bring a RICO claim must prove that an injury occurred domestically.

*** Voisine v. U.S., 2016 WL 3461559, ___ U.S. ___ (June 27, 2016):**
Holding: 18 U.S.C. Sec. 922(g)(9) makes it unlawful for persons convicted of misdemeanor crimes of domestic violence to possess firearms, and this includes convictions under statutes that allow for reckless (as opposed to knowing or intentional) conduct.

*** McDonnell v. U.S., 2016 WL 3461561, ___ U.S. ___ (June 27, 2016):**
Holding: The federal bribery statute, 18 U.S.C. Sec. 201, must be interpreted in a limited fashion to avoid constitutional concerns over vagueness; under the statute, a government official must take an "official act" in exchange for something of value, but an "official act" does not include merely setting up a meeting, hosting an event, or contacting another government official to talk about an issue or gather information, since these are routine matters that all government officials do and constituents request; the government official must make a decision or take an action "on" a question or matter (similar to how a court decides a question), or agree to do so, to violate the bribery statute.

*** Caetano v. Massachusetts, 2016 WL 1078932, ___ U.S. ___ (U.S. March 21, 2016):**
Holding: State law banning possession of stun guns violates Second Amendment as interpreted in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Seals v. McBee, 103 Crim. L. Rep. 459 (5th Cir. 8/3/18):
Holding: State law, which criminalized making a threat against public officials, was overbroad under First Amendment in that it not only criminalized physical threats, but also actions such as filing a lawsuit against a public official or threatening to run against them.

U.S. v. Meza-Rodriguez, 97 Crim. L. Rep. 665 (7th Cir. 8/20/15):
Holding: 2nd Amendment right to bear arms applies to illegal immigrants, not just "citizens."

U.S. v. Swisher, 2016 WL 142591 (9th Cir. 2016):
Holding: Statue prohibiting unauthorized wearing of military medals violates 1st Amendment free speech clause.

Dimaya v. Lynch, 98 Crim. L. Rep. 101 (9th Cir. 10/19/15):
Holding: The residual clause of the Immigration and Nationality Act that prohibits relief from removal for any immigrant who commits certain listed offenses or "any other offense that is a felony and that, by its nature, involves substantial risk of physical force" is unconstitutionally vague under *U.S. v. Johnson* (U.S. 2015), which struck down a similar residual clause under ACCA.

Heller v. District of Columbia, 97 Crim. L. Rep. 711 (D.C. Cir. 9/18/15):
Holding: Gun registration ordinance violated 2nd Amendment where it required gun registrants to bring their gun to police station for police inspection; required re-registration every three years; required owners pass a test about gun laws; and limited the number of guns that can be registered to one every 30 days; "[O]nce a firearm is registered, it becomes a trap for the unwary" who may fail to renew every three years because they "may not understand the requirement;" further, "re-registration serves no law enforcement purpose."

U.S. v. Arizona, 2014 WL 10987432 (D. Ariz. 2014):
Holding: Arizona statute that prohibited human smuggling was preempted by the federal Immigration and Nationality Act that also prohibits transporting aliens.

U.S. v. Jenkins, 2013 WL 3338650 (E.D. Ky. 2013):
Holding: Plain meaning of words "because of" in Hate Crimes Prevention Act means that sexual orientation of Victim is a necessary prerequisite to the assault to be a violation of the Act.

Ex parte Tulley, 2015 WL 5192182 (Ala. 2015):
Holding: Where a statute that criminalized carrying a gun on private property did not provide any punishment, the statute violated due process on its face.

Worsham v. State, 2019 WL 455814 (Ark. 2019):
Holding: Sexual-indecency-with-child statute was overbroad as applied to Defendant because it violated his right to expression under First Amendment, in that he was charged with sending sexually explicit text messages to his girlfriend about sexual conduct which would be legal.

People v. Webb, 2019 WL 1291586 (Ill. 2019):
Holding: Ban on publicly carrying stun gun violated 2nd Amendment.

City of Fort Lauderdale v. Dhar, 2016 WL 743287 (Fla. 2016):
Holding: Red-light camera statute which treated drivers who drove rental cars differently than drivers who owned their cars was unconstitutional as applied to renters; there was no rational basis for the unequal treatment, because the violation was the same.

Neptune v. Lanoue, 2015 WL 6735348 (Fla. 2015):
Holding: Even though Defendant was stalking Officer online, an injunction prohibiting Defendant from posing anything about the Officer on the internet was overly broad and violated 1st Amendment, because it went beyond prohibiting stalking to prohibiting legitimate expression about Officer's alleged police misconduct.

People v. Releford, 102 Crim. L. Rep. 230 (Ill. 11/30/17):
Holding: Cyberstalking law which punished negligently communicating "to or about" a person where the speaker knows the communication would cause a reasonable person emotional distress violated First Amendment.

Champion v. Kentucky, 100 Crim. L. Rep. 428 (Ky. 2/16/17):
Holding: Ordinance prohibiting "begins and soliciting alms" violated First Amendment free speech.

People v. Burns, 98 Crim. L. Rep. 272, 2015 WL 9227362 (Ill. 12/17/15):
Holding: Blanket ban on carrying concealed guns in public violates 2nd Amendment.

State v. Weddle, 2020 WL 424922 (Me. 2020):
Holding: Statute requiring police to test blood of all drivers involved in fatal or serious accidents without a warrant is unconstitutional.

State v. Brown, 2019 WL 1187380 (Me. 2019):
Holding: In measuring 1000 foot distance between Defendant's drug sale and school, the difference in elevation between the points must be taken into account.

State v. Hensel, 101 Crim. L. Rep. 633 (Minn. 9/13/17):
Holding: Disorderly conduct law which criminalized interfering with the "tranquility" of any gathering if a person knows they will "disturb others" violated First Amendment as overbroad; Defendant's conviction for displaying photos of dead children at city council meeting vacated.

Scott v. First Judicial Dist. Court of Nev., 98 Crim. L. Rep. 288 (Nev. 12/31/15):
Holding: An obstruction of justice ordinance which prohibited hindering, obstructing or resisting police from carrying out their official duties was unconstitutionally overbroad and vague, at least as applied to passenger who repeatedly interrupted police and told driver not to perform a field sobriety test; the ordinance criminalized speech protected by First Amendment.

State v. Shackeford, 2019 WL 1246180 (N.C. App. 2019):
Holding: Stalking statute was unconstitutional as applied to Defendant who made (unwelcomed) posts on social media that he was infatuated with woman-victim and wanted to marry her, where these posts were never sent to woman-victim.

State v. Bishop, 99 Crim. L. Rep. 345 (N.C. 6/10/16):
Holding: Internet bullying law which made it a crime to post "private, personal or sexual information" about a minor to "intimidate or torment" the minor violated 1st Amendment; law was content-based and not narrowly tailored to serve State interest in protecting children.

State v. Doyal, 2019 WL 94402 (Tex. Crim. App. 2019):
Holding: (1) Statute making it unlawful to "circumvent" the Sunshine Law was unconstitutionally vague; and (2) since the Sunshine Law only applies when there is a "quorum" at a public meeting, an attempt to avoid having a quorum can't violate the Sunshine Law.

State v. EJ.J., 2015 WL 3915760 (Wash. 2015):
Holding: Even though Defendant yelled profanity at Officer who was arresting his sister, this could not support conviction for obstructing a law enforcement officer because Defendant's words were protected by 1st Amendment.

State v. Houghton, 2015 WL 4208659 (Wis. 2015):
Holding: Statute prohibiting obstruction of windshields did not prohibit any object being present in the windshield but only those that caused material obstruction; the definition of "obstructs" indicates the object needs to have more than de minimus effect on driver's vision to be an obstruction.

State v. Butler, 101 Crim. L. Rep. 156 (W.Va. 5/9/17):
Holding: Even though Defendant assaulted two men for kissing, this did not constitute a hate crime under state law defining hate crimes based on "sex" because this meant male and female gender, not sexual orientation.

In re Chase C., 2015 WL 9254161 (Cal. App. 2015):
Holding: Even though Juvenile told other minors not to cooperate with police, and refused to identify himself when arrested, this did not constitute obstruction of justice or resisting arrest; Juvenile's verbal protests to the other minors were protected political speech under 1st Amendment, and his failure to identify himself was an assertion of silence under the 5th Amendment.

Tiplick v. State, 2015 WL 383884 (Ind. App. 2015):
Holding: The "synthetic drug" statute was unconstitutionally vague in that no person of ordinary intelligence would be able to determine what substances were prohibited; the statute listed over 60 chemical compounds and required a "Where's Waldo" expedition through the criminal code, administrative code and not-yet-codified agency rules to determine what was prohibited.

State v. Turner, 2015 WL 2456991 (Minn. App. 2015):
Holding: Criminal defamation statute was unconstitutionally overbroad because it did not make truth an absolute defense, but instead also required a showing of good motives and justifiable ends to be a defense.

State v. Barnett, 2016 WL 225216 (N.C. App. 2016):
Holding: Statute providing that court can enter a permanent "no contact" order for Victims of sexual offenses did not authorize such orders for Victims' family members.

Estes v. State, 2016 WL 1164194 (Tex. App. 2016):
Holding: Statute which enhanced the degree of felony based on whether the sexual assault-Victim was a person whom Defendant was prohibited from marrying or living with violated Equal Protection as applied to a Defendant who was married to someone else; the statute punished married Defendants more harshly than unmarried Defendants for the identical acts.

State v. Johnson, 98 Crim. L. Rep. 71, 2015 WL 5853115 (Tex. App. 10/7/15):
Holding: Statute criminalizing defacing or burning flag violated 1st Amendment.

Ex parte Perry, 2015 WL 4514696 (Tex. App. 2015):
Holding: Statute regarding coercion of a public servant violated 1st Amendment's free speech protection to the extent it was applied to Governor who was charged with coercion for acts related to his ordinary use of line-item veto.

State v. Ainsworth, 2016 WL 97416 (Utah App. 2016):
Holding: Statute which created a more serious felony for Defendants who injured or killed someone while driving under the influence of a "measurable amount" of an illegal substance violated the uniform operation of laws provision of Utah Const.; there was no rational basis for charging those with a measurable amount of drug with a higher offense than those under the influence of a non-measurable amount but who were still demonstrably impaired.

State v. Rose, 2015 WL 9203927 (Wash. App. 2015):
Holding: Even though Defendant's marijuana prosecution was pending when voter-approved initiative took effect which legalized marijuana, the prosecution "savings statute" did not apply to allow the prosecution to proceed; by legalizing marijuana, voters were making a common law assumption that prosecutions would be "stopped" on the effective date of the legalization, not that prosecutions would be "saved" by a contrary law.

Payseno v. Kitsap County, 2015 WL 1215059 (Wash. App. 2015):
Holding: Statute which required that Defendant could have his gun rights restored "after five or more consecutive years in the community without being convicted" meant any crime-free five year period after a conviction, not the five years immediately before

applying for restoration; the rule of lenity required interpreting statute in favor of Defendant.

State v. Herrmann, 2015 WL 7432597 (Wis. App. 2015):
Holding: Statute which prohibited possession of a switchblade knife violated 2nd Amendment as applied to Defendant who possessed knife in his own home for self-defense; the statute did not serve an important Gov't interest in that the public threat of a switchblade in someone's own home was negligible, and the total ban on switchblades significantly burdened the right to bear arms.

State v. Oatman, 2015 WL 5554299 (Wis. App. 2015):
Holding: Statute prohibiting sex offenders from photographing minors without their parents' permission was overbroad under 1st Amendment; statute was not content neutral, and statute did not further any Gov't interest in protecting children, because children are not harmed by nonpornographic photos taken in public places.

Sufficiency Of Evidence

State v. Knox, 2020 WL 4592034 (Mo. banc Aug. 11, 2020):
Holding: (1) Where the jury instructions in stealing case failed to specify any value for a watch and Bluetooth speaker that were stolen, the offense is a Class D misdemeanor under Sec. 570.030.7 (which specifies value less than $150), not a Class A misdemeanor under Section 570.030.8 (which applies when "no other penalty is specified"); and (2) where Defendant was convicted of stealing $1200 in cash, this was a Class D felony under Sec. 570.030.5(1), not a Class C felony (as it was under the pre-2017 criminal code); but since Defendant's actual sentence was within the range for a Class D felony, re-sentencing is not required and the sentence can be corrected by *nunc pro tunc* order.
Discussion: The "new" Criminal Code makes stealing more than $750 but less than $25,000 a Class D felony, Sec. 570.030.5(1). The Code makes stealing less than $150 a Class D misdemeanor, Sec. 570.030.7. The Code does not specify what happens for property valued between $150 and $750, but the Code states that if "no other penalty is specified in this section," the offense is a Class A misdemeanor, Sec. 570.030.8. Regarding the stolen watch and Bluetooth, the jury wasn't instructed to find any value. The State argues that this makes the offense a Class A misdemeanor, because that was the default position under the old criminal code. But this ignores that the State bears the burden of proof on every element of the crime, and that when the legislature amends a statute, it is intended to accomplish a result. When the legislature enacted the new criminal code, it added 570.030.7 that makes stealing less than $150 a Class D misdemeanor. The State's argument would render .7 a nullity. Under the new Code, a stealing between $150 and $750 is a Class A misdemeanor because "no other penalty is specified." But here, there is a penalty specified for less than $150, and that's a Class D misdemeanor. Since the State failed to prove the element of value, the offenses here

were Class D misdemeanors. Trial court erred in entering judgments for Class A misdemeanors for stealing the watch and Bluetooth.

Hamilton v. State, 2020 WL 2029272 (Mo. banc April 28, 2020):
Where (1) before Bazell Movant pleaded guilty to felony stealing, Sec. 570.030, and received a suspended imposition of sentence, but (2) after Bazell Movant's probation was revoked and she received a 5-year sentence, Movant was entitled to Rule 24.035 relief because Bazell applied "forward" to her and Rule 24.035 allows claims that a sentence exceeds the maximum authorized by law.
Facts: In 2012, Movant pleaded guilty to felony stealing and eventually received an SIS. In 2016, *Bazell* was decided, effectively making the offense a misdemeanor. In 2017, Movant's probation was revoked and she was sentenced to 5-years. She filed a 24.035 motion challenging her sentence. The motion court denied relief on grounds that Movant should have raised this claim in a direct appeal.
Holding: The Supreme Court previously held in *Windeknecht* that *Bazell* applies to cases "pending on direct appeal" and to cases going "forward." Because Movant received an SIS, there was no conviction or final judgment until sentence was entered – which was after *Bazell*. Since *Bazell* had already been decided at the time Movant was sentenced, Movant's case is a "forward" application of *Bazell*. To the extent that the language in prior opinions is unclear, the Court "reiterates that, in stating *Bazell* applies forward, it meant that *Bazell* applies to all cases that were not yet final when *Bazell* was announced, even if already filed, tried, or subject to a plea, so long as sentence had not been entered when *Bazell* was decided, as well as to cases on direct appeal." Reversed and remanded for misdemeanor sentencing.

State v. Russell, 2020 WL 2036711 (Mo. banc April 28, 2020):
Where (1) before Bazell, Defendant pleaded guilty to felony stealing, Sec. 570.030, and received a suspended imposition of sentence, but (2) after Bazell, when the State sought revocation, he timely objected to felony sentencing but received a 7-year sentence anyway, Defendant can raise this error on direct appeal because Sec. 547.070 authorizes a direct appeal of final judgments, and Bazell applied forward to his case. Remanded for misdemeanor sentencing.
Facts: In 2013, Defendant pleaded guilty to felony stealing and received an SIS. In 2016, *Bazell* was decided, effectively making the offense a misdemeanor. In 2017, the State sought to revoke Defendant's probation. At his sentencing, Defendant timely asserted that *Bazell* required misdemeanor sentencing and objected to felony-level sentencing. The court imposed a 7-year sentence. Defendant filed a direct appeal.
Holding: The State argues that Defendant cannot do a direct appeal of a guilty plea, and that his sole remedy, if any, was under Rule 24.035 for imposing an excessive sentence. The right of appeal is statutory. Sec. 547.070 provides a direct appeal in all cases of final judgment. This statutory language does not prohibit the right of appeal after guilty pleas, and neither can the Supreme Court, because Mo. Const. Art. V, Sec. 5, prohibits the Court from enacting Rules that change substantive rights "or the right of appeal." Rule 24.035 does not purport to change the right of appeal. It simply provides that procedure for seeking relief from an excessive sentence *in the sentencing court*. Rule 24.035 does not say – and the Court could not adopt a rule that says – this procedure

supplants the statutory right to direct appeal. This Court has previously stated that *Bazell* applies "forward" and the "appropriate remedy is a direct appeal." Defendant raised his *Bazell* claim after *Bazell* – i.e., forward – and he pursued a direct appeal. While Defendant could have waived his claim by not objecting at his sentencing, here, he did object and fully preserved his *Bazell* issue for appeal. Judgment reversed and remanded for sentencing as misdemeanor.

State v. Golden, 608 S.W.3d 182 (Mo. banc Oct. 13, 2020):
Holding: Even though Defendant pleaded guilty to felony stealing in 2014 (before *Bazell*), where he (1) received a Suspended Imposition of Sentence (SIS); (2) did not have his probation revoked until after *Bazell*; and (3) objected to sentencing to a 4-year sentence and filed a direct appeal, Defendant should have only been sentenced to a misdemeanor because *Bazell* applies to cases where a guilty plea had been entered but sentence had not yet been imposed.

State v. Shaw, 2019 WL 6710411 (Mo. banc Dec. 10, 2019):
Proof of resisting arrest, Sec. 575.150.1, requires only that the State show that Defendant resisted arrest for an offense and that that offense constituted a felony as a matter of law; the statute does not require proof that Officer subjectively contemplated arresting Defendant for a felony; cases to the contrary are overruled.
Facts: Defendant got into a fight at a church. Officer and other parishioners struggled with Defendant, and he was arrested. Defendant was charged with first-degree assault on a parishioner and resisting arrest. Officer testified at trial he arrested Defendant for "attempted assault on me." Defendant was convicted of assault on the parishioner and resisting arrest.
Holding: Defendant claims the evidence is insufficient to support felony resisting arrest because State didn't prove that Officer subjectively contemplated arresting Defendant for a felony offense at the time of the arrest. Sec. 575.150.5(1) enhances resisting arrest from a misdemeanor to felony if the person resisting an arrest "for" a felony. This means an offense that legally constitutes a felony. This is purely a question of law for the court, not fact-finder to determine. The statute enhances resisting to a felony if the State shows Defendant resisted Officer's attempt to make an arrest "because of" or "on account" of an offense, and the offense constitutes a felony as a matter of law. The statute does not require the State to produce evidence of Officer's subjective understanding of the specific offense prompting the arrest, or Officer's subjective understanding of whether that offense was a felony or misdemeanor. All the statute requires is for the State to establish to the fact-finder that Defendant resisted an arrest. It is then up to the court, not the fact-finder, to determine whether the offense constitutes a felony as a matter of law. The Officer's subjective understanding might aid the fact-finder in determining if Defendant was arrested "because of" or "on account of" an offense, but the subjective understanding has no bearing on whether resisting is a felony or misdemeanor. Cases which relied on the subjective intent of Officer are overruled.

State v. Stewart, 560 S.W.3d 531 (Mo. banc Nov. 20, 2018):
Holding: (1) Even though domestic assault Victim did not testify she "feared" Defendant (who shot gun at ceiling), definition of "apprehension" in Sec. 565.074.1 is

defined using a dictionary, and requires only that Victim perceive, comprehend or conceive of immediate physical injury (which shooting a gun at a ceiling would cause); "apprehension" does not require proof of "fear"; and (2) even though Defendant-former Husband had an ownership interest in the house and was living in a camper outside the house, evidence was sufficient to convict him of burglary for being inside the house, Sec. 569.010, because his "license" or "privilege" to be inside the house was revoked when he and Victim (ex-Wife) had previously agreed he would move out, and Defendant ignored Victim's demand that he leave the house during the shooting incident.

State v. Ajak, 543 S.W.3d 43 (Mo. banc April 3, 2018):

Even though after Defendant was handcuffed he struggled with and spat at Officers, evidence was insufficient to convict of resisting arrest, Sec. 575.150, because the arrest was effected once he was handcuffed.

Facts: Police responded to a domestic disturbance at a house. Officers handcuffed Defendant in the kitchen and put him in a chair. Officers then told him he was under arrest and they were taking him to jail. While Defendant was being escorted to the patrol car, he yelled at officers, struggled with them, and spat at them. Defendant was convicted of resisting arrest.

Holding: Sec. 575.150 provides that a person resists arrest when they "prevent[] the officer from effecting the arrest." Defendant argues the arrest was complete when Defendant was handcuffed in the kitchen. The State argues that arrest is a continuing process that wasn't complete until Defendant was placed in the patrol car. However, Sec. 544.180 defines arrest as "an *actual restraint* of the person of the defendant, or by his submission to the custody." The State argues this merely provides "guidance" about what an arrest can be. The legislature does not adopt "guidance" but rather law. The definition in 544.180 would have little or no purpose unless it was to govern prosecution of the crimes set out in the criminal code that follows. The key factor is whether evidence showed Defendant under "actual restraint." Case law does not support the State's narrow interpretation of "actual restraint" to mean that Defendant had to be put in the patrol car for the arrest to be effected. The critical element in determining whether the arrest had been effected is whether the officer had control over the Defendant's movements. This occurred when Defendant was handcuffed in the kitchen. The State could have charged Defendant with attempted escape from custody, but it did not. Conviction for resisting arrest reversed.

State v. Rohra, 545 S.W.3d 344 (Mo. banc May 1, 2018):

Holding: Where (1) the information charged Defendant with unlawful possession of a firearm because he had a prior felony "conviction," and (2) Defendant pleaded guilty to unlawful possession of a firearm, Defendant, by pleading guilty, waived his argument that the prior felony did not count as a "conviction" because it was a deferred prosecution under Oklahoma law; and (2) even though a direct appeal from a guilty plea lies if the charging document is insufficient, Defendant's claim on appeal is not a challenge to the sufficiency of the information but is a substantive legal argument over the meaning of the word "conviction" in Sec. 571.070, which was waived by the guilty plea.

State v. Gilmore, 537 S.W.3d 342 (Mo. banc Jan. 16, 2018):
Holding: Even though (1) Defendant (female) was at a trailer where meth was found in a medicine cabinet; (2) Defendant admitted using marijuana at the trailer; (3) Defendant had a message on her phone about selling marijuana; (4) Defendant was a regular visitor to the trailer; and (5) an eyelash curler was found in the medicine cabinet, evidence was insufficient to convict of possession of meth where Defendant did not own the trailer; did not live there; had no personal belongings there; and there was no meth plainly visible in the trailer.
Discussion: Possession requires both a guilty mind or intent and an act of control, i.e., (1) conscious and intentional possession, and (2) possession of the substance, either actual or constructive. Here, the State did not prove beyond a reasonable doubt that Defendant had the requisite guilty mind or intent. Regardless of whether Defendant had the actual or constructive possession, insufficient evidence was introduced to show that Defendant knew or was aware of the meth found in the medicine cabinet. Defendant did not have exclusive control over the trailer, did not own it, and did not live there. Even though she admitted to marijuana activity at the trailer, she did not admit knowing about meth. Nothing connects Defendant to the eyelash curler other than speculation based on her gender. Conviction reversed and acquittal entered.

State ex rel. Windeknecht v. Mesmer, 530 S.W.3d 500 (Mo. banc Oct. 5, 2017):
Holding: Habeas petitioners, who were convicted of felony stealing under Sec. 570.030.3 before *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016), are not entitled to habeas relief for a sentence in excess of that authorized by law, because the *Bazell* holding "only applies forward, except those cases pending on direct appeal."
Discussion: Habeas petitioners contend that their felony sentences are in excess of that authorized by law because *Bazell* held their offense is a class A misdemeanor. The U.S. Supreme Court has held that a state supreme court is not constitutionally compelled to make retroactive a different interpretation of a state statute. "Exercising this authority, the Court orders the *Bazell* holding only applies forward, except those cases pending on direct appeal." Petitioners received a sentence that was authorized by a different interpretation of Sec. 570.030 without objection, and should not receive the benefit of retroactive application of this Court's decision in *Bazell*.

State v. Smith, 522 S.W.3d 221 (Mo. banc July 11, 2017):
Holding: (1) In first-degree burglary case, Defendant was entitled to nested lesser-included instruction for first-degree trespass, and failure to give it was not harmless even though jury was instructed on (but did not find) second-degree burglary; a trespassing instruction would have tested a different element than the second-degree burglary instruction; and (2) *Bazell* applies to all provisions of Sec. 570.030.3, including stealing over $500.
Discussion: (1) Defendant, charged with first-degree burglary, requested lesser-included offense instruction for nested offense of first-degree trespassing. Because it is impossible to commit first-degree burglary without also necessarily committing first-degree trespass, there is always a basis in the evidence to acquit of the charged offense because the jury is free to disbelieve any or all of the State's evidence. The court erred in failing to give the trespass instruction. The State argues the error is harmless, however, because the jury

was instructed on second-degree burglary, but failed to find it. But the jury's rejection of one lesser instruction in favor of the charged offense does not automatically mean the refusal to give additional nested lesser can be regarded as harmless. This case shows why. The jury was instructed on first-degree burglary which has three elements: (a) unlawful entry; (b) with intent to commit a crime therein; (c) while armed with a deadly weapon. Second-degree burglary omits the third element, meaning second-degree burglary tests jurors' belief whether there is a deadly weapon. But that is not the element Defendant disputed at trial. He disputed whether he entered with intent to commit a crime. First-degree trespass would have required only a finding of unlawful entry. The element of intent to commit a crime in the premises was not tested. Reversed for new trial. (2) Defendant was also convicted of felony stealing over $500, Sec. 570.030.3(3)(d). *Bazell*'s analysis of the applicability of Sec. 570.030.3 does not depend on which particular enhancement provision of 570.030.3 is at issue. *Bazell* looked at the definition of the offense of stealing in 570.030.1 and held that, because the definition does not contain as an element "the value of property or services," Sec. 570.030.3 does not apply. *Bazell* draws no distinction among the numerous subcategories of 570.030.3. Stealing convictions reversed and remanded for resentencing as misdemeanors.

State v. Bazell, 2016 WL 4444392 (Mo. banc Aug. 23, 2016):

Sec. 570.030.3 does not enhance any of its stealing provisions to a felony because it only applies to "offenses in which the value of property or services is an element," and the stealing statute, Sec. 570.030.1, does not include the value of property or services appropriated as an "element."

Facts: Defendant was convicted of felony stealing from theft of two firearms during a burglary.

Holding: Sec. 570.030.3(3)(d) provides that "*any offense in which the value of property or services is an element* is a class C felony if … the property appropriated consists of … any firearms." Under Sec. 570.030.1 a person commits the crime of stealing "if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." The definition of stealing in Sec. 570.030.1 does not include "the value of property or services appropriated" as an *element* of the offense. Thus, enhancement pursuant to Sec. 570.030.3 does not apply to Defendant's convictions for stealing firearms. The offenses must be classified as misdemeanors. Reversed and remanded for sentencing as misdemeanors.

Editor's Note: This opinion clearly invalidates *all* of the felony stealing enhancements in Sec. 570.030.3(1), (2) and (3), and the enhancement in 570.030.8, because it also contains the "value of property or services is an element" language. The opinion's effect – if any -- on Secs. 570.030.6 and .7 (which refer to Sec. 570.030) is uncertain.

State v. Clark, 2016 WL 3549424 (Mo. banc June 28, 2016):

Holding: Even though Defendant was sitting on a bed in a bedroom which had drugs in two closed pouches on a nightstand, Defendant had $560 in cash, and a pair of men's shoes was in the bedroom, this evidence was insufficient to prove that Defendant consciously or intentionally possessed the drugs, either actually or constructively, where

(1) the residence was owned by Defendant's girlfriend; (2) Defendant's belongings were in a different bedroom; (3) there was a lot of clutter on the nightstand with the pouches; and (4) the $560 was not in denominations typically used in drug transactions, i.e., it was not all in "small" denominations. Additionally, even though an Officer testified that a cell phone which he "believed" belonged to Defendant was in the bedroom with the drugs, this was mere speculation since the State did not present evidence as to the ownership of the phone; speculative inferences cannot be used to support a conviction.
Concurring Opinion: Although three judges concurred in the result, they wrote that the Court's long-standing interpretation of the drug possession statute is erroneous. They would hold that under 195.010(34) Defendant constructively possessed the drugs because they were "within [his] easy reach and convenient control," but they would hold that the State did not prove the knowledge element, i.e., that he knew of the nature and presence of the drugs.

State v. Jones, 479 S.W.3d 100 (Mo. banc Jan. 26, 2016):
(1) Where Defendant entered an open garage door with a gun in order to commit burglary, this was sufficient to also convict of ACA because Sec. 571.015.1 only requires that a Defendant commit a crime "by, with, or through" the "use, assistance or aid" of a weapon; the statute does not require that the weapon be the means of forcing entry, either directly or indirectly; (2) even though Officer who chased Defendant after the burglary told him only to "stop running," Defendant should have reasonably known he was under arrest, so evidence was sufficient to convict of resisting arrest.
Facts: Defendant entered an open garage door. He had a gun. He then went into the residence, and after scuffling with a resident, fled. Shortly thereafter, police arrived, and saw Defendant in the area. An officer told Defendant to "stop running," and chased him. Defendant was convicted of first degree burglary, armed criminal action and resisting arrest.
Holding: (1) Defendant claims the evidence is insufficient to convict of ACA because he didn't "use" a weapon to enter the residence, because he entered through an open garage door. Sec. 571.015.1 does not contain only the word "use" of a weapon. The statute makes it a crime to act "by, with, or through" the "use, assistance or aid" of a weapon. The noun "use" does not mean that the weapon must have been necessary to commit the crime or that but for the Defendant's "use" of the weapon the crime would not have occurred. Regarding a burglary, the weapon need not have been the means of forcing entry, either directly or indirectly. Aside from "use," Defendant ignores the "with" and "through" "assistance" and "aid" language of the statute. The statute is intended to reach as far as possible and discourage defendants from arming themselves during commission of felonies. (2) Defendant claims the evidence is insufficient to convict of resisting arrest, Sec. 575.150.1, because Officer said only "stop running" and not "stop running, you're under arrest." However, it is not necessary for police to specifically say, "you are under arrest," when the circumstances indicate Officer is attempting an arrest. Here, when Officer identified himself and told Defendant to stop running, Defendant fled and kept running as Officer chased him. There was sufficient evidence to infer that Defendant knew or reasonably should have known he was being arrested for crimes he had just committed.

State v. Lammers, 479 S.W.3d 624 (Mo. banc Feb. 9, 2016):
(1) Where Defendant purchased guns and practiced with them, and under police questioning, said he had thought about doing a mass shooting at Wal-Mart before he bought the guns, the evidence was sufficient to convict of attempted first-degree assault and ACA, because this showed an intent and substantial step to commit the crime; and (2) State ex rel. Verweire v. Moore, 211 S.W.3d 89 (Mo. banc 2006), which appeared to decide intent to commit attempted assault as a matter of law rather than defer to the trier of fact, is overruled.
Facts: Defendant suffered from mental illness. He legally purchased two guns and used them for practice. He had a friend store the guns because he knew his mother would not approve of them. When his mother learned he had purchased guns, she became concerned and called police to check on his well-being. Police took him to the police station and questioned him. He initially said he bought the guns to go hunting, but after police told him his mother was concerned he might be a mass shooter, he agreed there were similarities between himself and other mass shooters. He said that before he bought the guns, he envisioned himself committing a shooting at a Wal-Mart. He then said he "realized when I went shooting … I was like, this isn't me." Defendant was convicted at a trial of attempted first-degree assault and armed criminal action.
Holding: (1) To be convicted of attempted first-degree assault, Defendant must have the purpose to commit the offense, and have taken a "substantial step" toward commission. Intent is usually showed circumstantially. Here, Defendant envisioned doing a mass shooting at a Wal-Mart and bought two guns to carry that out; this is sufficient to prove intent to kill or cause serious physical injury. Defendant's actions in buying guns and practicing with them showed a "substantial step" because this was strongly corroborative of the firmness of his purpose in completing the offense. (2) In *Verweire*, the Court found there was no factual basis to find a "substantial step" toward attempted first-degree assault where the defendant did not pull the trigger on a gun and voluntarily retreated. *Verweire* appears to have decided intent as a matter of law rather than deferring to the trier of fact; as a result, *Verweire* was wrongly decided. "To the extent that *Verweire* and its progeny hold that threats with a deadly weapon with the ability to carry them out cannot constitute attempt unless the defendant pulls the trigger, police intervene, or the defendant causes only minor injury, those decisions should no longer be followed."

State v. Zetina-Torres, 2016 WL 792508 (Mo. banc March 1, 2016):
(1) Even though jury was instructed to find Defendant guilty based on an accomplice liability theory, and (2) even though the evidence against Co-Defendant had previously been found insufficient to convict in Co-Defendant's prior direct appeal, the appellate court reviewing sufficiency of the evidence considers only the legal question whether the statutory elements of the crime were proven, which does not rest on how the jury was instructed; further, Sec. 562.046(1) provides that it is no defense to criminal responsibility of a defendant based upon conduct of another that such other person has been acquitted.
Facts: Defendant and Co-Defendant were charged with trafficking drugs found in a truck. Defendant was the driver and Co-Defendant was the passenger. Co-Defendant was tried and convicted, but on direct appeal, the appellate court found the evidence insufficient to prove that Co-Defendant knew about the drugs. When Defendant went to

trial, the jury was instructed to find Defendant guilty if he acted with Co-Defendant in the crime.
Holding: Defendant contends that because the jury was instructed on an accomplice liability theory, and because Co-Defendant's conviction was ultimately vacated, the evidence is insufficient. The U.S. Supreme Court recently held in *Musacchio v. U.S.*, 2016 WL 280757 (U.S. 2016), that when examining sufficiency, the appellate court considers only the legal question whether the elements of a statute were satisfied; sufficiency review does not rest on how the jury was instructed. Here, Defendant was charged with acting alone or in concert with Co-Defendant. There was ample evidence that Defendant knew about the drugs in the truck. Defendant's argument that his conviction must be vacated because the Co-Defendant was ultimately discharged is also refuted by Sec. 562.046(1) which provides that it is no defense to criminal responsibility based on conduct of a co-defendant that such co-defendant has been acquitted.

State v. Steward, 2020 WL 5524200 (Mo. App. E.D. Sept. 15, 2020):
Even though Defendant speeded away from Officer who stopped her, where the jury instruction did not require to the jury to find that this created a substantial risk of physical injury or death, the evidence was insufficient to enhance the offense of resisting a lawful stop to a felony from a misdemeanor, Sec. 575.150.5; case remanded for entry of misdemeanor conviction.
Facts: Officer attempted to stop the car Defendant was driving to investigate alleged tampering offense. Defendant pulled over, but as Officer walked up to car, Defendant sped off at high rate of speed. Defendant was convicted of felony resisting a lawful stop.
Holding: Under Sec. 575.150, resisting a *lawful stop* "for a felony" is not a felony offense. Under Sec. 575.150.5, the offense is only a felony if Defendant resisted a stop by fleeing in a manner that created a substantial risk of physical injury or death, Sec. 575.150.5. The statute distinguishes between resisting "arrest" and resting a "stop." The statute enhances to a felony only resisting or interfering with *an arrest* for a felony. Resisting a lawful *stop* is a felony only if the fleeing creates a substantial risk of serious physical injury or death. The State here confused the offense of resisting arrest (MACH-CR 4th 29.60) with resisting a lawful stop (MACH-CR 4th 29.61). The two offenses aren't the same. Here, the jury instruction did not require the jury to find that Defendant's fleeing created a substantial risk of serious injury or death. While Defendant's conduct might, in fact, have done that, the jury wasn't required to find that, which violated the Sixth Amendment right to a jury trial and the due process right to require the State to prove every element beyond a reasonable doubt. Case remanded for entry of misdemeanor conviction.

City of Bellefontaine Neighbors v. Carroll, 2020 WL 202097 (Mo. App. E.D. Jan. 14, 2020):
Holding: Where City had announced at trial that it was abandoning a certain charge against Defendant, but trial court's judgment found Defendant guilty of that charge anyway, judgment of conviction on that count is reversed and appellate court amends the judgment accordingly.

State v. Barnett, 2020 WL 424601 (Mo. App. E.D. Jan. 28, 2020):
Even though Defendant-Passenger (1) appeared nervous during a traffic stop; (2) was seated in the front seat but within reaching distance of drugs found under a wash cloth in the backseat; and (3) the back seat passenger had ledgers in her purse indicating drug sales, the evidence was insufficient to convict Defendant of constructive possession of drugs or accomplice liability for possession.
Facts: Officer stopped car for not having license lamp. Defendant was front seat passenger. Back seat passenger was Defendant's sister, who was known to be involved in drug sales. Driver consented to search. Drugs were found under a wash cloth in back seat. Officer testified Defendant became more nervous during search, and also was looking at back seat passenger every few seconds. A ledger showing drugs sales was found in back seat passenger's purse. Defendant was convicted of possession of drugs.
Holding: The State claims Defendant's nervousness, his proximity to the drugs, and the drug ledgers show constructive possession. But nervousness and access to contraband aren't sufficient to show knowledge and control of the drugs. Access is a relative concept and should be compared when there are multiple people in a car. Although Defendant could have reached the drugs, the back seat passenger had better access to them. There was no evidence to support that Defendant knew of the drug ledgers in back seat passenger's purse. The State claims Defendant is guilty under an accomplice liability theory. But under accomplice liability, the State needed to show Defendant knew the contraband was in the car and promoted the particular underlying crime of possession. There was no evidence Defendant knew this. Conviction reversed.

State v. Jones, 2020 WL 890999 (Mo. App. E.D. Feb. 25, 2020):
Holding: Offense of abuse of child resulting in death can serve as predicate offense to support second-degree felony murder; Defendant's conviction for both offenses does not violate felony-murder statute, the merger doctrine, or Double Jeopardy.

State v. Baker, 2020 WL 6139885 (Mo. App. E.D. Oct. 20, 2020):
Holding: Even though Defendant-Mother (1) gave birth to a premature baby at her home; (2) the baby had methamphetamine in system; and (3) the baby died after a couple of days, where State's expert-doctor testified the cause of death was "complications of prematurity" and only that it would have been "less likely" that baby would have died if born at a hospital, the evidence was insufficient to convict of Class B felony of abuse or neglect of a child, Sec. 568.060.2.
Discussion: Sec. 568.060 requires the State prove that Defendant knowingly caused the baby's physical injury and substantial risk of death due to her neglect. Prior cases have held that a Mother cannot be prosecuted for indirect harm caused to an unborn child by ingesting illegal drugs during pregnancy, and that a medically unattended delivery of a baby cannot support a criminal prosecution as a matter of law. Here, the evidence was insufficient to prove Defendant knowingly caused the baby to suffer physical injury resulting in substantial risk of death. Expert-doctor testified the death was caused by being prematurely born. Even though Expert-doctor testified that Defendant's meth use may have contributed to the premature birth, the meth use cannot be considered under a prior case. Conviction reversed.

State v. Ahart, 609 S.W.3d 512 (Mo. App. E.D. Oct. 20, 2020):
Holding: (1) Even though Defendant put a nail-filled can underneath Victim's vehicle's tire with the intent to cause a flat tire, where there was no evidence that the can made contact with or actually damaged the vehicle (because Victim discovered it before driving over it), the evidence was insufficient to convict of second degree tampering, Sec. 569.090, because the offense requires some effect on the vehicle's condition or use, or at least minimal contact with the vehicle; but (2) the evidence was sufficient to convict of the lesser offense of attempted second degree tampering, because Defendant had both the intent to commit the greater offense and took a substantial step toward it; case remanded for entry of attempted second degree tampering conviction and sentence accordingly.

Harmon v. State, 2020 WL 7702250 (Mo. App. E.D. Dec. 29, 2020):
Holding: (1) Where Movant pleaded guilty to felony stealing in 2014 before *Bazell* (2016) and received a suspended imposition of sentence (SIS), but his probation was not revoked and sentence executed until after *Bazell* in 2018, and Movant filed a timely 24.035 motion, Movant is entitled to sentencing as a misdemeanor because his conviction was not "final" before *Bazell* since he had received an SIS; and (2) Even though Movant failed to appear multiple times for probation revocation hearings and warrants had to be issued for his arrest, the "escape rule" does not bar Movant's claim because the "escape rule" does not apply to post-capture errors, and sentencing Movant for a felony was a post-capture error.
Discussion: Where a postconviction motion challenges errors that occur after Movant has been returned to custody, the escape rue does not apply. The escape rule must not apply to post-capture errors to avoid the temptation to complete the proceedings in a less diligent manner secure in the knowledge that any errors or short-cuts would not result in reversals.

State v. Knox, 2019 WL 5876813 (Mo. App. E.D. Nov. 12, 2019):
(1) Even though Victim testified that phones, headphones, a watch, and other miscellaneous items were taken, where Victim never testified to the value of any of them, trial court plainly erred in sentencing Defendant for Class A misdemeanor of stealing under $500, Sec. 570.030.8, because State failed to prove property was worth more than $149 but less than $750 – necessary for Class A misdemeanor -- or that Defendant had a prior stealing conviction – necessary Sec. 570.030.7 for Class A misdemeanor; and (2) even though Victim testified that he had $1200 in cash and Defendant was arrested with $1570 in cash in his pocket shortly after the offense, where Victim never testified that anyone actually took his cash (although they took other miscellaneous items), the State failed to meet its burden to prove Defendant committed the Class D felony of stealing more than $750, Sec. 570.030.4. Convictions entered for lesser-included offense of Class D misdemeanor stealing.
Facts: Defendant was charged with multiple counts of first degree robbery. Victim testified he had $1200 in cash at the time of the robbery, and that various miscellaneous items were taken. Defendant was arrested within minutes of the robbery. Defendant had $1500 in cash and other miscellaneous items. The jury convicted of the lesser-included offenses of felony stealing and Class A misdemeanor stealing.

Holding: (1) Class D felony stealing is when the value of property is $750 or more, Sec. 570.030.5(1). Class D misdemeanor stealing is when the value is less than $150 and defendant has not prior stealing convictions, Sec. 570.030.7. Class A misdemeanor stealing is when "no other penalty is specified." Here, the Victim never testified to the value of any of the stolen items. The State had the burden of proving that the items were more than $149 and that Defendant had a prior stealing conviction. The State did neither. Thus, the evidence supports conviction for the Class D misdemeanor only. (2) Even though Victim testified he had $1200, Victim never testified this was actually taken in the robbery. It was the State's burden to prove the $1200 was actually taken. Again, the evidence supports conviction for the Class D misdemeanor only. Case remanded for entry of Class D misdemeanor convictions and sentence accordingly.

State v. Schelsky, 2019 WL 5882871 (Mo. App. E.D. Nov. 12, 2019):
Holding: (1) Even though Defendant attempted to escape from the county jail where he was being held, this did not constitute attempted escape from "custody," because Sec. 556.061(17), defines "custody" as when a person "has been arrested but has *not* been *delivered to a place of confinement*"; (2) Officer's testimony that "I know when you stick a gun in someone's side, you're planning to kill them," and "You don't point a gun at somebody you're not going to kill" was improper lay opinion testimony which invaded the province of the jury on the ultimate issue of Defendant's mental state to commit first-degree assault, but was not plain error due to overwhelming evidence of guilt.
Discussion: Defendant attempted to escape from the county jail, where he was being held before trial. This does not support a conviction for attempted escape from "custody," Sec. 575.200. Sec. 556.061(17) states that a person is in "custody" when he has been arrested but not delivered to a place of confinement. Sec. 556.061(37) states that a place of confinement is any building where a court is legally authorized to order a person charged or convicted of a crime be held. Defendant's offense was attempted escape from "confinement," Sec. 575.210.1, not escape from "custody." Conviction reversed.

State v. Conner, 2019 WL 2783272 (Mo. App. E.D. Aug. 13, 2019):
Holding: (1) Where Defendant communicated by internet with an Officer masquerading as a 14-year-old girl, the evidence was insufficient to convict of enticement of a child, Sec. 566.151, or sexual misconduct involving a child, Sec. 566.083, because both statutes require an actual person under age 15 to be involved in the communication; but appellate court enters convictions for *attempted* enticement of a child, and *attempted* sexual misconduct involving a child; (2) because attempted sexual misconduct involving a child carries a lower range of punishment than the completed offense, case must be remanded for resentencing; and (3) even though enticement of a child and attempted enticement carry the same range of punishment (so resentencing is not usually necessary), appellate court remands for resentencing since it is remanding the other count for resentencing.

State v. Russell, 2019 WL 1770067 (Mo. App. E.D. April 23, 2019):
Holding: Even though (1) Defendant pleaded guilty to felony stealing, Sec. 570.030, and received an SIS in 2013; (2) *Bazell* was decided in 2016 and held that the offense was a misdemeanor under the statute; and (3) Defendant objected to a felony sentence being

executed in 2017 and filed a direct appeal, Defendant cannot receive relief on direct appeal because *Bazell* is not retroactive and Defendant had knowingly and voluntarily pleaded guilty to a felony; Defendant should not get the benefit of *Bazell* even though his sentence was not final until after *Bazell*.

Discussion: The Western District has recognized that a direct appeal can be taken from a guilty plea to claim that a sentence is in excess of that authorized by law where it can be determined from the face of the record that the court had no power to enter the conviction or impose the sentence. The Eastern District questions whether the Western District's precedent applies here, and believes the "greater weight of authority" would hold that Defendant must raise his claim in a Rule 24.035 proceeding that his sentence is in excess of that authorized by law. But even assuming that the claim is cognizable on appeal, Defendant still cannot prevail. In general, a defendant is sentenced to the punishment in effect at the time the offense was committed. Defendant knowingly and voluntarily pleaded guilty to a felony offense. The Supreme Court, in *Windeknecht*, held that *Bazell* is not retroactive. Even though Defendant's case is different than *Windeknecht* in that his sentence was not "final" until after *Bazell*, "we decline to create an exception that would allow defendant to reap the benefit of the forward application of *Bazell* merely because he was sentenced after *Bazell* was decided."

Editor's Note: In *Hamilton v. State*, 2019 WL 1339462 (Mo. App. E.D. March 26, 2019), the Eastern District held that a Defendant/Movant, who was not sentenced until after *Bazell*, could not raise the excess felony sentencing issue under Rule 24.035 because *Bazell* is not retroactive.

State v. Byington, 2019 WL 1120269 (Mo. App. E.D. March 12, 2019):

Holding: (1) In case of first-impression, "intent to defraud" under the lien fraud statute, Sec. 429.014, means the intent to defraud a particular individual, i.e., subcontractor, materialman, supplier or laborer – a general intent to defraud is not sufficient; thus, where Defendant-Contractor took money from Homeowner allegedly to buy drywall at Store, but Defendant never paid Store, the "intent to defraud" must be of Store, which had placed a lien on Homeowner's house for non-payment of the drywall; but (2) the evidence here was sufficient to show Defendant-Contractor intended to defraud Store.

Hamilton v. State, 2019 WL 1339462 (Mo. App. E.D. March 26, 2019):

Holding: Even though (1) in 2014, 24.035 Movant pleaded guilty to felony stealing, Sec. 570.030, and received an SIS, (2) in 2016 Bazell was decided, which made the offense a misdemeanor, and (3) Movant's felony sentences were imposed in 2017, 24.035 Movants cannot raise their claim that their sentence is in excess of that authorized by law because *Windeknecht* held that *Bazell* "only applies forward except for cases those pending on direct appeal," and Movant did not direct appeal.

Discussion: The State (in support of Movant) argues that *Windeknecht*, 530 S.W.3d 500 (Mo. banc 2017), is distinguishable from Movant's case because it involved a person who was sentenced *before Bazell*. The State argues that Movant's case presents a forward, rather than retroactive, application of *Bazell*. Appellate court declines to create an exception to *Windeknecht* that would allow postconviction Movants to "reap the benefit of forward application of *Bazell* merely because they were sentenced after *Bazell* was

decided." Movant pleaded guilty four years before *Bazell*. She never objected to her sentence. There is nothing showing her plea was involuntary.

State v. Drabek, 2018 WL 2207526 (Mo. App. E.D. May 15, 2018):
Even though Defendant was the sole occupant of a trailer and Officers found materials used for making meth in and around the trailer, the evidence was insufficient to convict of possession of meth found in a small box on the back porch, because other people had access to the porch and another person's drug paraphernalia was found in a purse on the front porch.
Facts: Police received an anonymous tip that meth was being produced on a property. The property had five mobile homes on it, including Defendant's. When police arrived, Defendant and several other people were inside Defendant's trailer. Police found items in the trailer that are associated with making meth. Police also found items outside the trailer associated with making meth in a "communal burn pile." Police also found a purse on the front porch that contained drug paraphernalia, but the purse belonged to the daughter of the landlord, and the daughter was not one of the people in Defendant's trailer. Police then found a plastic bag with a small box in it on Defendant's back "porch" (also described as "partially finished room"), which contained .30 grams of meth. Defendant was convicted of possession of meth based on this box.
Holding: The State contends that because Defendant was the sole occupant of the trailer, the jury can infer that he was the only person who had constructive possession of the meth. In drug cases, the law has developed a policy that a person in exclusive control of premises will be deemed to have possession and control of any substance found on the premises. But the evidence here was insufficient to show that Defendant had exclusive access to or control over the "porch." The evidence did not show that the porch was closed to other people. The presence of landlord's daughter's purse on the front porch showed that other people had access to residence. In addition, other people were in the trailer besides Defendant. The materials used to make meth would show that meth was used on the premises at some time, but this does not prove that Defendant possessed the meth on the back porch.

State v. Stewart, 2018 WL 326290 (Mo. App. E.D. Jan. 9, 2018):
Even though (1) Defendant entered his and his ex-Wife's house, shot a gun and broke a window when another man was there, and thus committed third-degree domestic assault, and (2) ex-Wife told Defendant to leave, where (3) ex-Wife and Defendant had both paid to live there on a rent-to-own arrangement, (4) Defendant continued to eat meals and shower there and his possessions were there; (5) and Defendant had been invited into the house to deliver firewood at time of charged offense, the evidence was insufficient to sustain conviction for first-degree burglary because the State did not prove Defendant knowingly remained unlawfully in the house. The evidence indicated Defendant subjectively believed he had a right to be in the house.
Facts: Defendant and ex-Wife owned a home on a rent-to-own basis. When Defendant did not come home one night, ex-Wife told Defendant "not to come back." Nevertheless, Defendant, with ex-Wife's consent, continued to eat meals at the house, shower at the house, and had possessions there. Ex-Wife testified Defendant was "living there." On the day of the charged offense, ex-Wife had invited Defendant to come to the house to

deliver firewood. While there, Defendant found ex-Wife with another man. Defendant then shot a gun into the ceiling, and broke a window. Ex-Wife told Defendant to leave. He threatened to kill her and man, but then left.
Holding: Defendant was convicted for first-degree burglary for "knowingly remain[ing] unlawfully in an inhabitable structure" possessed by ex-Wife for purpose of committing the offense of third degree domestic assault. A person remains unlawfully when he is aware he has no privilege to remain. The analysis focusses on evidence of Defendant's subjective belief. There is no direct evidence Defendant left the residence because he was subjectively aware he had no right to be there. Rather, the record shows Defendant was in fact *not* subjectively aware he lacked such privilege. Ex-Wife testified Defendant's possessions were in the house, and he continued to eat meals there and showered there. He was in the house at the time of the charged offense because he was delivering firewood at ex-Wife's request. The circumstantial evidence would require juror speculation to conclude Defendant must have been aware he lacked any privilege to remain. Conviction reversed.

State v. Cotner, 2018 WL 944675 (Mo. App. E.D. Feb. 20, 2018):
Holding: Trial court erred in convicting and sentencing Defendant for felony stealing, Sec. 570.030.3, because under *Bazell*, Sec. 570.030.3 cannot be used to enhance to a felony; remanded for resentencing as misdemeanor.

State v. Brand, 2018 WL 944917 (Mo. App. E.D. Feb. 28, 2018):
Holding: Trial court plainly erred in convicting and sentencing Defendant for felony stealing under Sec. 570.030.3, because under *Bazell* that section cannot be used to enhance to a felony; remanded for resentencing as misdemeanor.

State v. Dixson, 2018 WL 1277866 (Mo. App. E.D. March 13, 2018):
Holding: Even though when police arrived (1) Defendant and co-defendant were standing next to a car from which two tires had been removed without the owner's consent, and (2) the tires had been placed in an adjoining car which was owned by co-defendant's girlfriend, the evidence was insufficient to convict Defendant of tampering because the evidence merely showed Defendant's presence at the scene, not any involvement with co-defendant in removing the tires.
Discussion: Defendant's responsibility for the crime was based solely on the theory that he acted together with co-defendant to remove the tires. While mere encouragement is enough, mere presence at the scene is not enough to prove affirmative participation. There was no evidence Defendant knew co-defendant, or what Defendant and co-defendant may have been doing before or during the crime. Appellate court cannot supply missing inference that because Defendant was there, he must have known what co-defendant was doing or been with him before or during the crime. The only evidence was that, when police arrived, Defendant and co-defendant were "just standing there" and not having anything to do with either car, and neither of them ran when approached by police. Conviction reversed.

K.L.M. v. B.A.G., 532 S.W.3d 706 (Mo. App. E.D. Oct. 10, 2017):
Holding: Even though Defendant, who used date Petitioner's Boyfriend, (1) worked in law enforcement; (2) sent 17-page anonymous letter to Petitioner saying Boyfriend "treats women horribly" and "don't you want someone who will treat you" better; (3) sent a 2-page letter to Petitioner saying "we will walk this journey together" and she "looks forward to many more years of your friendship"; and (4) apparently "hacked into" Petitioner's Facebook page to obtain a photo of Petitioner and used Petitioner's picture as her own, the evidence was insufficient for a full order of protection for stalking, because even though Petitioner was "uncomfortable" by Defendant's actions, the actions would not cause a person to fear physical harm (alarm), as required by Sec. 455.010(14).
Discussion: Alarm contains both a subjective and objective component. The record must show both that Defendant's conduct caused Petitioner to subjectively fear physical harm, and that a reasonable person under the same circumstances would have feared physical harm. Here, there is insufficient evidence that a reasonable person would fear physical harm. Petitioner contends that Defendant's connection to law enforcement supports fear of harm. But Petitioner does not cite any case law that a person is entitled to "heightened alarm" merely because the alleged stalker has some connection to law enforcement.

State v. Rohra, 2017 WL 5580221 (Mo. App. E.D. Nov. 21, 2017):
Holding: (1) Even though Defendant pleaded guilty to felon-in-possession, he may a pursue a direct appeal on grounds that the information was defective because the predicate felony did not count as a "conviction"; (2) Eastern District would hold that where Defendant received a deferral of judgment in Oklahoma, this was not a felony "conviction" under Sec. 571.070(1), which would render possession of a gun by Defendant unlawful, but Eastern District transfers case to Missouri Supreme Court due to general interest and importance.
Discussion: Defendant had filed a motion to dismiss, but ultimately pleaded guilty. The State claims Defendant waived his claim about his Oklahoma judgment by pleading guilty. But a defect in the information may be raised for the first time on appeal. An information may be deemed insufficient if (1) it does not by any reasonable construction charge the offense of which Defendant was convicted and (2) the defendant demonstrates actual prejudice. The information here meets this test. A person who pleads guilty can challenge an information by direct appeal.

P.D.J. v. S.S., 2017 WL 6460159 (Mo. App. E.D. Dec. 19, 2017):
Holding: (1) Order of protection based on abuse by "harassment" is available only to victims of domestic violence (household members); people who do not qualify as household members can only seek order of protection on grounds of "stalking"; (2) Adult Abuse Act does not authorize court to award monetary damages for vandalism associated with stalking; remedy is a separate civil suit.
Discussion: Petitioner obtained an order of protection against Defendant for stalking, and the trial court also ordered Defendant to pay $13,000 for vandalizing Petitioner's car as part of the stalking incidents. Sec. 455.050.1 outlines the terms that a court can order as part of a protection order. Payment for damages to personal property is not among the listed terms. While 455.050.1 provides a non-exhaustive list of terms that can be

included in a protection order, the section states that an order should include only "such terms as the court reasonably deems necessary to ensure the petitioner's safety." Paying $13,000 in damages for a car was not reasonably necessary to ensure Petitioner's safety. Petitioner's remedy is to file a separate civil suit for damages to her car.

State v. Luster, 2017 WL 6460096 (Mo. App. E.D. Dec. 19, 2017):
Holding: Where Defendant was convicted at jury trial of felony stealing under Sec. 570.030.3, Defendant's conviction cannot be enhanced to felony in light of *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016); case remanded for resentencing as misdemeanor.

S.N.L. v. A.B., 2017 WL 6816575 (Mo. App. E.D. Dec. 26, 2017):
Holding: (1) Parent can file for protection order on behalf of their Child, and in order to grant order, court does not have to find that *Child* personally was "alarmed" by Defendant's conduct, since children may not themselves perceive danger; but (2) even though Defendant, who was property manager of a subdivision, posted a photo on Facebook of Child driving a golf cart in street with caption, "Busted 8-year-old for texting and driving; some kids never learn" this did not constitute stalking, because it was not a course of conduct (repeated acts) that lacked a legitimate purpose; (3) Sec. 455.504(2) prohibited trial court from assessing GAL costs against Petitioner.
Discussion: (1) Sec. 455.010(14) states that stalking occurs when a person purposely engages in an unwanted course of conduct that causes alarm to another person, *or a person who resides in the same household with the person seeking the protection order*. The latter language allows a Parent to seek a protection order on behalf of their Child. This latter language also exempts the Child from having to establish their own alarm in order for the Parent to obtain the protection order. A Child may be unaware of danger, so cannot establish their own alarm. (2) On the merits, Parent failed to meet burden to obtain full order of protection. Defendant was the property manager of subdivision and had legitimate reason to be in subdivision. Defendant took photo to show his employer that Child was driving in the street. Defendant also thought photo was "funny" so posted it on Facebook. Defendant had no direct contact with Child. This was a single incident. Petitioner failed to show not only fear of danger of physical harm (alarm) but also intent on Defendant's part, lack of legitimate purpose, and repeated acts. Also, the GAL, who was appointed to represent Child's interest, did not believe that the one event of posting a picture on Facebook warranted a protection order.

State v. Clay, 2017 WL 4126379 (Mo. App. E.D. Sept. 19, 2017):
Holding: Where Defendant was convicted of felony stealing by deceit and attempted stealing by deceit in violation of 570.030.3, plain error resulted and case must be remanded for entry of misdemeanor convictions and resentencing in light of *Bazell*.

State v. Allen, 2017 WL 4247998 (Mo. App. E.D. Sept. 26, 2017):
Even though Defendant was driving a truck in Arkansas which had been stolen in Missouri a week earlier, the evidence was insufficient to show jurisdiction in Missouri in order to convict of first-degree tampering because there was no evidence Defendant operated the truck in Missouri.

Facts: Truck was stolen in Missouri. About a week later, Defendant traded the truck in Arkansas for another vehicle, even though Defendant did not have a title for the truck. Defendant was convicted of first-degree tampering, Sec. 589.080.
Holding: Defendant argues the trial court lacked territorial jurisdiction to convict him because there was no evidence that any part of the offense occurred in Missouri. A claim challenging a court's lack of jurisdiction because the State failed to prove the offense occurred in Missouri attacks the sufficiency of evidence to support the conviction. Missouri courts lack jurisdiction to prosecute violations of Missouri law unless the conduct constituting the offense, or some substantial part of it, occurred in Missouri. The only relevant basis for jurisdiction was Sec. 541.191.1(1) which requires some element of the offense to occur in Missouri. But there is simply no evidence that Defendant ever operated the truck in Missouri. The State argues this can be inferred from stealing and burglary cases which hold that where a defendant has possession of recently stolen property, this raises an inference of guilt. But this is not a stealing or burglary case; Defendant was not charged with stealing the truck. Operating a stolen vehicle in Arkansas, without more, does not allow an inference of guilt to convict of first-degree tampering in Missouri.

State v. Stufflebean, 516 S.W.3d 456 (Mo. App. E.D. April 25, 2017):
Where: (1) Defendant's license had been suspended for child support delinquency shortly before being stopped by police but (2) the State produced no proof that Defendant was notified by any State agency that his license had been suspended, there was insufficient evidence to prove Defendant had the mental state of criminal negligence to support conviction for driving while suspended.
Facts: On October 4, Defendant's license was suspended for non-payment of child support. On Oct. 29, Defendant was arrested for driving while suspended. At trial, the State produced evidence only that Defendant was suspended.
Holding: The State failed to produce sufficient evidence of Defendant's mental state to prove driving while suspended. Sec. 302.321.1 required the State to prove Defendant acted with criminal negligence with respect to knowledge that his driving privilege had been revoked. Here, the State presented no evidence that State agencies had notified Defendant of the suspension. Defendant had committed no driving offenses that would have allowed his license to be suspended due to accumulation of points, so it cannot be inferred that Defendant knew of his suspension due to illegal driving history. Even though a statute required the Children's Division or Dept. of Revenue to notify Defendant that his license had been suspended, the court will not presume that these agencies actually notified him. The State should have introduced proof of notification here. Conviction reversed.

State v. Harding, 2017 WL 1485564 (Mo. App. E.D. April 25, 2017):
A felon-in-possession felony can serve as the underlying felony for the offense of felony murder because Sec. 565.021.1(2) provides that a person commits felony murder if he commits "any" felony in which a person is killed, but a court must still apply a foreseeability-proximate cause analysis to the underlying felony in order to sustain a conviction.

Facts: Defendant, who had previously been convicted of a felony, owned a gun that was kept between couch cushions. He got into an argument with his girlfriend. She grabbed the gun. They struggled for control of the gun, and it fired, killing the girlfriend. Defendant was charged with felony murder, with the underlying felony being a felon-in-possession.
Holding: Whether a felon-in-possession felony can support felony murder is a matter of first impression in Missouri. Sec. 565.021.1(2) provides that a person commits felony murder if he commits or attempts to commit "any" felony, and in the perpetration thereof, another person is killed as a result. The use of the word "any" indicates that the legislature intended "every" felony to serve as the underlying felony. Thus, felon-in-possession can serve as the underlying felony. But a court must still apply a "foreseeability-proximate cause" concept to the underlying felony. A defendant may be responsible for any death that is the natural and proximate result of the crime unless there is an intervening cause of that death. To test causation, courts look at the underlying felony, as well as all the facts of the particular case. A death is foreseeable if the underlying felony and killing were part of a continuous transaction, closely connected in time, place and causal relation. Under the facts here, a rational juror could find that Defendant's unlawful possession of a firearm was the proximate cause of death, because he knew he was not allowed to own a gun, but he bought one "off the street" and kept it at home, in a couch, where he knew he and Victim were prone to argue. It is Defendant's fault that this gun became part of the altercation that resulted in Victim's death; it was completely foreseeable that such an incident would occur. Evidence was sufficient to convict.

State v. Sigmon, 517 S.W.3d 653 (Mo. App. E.D. April 25, 2017):
(1) Even though Defendant made repeated threats to police while being transported to the station in a patrol car, evidence insufficient to convict of aggravated stalking, Sec. 565.225, because this was a continuing, single incident, not a "course of conduct" with separate and distinct acts; and (2) even though Defendant threatened Officer by saying he was going to commit sexual acts on Officer's daughter when he was released, evidence insufficient to convict of second-degree sexual misconduct, Sec. 566.095, because Defendant's threats to Officer were not a solicitation or request to engage in sexual acts.
Facts: Defendant was arrested during a domestic disturbance. He was verbally abusive and threatening while being arrested. While being transported in a patrol car, Defendant said he knew one of the officers had a young daughter, and when he got out he was going to take her and commit sexual acts on her. Defendant continued to be verbally threatening and abusive. He was convicted at trial of aggravated stalking and sexual-misconduct for this conduct toward police.
Holding: (1) Aggravated stalking, Sec. 565.225.3, requires the State to prove that Defendant purposefully harassed police as part of a course of conduct and that, during this course of conduct, he made at least one credible threat. Here, the evidence was insufficient to prove aggravated stalking because the encounter with police was a single, continuous encounter that did not establish the "course of conduct" requirement. The threats occurred in the heat of the moment from the time of arrest through the transporting to jail. 565.225 requires more than one instance of harassment to support a

stalking conviction. Without any meaningful separation of time between Defendant's actions, the threats made did not constitute separate and distinct acts. (2) Sexual misconduct, Sec. 566.095, requires the State to prove that Defendant solicited or requested another person to engage in sexual conduct under circumstances in which he knows such a request is likely to cause affront or alarm. A solicitation or request to engage in sexual conduct involves asking or petitioning another person to participate in sexual acts. Here, Defendant's comments were sexual, but it subverts the meaning of the words used by Defendant to suggest he was proposing, inviting or otherwise requesting to engage in sexual acts with Officer's daughter. To the contrary, he was threatening. Defendant's threats do not constitute crime of sexual misconduct with corresponding requirement to register as sex offender. Convictions reversed.

State v. Graham, 516 S.W.3d 925 (Mo. App. E.D. April 25, 2017):
(1) Even though Defendant, who was lawfully prescribed oxycodone, misused it by injecting himself with it rather than taking it in pill form, evidence was insufficient to convict for unlawful possession of controlled substance because Sec. 195.180.1 provides that a person may lawfully possess a controlled substance pursuant to a valid prescription; misuse of the drug does not invalidate a Sec. 195.180.1 affirmative defense; and (2) where Defendant's conviction for unlawful possession of controlled substance (oxycodone) was vacated, Defendant's conviction for related unlawful use of drug paraphernalia must also be reversed because he is not "in violation" of a drug statute, which is a necessary prerequisite for conviction under Sec. 195.233.1.
Facts: Defendant was a hospital patient, who was prescribed oxycodone for oral use. A nurse discovered him injecting himself with the drug. He was convicted of possession of a controlled substance, and unlawful use of drug paraphernalia.
Holding: Sec. 195.180.1 provides an affirmative defense to possession of a controlled substance; it provides that a person may lawfully possess the substance pursuant to a valid prescription. Defendant had a valid prescription for oxycodone. The State argues Sec. 195.180.1 is not an available defense because Defendant "misused" the oxycodone. But the plain language of the statute does not criminalize "misuse." Further, the rule of lenity requires that any ambiguity in a statute be resolved in Defendant's favor. Conviction for unlawful possession reversed. Regarding the paraphernalia conviction, Sec. 195.233.1 makes it unlawful to use paraphernalia to introduce into the body a controlled substance "in violation of Secs. 195.005 to 195.425." Since Defendant's conviction for unlawful possession is vacated, he is not "in violation" of Secs. 195.005 to 195.425 and his paraphernalia conviction must be vacated too.

State v. McCauley, 2017 WL 2118649 (Mo. App. E.D. May 16, 2017):
Holding: Even though evidence was sufficient to support Defendant's conviction for possession of drug paraphernalia in an apartment based on constructive possession, trial court did not err in granting judgment of acquittal for felon-in-possession of a firearm in the apartment; other than showing that Defendant had joint-control over the apartment, State failed to show any "additional incriminating evidence" specifically connecting Defendant to the gun.
Discussion: The State argues that because the evidence is sufficient on the drug charge, it must be sufficient on the gun charge. But the gun was not in the same drawer as the

drugs. Defendant's personal belongings were not comingled with the gun, or in close proximity to the gun's drawer. There was no evidence Defendant had a gun. Even though Defendant fled from police, this shows consciousness of guilt of the drugs, not necessarily the gun. The State argues that it is "well-established" that there is a connection between drugs and guns, but this does not provide proof beyond a reasonable doubt that Defendant constructively possessed the gun.

State v. Bowen, 2017 WL 361185 (Mo. App. E.D. Jan. 24, 2017):
Holding: Trial court plainly erred, following jury trial, in convicting Defendant of felony stealing over $500, Sec. 570.030.3(1), in light of *Bazell*, 497 S.W.3d 263 (Mo. banc 2016); trial court had "no power" to enter judgment for a felony.

Murphy v. State, 2017 WL 588184 (Mo. App. E.D. Feb. 14, 2017):
Holding: Because plain error review is not available in Rule 24.035 cases, appellate court cannot review Movant's claim, not raised in his amended motion, that his felony stealing conviction is contrary to *Bazell*.

State v. Feldt, 2107 WL 900082 (Mo. App. E.D. March 7, 2017):
Holding: (1) Even though (a) counsel filed a motion with the court indicating the parties had agreed to waive a jury trial; (b) Defendant said after he was found guilty and sentenced that he and counsel had "discussed" whether to have a jury trial; and (c) Defendant never objected to a bench trial, trial court plainly erred in conducting bench trial because the record did not reflect with unmistakable clarity that Defendant *personally* understood and voluntarily waived his right to a jury trial; and (2) even though appellate court is granting new trial, it must first consider Defendant's sufficiency of evidence claim on appeal because to fail to do so would possibly subject Defendant to double jeopardy, if State had presented insufficient evidence to convict (but evidence was sufficient here).

State v. Shockley, 2017 WL 772255 (Mo. App. E.D. Feb. 28, 2017):
Holding: Under *Bazell*, the felony enhancement for stealing applies only where value is an element of the offense; where Defendant was convicted of stealing a motor vehicle as a felony, Sec. 570.030.3(3)(a), value was not an element of the offense, so case is remanded for entry of conviction for misdemeanor stealing and resentencing.

State v. Cecil McBenge, 2016 WL 6695799 (Mo. App. E.D. Nov. 15, 2016):
(1) Even though Defendant and his brother's DNA were found at a murder scene where Victim's house had been ransacked and Victim beaten to death, the evidence was insufficient to convict of first degree murder because there was no evidence that Defendant or his brother personally deliberated on the killing; but (2) because Defendant was also charged with second degree felony-murder based on first degree burglary and because the evidence was sufficient to prove Defendant committed first degree burglary and Victim was killed as a result, case is remanded for trial on second degree felony-murder. (3) Similarities between 1980 burglary in which Brother was implicated and 1984 burglary-murder were not sufficient to prove Defendant's motive, intent or identity in 1984 murder, so evidence of 1980 murder was not admissible; there is no authority

providing that the motive, intent or identity exceptions to uncharged crimes applies to crimes committed by an accomplice; Defendant's intent was never at issue because he did not clam the offense was a mistake or accident; he denied committing the offense; additionally, the 1980 murder's prejudicial effect was greater than its probative value.
Facts: Defendant and his brother were charged with first degree murder in the 1984 death of Victim. Alternatively, they were charged second degree felony-murder based on burglarizing her house, and Victim's resultant death. Defendant's Brother dated Victim's granddaughter and knew Victim kept money in a Calumet baking powder can in her house. In 1980, Victim's house was burglarized. Brother was not linked to that crime until 1986, when a fingerprint lifted from the scene was tested and matched Brother. Brother was apparently never charged with the 1980 burglary because the three-year statute of limitations ran by 1986. Meanwhile, Victim's house was burglarized again in 1984 in the crime at issue. Her house was ransacked, and Victim was beaten to death. In 2011, Brother's DNA was found on a cheese wrapper at the house, and Defendant's DNA was found on a stocking. The trial court admitted evidence about the 1980 burglary to prove Defendant's motive, intent and identity. The jury was instructed on first degree murder, and second degree felony-murder based on the burglary. The jury convicted of first degree murder.
Holding: (1) The evidence is not sufficient to convict of first degree murder. The State must prove Defendant committed acts which aided another in killing; it was Defendant's conscious purpose in committing those acts that Victim be killed; and Defendant personally deliberated on Victim's death. There is no evidence Defendant or his brother personally committed Victim's murder or personally deliberated in killing Victim. There is no evidence that Defendant or his brother had an agreement to kill Victim. There is no evidence Defendant or his brother made a statement or exhibited any conduct indicating an intent to kill Victim. No deadly weapon was used; instead Victim was beaten. While the fact that Victim was beaten shows that someone deliberated, it does not prove that Defendant deliberated. In short, there was not sufficient evidence to find Defendant personally deliberated on Victim's death. The first degree murder conviction must be reversed. (2) But this does not mean Defendant must be discharged. Here, Defendant was also charged with second degree felony-murder based on burglarizing Victim's house. It is not possible for appellate court to just enter a conviction for second degree felony-murder because the jury was not required to find that Victim's death occurred as a result of Defendant's commission of the burglary, although the jury had been so instructed. Unlike first degree murder, a defendant may be convicted as an accomplice to second degree murder without a finding that defendant had any culpable mental state other than intent to promote commission of the offense. In other words, a defendant can be convicted of second degree murder as an aider without proof that defendant specifically intended to kill Victim. There was sufficient evidence to prove Defendant committed first degree burglary and Victim was killed as a result. Case remanded for trial on second degree felony-murder. (3) The trial court abused discretion in admitting evidence of the 1980 burglary. The State argues the 1980 burglary is logically relevant to prove motive, intent or identity. As an initial matter, there is no legal authority that the State may use evidence of uncharged crimes committed by an accomplice to prove motive, intent or identity. However, appellate court assumes for purposes of this appeal only that the State may do this. Even so, the 1980 burglary should not have been

admitted. Even if evidence is logically relevant because it tends to prove guilt, it is legally relevant only if its probative value outweighs the prejudicial effect. The 1980 burglary was more prejudicial than probative. There was not a strict necessity to admit the 1980 burglary to show motive because other evidence showed motive, i.e., Granddaughter testified Brother knew Victim kept money in the Calumet can. The 1980 burglary did not show intent because Defendant never put his intent at issue. A defendant puts intent at issue only if he admits the charged acts, but claims they were committed innocently or by mistake. A defendant's denial of a charged act does not make intent an issue. Nor did the 1980 burglary prove identity. Although there were similarities in the 1980 and 1984 crimes, there were also differences. The methodologies were not so unusual and distinctive to resemble a "signature."

State v. Brian McBenge, 2016 WL 6695801 (Mo. App. E.D. Nov. 15, 2016):
(1) Even though Defendant and his brother's DNA were found at a murder scene where Victim's house had been ransacked and Victim beaten to death, the evidence was insufficient to convict of first degree murder because there was no evidence that Defendant or his brother personally deliberated on the killing; but (2) because Defendant was also charged with second degree felony-murder based on first degree burglary and because the evidence was sufficient to prove Defendant committed first degree burglary and Victim was killed as a result, case is remanded for trial on second degree felony-murder. (3) Similarities between 1980 burglary and 1984 burglary-murder were not sufficient to prove Defendant's motive or identity in 1984 murder, so evidence of 1980 murder was not admissible, because its prejudicial effect was greater than its probative value.
Facts: Defendant and his brother were charged with first degree murder in the 1984 death of Victim. Alternatively, they were charged with second degree felony-murder based on burglarizing her house, and Victim's resultant death. Defendant dated Victim's granddaughter and knew Victim kept money in a Calumet baking powder can in her house. In 1980, Victim's house was burglarized, but Defendant was not linked to that crime until 1986, when a fingerprint lifted from the scene was tested and matched Defendant. Defendant was apparently never charged with the 1980 burglary because the three-year statute of limitations ran by 1986. Meanwhile, Victim's house was burglarized again in 1984 in the crime at issue. Her house was ransacked, and Victim was beaten to death. In 2011, Defendant's DNA was found on a cheese wrapper at the house, and his brother's DNA was found on a stocking. The trial court admitted evidence about the 1980 burglary to prove Defendant's motive and identity. The jury was instructed on first degree murder, and second degree felony murder based on the burglary. The jury convicted of first degree murder.
Holding: (1) The evidence is not sufficient to convict of first degree murder. The State must prove Defendant committed acts which aided another in killing; it was Defendant's conscious purpose in committing those acts that Victim be killed; and Defendant personally deliberated on Victim's death. There is no evidence Defendant or his brother personally committed Victim's murder or personally deliberated in killing Victim. There is no evidence that Defendant or his brother had an agreement to kill Victim. There is no evidence Defendant or his brother made a statement or exhibited any conduct indicating an intent to kill Victim. No deadly weapon was used; instead Victim was beaten. While

the fact that Victim was beaten shows that someone deliberated, it does not prove that Defendant deliberated. In short, there was not sufficient evidence to find Defendant personally deliberated on Victim's death. The first degree murder conviction must be reversed. (2) But this does not mean Defendant must be discharged. Here, Defendant was also charged with second degree felony-murder based on burglarizing Victim's house. It is not possible for appellate court to just enter a conviction for second degree felony-murder because the jury was not required to find that Victim's death occurred as a result of Defendant's commission of the burglary, although the jury had been so instructed. Unlike first degree murder, a defendant may be convicted as an accomplice to second degree murder without a finding that defendant had any culpable mental state other than intent to promote commission of the offense. In other words, a defendant can be convicted of second degree murder as an aider without proof that defendant specifically intended to kill Victim. There was sufficient evidence to prove Defendant committed first degree burglary and Victim was killed as a result. Case remanded for trial on second degree felony-murder. (3) The trial court abused discretion in admitting evidence of the 1980 burglary. The State argues the 1980 burglary is logically relevant to prove motive or identity. However, even if evidence is logically relevant because it tends to prove guilt, it is legally relevant only if its probative value outweighs the prejudicial effect. The 1980 burglary was more prejudicial than probative. There was not a strict necessity to admit the 1980 burglary to show motive because other evidence showed motive, i.e., Granddaughter testified Defendant knew Victim kept money in the Calumet can. Nor did the 1980 burglary prove identity. Although there were similarities in the 1980 and 1984 crimes, there were also differences. The methodologies were not so unusual and distinctive to resemble a "signature."

M.N.M. v. S.R.B., 2016 WL 5376358 (Mo. App. E.D. Sept. 27, 2016):
Holding: Even though Petitioner seeking Order of Protection testified that (1) she believed, but couldn't prove, that Defendant wrote obscenities on her door, (2) that Defendant talked to Petitioner's friends about her "in a negative way," (3) that Defendant sent her a "nasty" text message and called her a bitch, but (4) that she wasn't afraid of Defendant, the evidence was insufficient to prove that Defendant stalked or harassed, as defined in Sec. 455.010, to support an Order of Protection; among other requirements, Sec. 455.010 requires fear of danger of physical harm.

M.S. v. N.M., 2016 WL 1319059 (Mo. App. E.D. April 5, 2016):
Holding: Even though Defendant and Victim had a "heated" argument over coaching baseball in 2012, and Defendant threatened Victim in a phone call in 2015, the evidence was insufficient to enter an order of protection because there were not two or more incidents showing a "continuity of purpose" as required by Sec. 455.010(13)(c); the two incidents were separated by three years and were not connected to each other; furthermore, the "heated" argument incident was initiated by Victim, so cannot qualify as part of an "unwanted course of conduct."

State v. Twitty, 2016 WL 2731943 (Mo. App. E.D. May 10, 2016):
Even though (1) Defendant possessed empty pseudoephedrine boxes and receipts for having purchased them, and (2) Defendant confessed to having purchased the pills and trading them for methamphetamine, the evidence was insufficient to convict of "possession" of pseudoephedrine with intent to make meth; this is because (a) Defendant did not have "actual possession" of any pseudoephedrine when he was arrested, and (b) Defendant did not have "constructive possession" either because, at the time of his arrest, he no longer exercised dominion or control over the pills.
Facts: After examining pseudoephedrine log records showing frequent purchases of the drug, police went to a residence. There, they saw Defendant shred pseudoephedrine boxes. They arrested Defendant, and seized the boxes and receipts for purchasing the pills. Defendant confessed to having purchased the pills and said he had traded them for methamphetamine. Police found no methamphetamine or pseudoephedrine. Defendant was convicted of possessing pseudoephedrine with intent to make meth, Sec. 195.420.
Holding: The State was required to prove that Defendant had actual or constructive possession of the pseudoephedrine. However, Defendant lacked dominion or control over a controlled substance at the time of his arrest. Sustaining Defendant's conviction premised on "actual possession" would run afoul of Sec. 195.010(34)'s language that a person has actual possession if he "has the substance on his person or within easy reach and convenient control." Also, affirming Defendant's conviction under "constructive possession" would drastically broaden what constitutes "constructive possession." The statute allows either actual or constructive possession. The State, in effect, asks the court to create a third category of possession, i.e., *past* actual possession under a constructive possession theory. This would usurp the Legislature's role. Conviction vacated.

State v. Shell, 2016 WL 3070002 (Mo. App. E.D. May 31, 2016):
Even though Defendant provided heroin to Victim, where Defendant did not inject Victim and dropped seemingly-well Victim off at his parents' house after they used heroin together, evidence was insufficient to convict of involuntary manslaughter when Victim later died; this is because (1) Defendant did not have a duty to seek medical care for Victim and (2) Defendant's actions were not reckless in that there was no evidence that Defendant was aware of the risk that Victim's death was "probable" as a result of the heroin.
Facts: Defendant and Victim wanted to use heroin together. Defendant bought heroin for them to use. Victim was to pay him back. Both injected themselves with heroin. Afterwards, Defendant drove Victim back to Victim's parents' house. Victim told his mother he was tired and was going to bed. The next day, Victim was found dead. Defendant was convicted of involuntary manslaughter for recklessly causing Victim's death by providing him with heroin.
Holding: Because the involuntary manslaughter statute does not consider a defendant's failure to act, a duty to perform an omitted act must be otherwise imposed by law. Where evidence to support conviction for involuntary manslaughter consists of affirmative acts as well as omission, a defendant may still be found guilty of the offense even if a duty to perform the omitted acts is not otherwise imposed by law. A defendant has a duty to seek medical help for a person where a defendant has "created and/or increased the risk of injury," or if he has a "status relationship" with a victim such that the victim may rely on

the defendant for medical care. Here, Defendant provided the heroin. Defendant did not suggest how much heroin Victim should use or help Victim inject the drugs; thus, Defendant did not create or increase the risk of injury. Nor did Defendant assume responsibility for medical care of Victim; Defendant dropped Victim off at his parents' house, where Victim was able to converse with his mother. Having concluded that the law did not impose on Defendant a duty to act, we must consider whether Defendant's affirmative acts rose to the level of recklessness. The State was required to prove that Defendant was aware of the risk that Victim's death was "probable" as a result of the heroin, but no expert testified to this at trial. Although a doctor testified that she had seen heroin overdose deaths, given the lack of evidence establishing the amount of heroin injected, the evidence was not sufficient to support conviction.

State v. Naylor, 2016 WL 3418806 (Mo. App. E.D. June 21, 2016):
Even though (1) Defendant entered a private office (room) in a public restaurant building during business hours and stole money from the office, and (2) he was charged with first-degree burglary on grounds that another person was in the public part of the restaurant at this time, the evidence was insufficient to convict of first-degree burglary because Sec. 569.160 logically contemplates that the "building or inhabitable structure" that Defendant unlawfully entered be the same "structure" in which another person was present; since Defendant was charged with entering a "room" (the office), the State had to prove that another person was in that "room" specifically.
Facts: Defendant was charged and convicted of first-degree burglary for entering a private office in a public restaurant building and stealing money from the office while "there was present in such building [Other Person], a person who was not a participant in the crime." "Other Person" was present in the public restaurant during business hours.
Holding: The evidence is insufficient for first-degree burglary because the statute requires the Other Person to be in the room that was burglarized, when part of the building is private and part open to the public. The State charged Defendant with burglary for entering a *room* not open to the public – the office – in the public restaurant *building*. The State presented no evidence that anyone was in the *office* (room) when Defendant entered it and stole the money. Sec. 569.160 contemplates that the "building or inhabitable structure" that a defendant unlawfully enters be the *same* "structure" in which another person is present. By charging that Defendant entered a "room," the State bore the burden of proving that another person was in this "room" specifically. The evidence was insufficient to prove this. However, the evidence does support the lesser offense of second-degree burglary, so court enters conviction for that.

State v. Burnett, 2016 WL 3437503 (Mo. App. E.D. June 21, 2016):
Where no officers testified as to what offense they arrested Defendant for, the evidence was insufficient to prove felony resisting arrest, because there was no evidence that Defendant was being arrested for a felony.
Facts: Police responded to a call at a house for "flourishing" or "brandishing a weapon." When they arrived, they found a woman who appeared to be a victim of domestic violence. Police also found Defendant hiding in a closet. He struggled and fought with police as they arrested him. Defendant was charged with felony resisting arrest on

grounds that police were making an arrest for second-degree domestic assault, which is a felony.
Holding: Under Sec. 575.150.5(1), resisting arrest is a misdemeanor, unless the police were arresting Defendant for a felony, in which case the resisting is a felony. The relevant inquiry is not whether Defendant is guilty of second-degree domestic assault, but whether the arresting officer contemplated making a felony arrest. Here, the State failed to ask any of the testifying officers what offense they were arresting Defendant for. The record does not show the specific reason Defendant was arrested. This could have easily been established by asking the testifying officers. Although it is "probable" that Defendant was arrested for a felony (and he was charged with various felonies), the evidence is insufficient to prove felony resisting arrest beyond a reasonable doubt. However, court enters conviction for lesser-included offense of misdemeanor resisting.

State v. Voss, 2016 WL 145727 (Mo. App. E.D. Jan. 12, 2016):
(1) Defendant can be convicted of first-degree involuntary manslaughter for involvement in a death of a Victim from a drug overdose, where Defendant's reckless conduct caused Victim's death in that Defendant supplied heroin to Victim, helped Victim ingest it, saw signs that Victim was overdosing, and failed to seek medical attention; (2) trial court abused discretion in penalty phase in admitting hearsay testimony from the mother of a different victim than the one in this case in which she claimed that Defendant had caused her son's death, too; allowing a mother of a different victim than the one in this case to read a "victim-impact" statement, because this mother was not a family member of the victim in this particular case; allowing Victim's sister to testify to hearsay that she believed Defendant was involved in five other heroin overdose deaths; and allowing a probation officer to testify to hearsay from a police report that Defendant was involved in another person's overdose death. However, the penalty phase testimony was harmless given other admissible penalty phase evidence.
Facts: Defendant was convicted at a jury trial of first-degree involuntary manslaughter for recklessly causing the heroin overdose death of Victim. During penalty phase, trial court admitted testimony by various witnesses that Defendant had also caused other people to die of heroin overdoses, though none of those witnesses had personally witnessed this. The court also allowed a mother of a victim in one of those other alleged deaths to read a victim-impact statement about her son's death.
Holding: (1) It is a matter of first impression in Missouri whether a person can be convicted of first-degree involuntary manslaughter for involvement in a victim's death from drug overdose. The involuntary manslaughter statute is not defined in terms of a Defendant's failure to act, and thus, any duty to act must be otherwise imposed by law. The comment to Sec. 562.011.4 provides an example of liability for manslaughter based on the failure to perform an act "such as supplying medical assistance to a close relative." A Defendant can be criminally liable for a failure to act where "one stands in a certain status relationship to another." Here, that standard was met because Defendant created or increased the risk of injury to Victim by providing Victim heroin, helping to prepare it for ingestion, and after observing signs of overdose, leaving Victim alone and not contacting medical help. This is sufficient evidence from which a reasonable juror could find recklessness, i.e., conscious disregard of risk of death to Victim and such disregard was a gross deviation from what a reasonable person would do in such circumstances. (2) In

penalty phase, "history and character" evidence of prior unadjudicated criminal conduct is admissible under Sec. 557.036.3 if it satisfies the preponderance of evidence standard, which means it must be based on a witness' "firsthand knowledge" of the unadjudicated criminal conduct. Here, the witnesses who testified that Defendant had caused other heroin overdose deaths did not have firsthand knowledge of those incidents. Their knowledge was based on hearsay. Hearsay testimony is admissible during penalty phase only if it falls within a recognized hearsay exception, which the testimony from these witnesses did not. With regard to the mother of a victim in a different incident than the one charged who read a victim-impact statement about how her son's death affected her, this mother-witness was not a victim in the instant case and her statement did not concern the facts of the instant case. Although Sec. 557.041 does not define the term "victim," Sec. 595.200(6) provides a definition of "victim" as a direct victim of a crime or family members of a direct victim. Sec. 557.041.2 allows the "victim of such offense" to make a victim-impact statement in a particular case. This language only authorizes a victim of *the offense at issue* (charged offense) to make a statement. Although this was a close case, the inadmissible evidence was harmless when considered with other admissible penalty phase evidence, particularly damaging admissions made by Defendant. However, courts should be "cautious" about admitting alleged prior unadjudicated conducted.

State v. Johnson, 2016 WL 92827 (Mo. App. E.D. Jan. 12, 2016):
Even though Defendant removed Victim's pants with his hands, where Victim testified that Victim's hands were "on the floor, I'm not sure" during the sexual acts, the evidence was insufficient to convict of second-degree statutory sodomy because hand-to-genital contact was not proven.
Facts: Defendant was convicted of second-degree statutory sodomy for allegedly touching Victim's genitals with his hand. Victim testified that Defendant removed her pants with his hands and performed various sex acts. When asked where Defendant's hands were during the sexual acts, Victim testified, "On the floor. I'm not sure."
Holding: Under Sec. 566.010(1), second-degree statutory sodomy requires an act involving the genitals of one person and the hand, mouth, tongue or anus of another person. Victim never testified that Defendant touched her genitals with his hand. Close proximity between a Defendant's body part and Victim's body part is insufficient to reasonably infer actual contact without additional evidence. The State claims that actual contact can be inferred because Defendant testified at trial that no sexual acts occurred, and since the jury convicted him, the jury did not believe his testimony. This bootstrapping argument must be rejected. Even though the jury disbelieved Defendant's testimony that no sex acts occurred, it is rank speculation that Defendant's hand touched Victim's genitals, without some evidence of this.

State v. Sanders, 2016 WL 616433 (Mo. App. E.D. Feb. 16, 2016):
Holding: (1) Where the definition of "deviate sexual intercourse" was changed in 2006, and Defendant's pre-2006 acts did not fit within the pre-2006 definition, trial court plainly erred in giving a jury instruction based on the newer definition; and (2) where the written sentence and judgment did not conform to the oral pronouncement of sentence,

case is remanded for correction of written sentence *nunc pro tunc* to conform to oral pronouncement.

State v. Vu, 2016 WL 1086357 (Mo. App. E.D. March 15, 2016):
Even though the Prosecutor's "bad check clerk" sent a "10-day" notice letter to Defendant at his address and the letter was not returned, the evidence was insufficient to convict of passing a bad check because Sec. 570.120 requires proof that Defendant "actually received" the notice.
Facts: Defendant was convicted of passing a bad check at trial. The Prosecutor's "bad check clerk" testified that she sent a "10-day" letter to Defendant, and that the letter was not returned.
Holding: Sec. 570.120.1(2) criminalizes passing a bad check if the Defendant fails to pay the check "within ten days after receiving actual notice in writing that [the check] has not been paid because of insufficient funds." Here, there was proof that a 10-day notice was sent to Defendant's address, and not returned. But there is no proof Defendant *actually received* the notice. The notice could have been lost in the mail. The State could have used means to notify Defendant that would have provided proof of actual receipt. But by choosing to send the 10-day notice by regular mail, the State left the record bereft of proof that Defendant actually received it, as required by statute. Defendant discharged.

State v. Woolard, 2020 WL 3969632 (Mo. App. S.D. July 14, 2020):
Holding: Even though Defendant touched Victim's vagina through her shorts (clothing), this was sufficient to constitute first-degree statutory sodomy, Sec. 566.062.1, because the definition of deviate sexual intercourse, Sec. 566.010(3), does not require skin-to-skin contact.
Discussion: Missouri case law is inconsistent on whether first-degree statutory sodomy can be committed by touching through the clothing. An Eastern District case held that such conduct supports only the lesser offense of first-degree child molestation because "sexual contact" is defined as "touching through the clothing." But "deviate sexual intercourse" is defined as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person." This doesn't require skin-to-skin contact, or exclude touching through the clothing. Here, Defendant used his hand to touch Vicitm's vagina through her clothing. Although his conduct also constitutes "sexual contact," the prosecutor has discretion which statute to charge Defendant under.

State v. McCord, 2020 WL 1873237 (Mo. App. S.D. April 15, 2020):
Holding: In case of first impression, Sec. 566.147.1 (2016) -- which prohibits a sex offender from living within 1,000 feet of a school -- measures distance from school's property line to Defendant's property line; thus, even though the school building may have been more than 1,000 feet from Defendant's house or outbuilding in which Defendant lived, the evidence was sufficient to convict where Defendant's property line was within 1,000 feet of the school's property line.
Discussion: A common sense understanding of the word "school" includes not only the physical building but also the grounds. Likewise, a common sense understanding of the location where a sex offender resides includes not only the house, but the yard. The

property lines of the school and Defendant's residence best define the places of concern to the legislature in keeping offenders away from schools. Thus, the statutorily prescribed minimum distance between the school and the location where a sex offender may reside is measured from property line to property line. This conclusion is consistent with the 2018 amendment to Sec. 566.147 that requires the minimum distance be from the "edge of the offender's property nearest" the school to the "nearest edge" of the school.

State v. Friend, 2020 WL 467959 (Mo. App. S.D. Jan. 29, 2020):
Holding: Where Child-Victim was 12-years-10-months old at the time of the sexual contact at issue, trial court erred in denying motion for judgment of acquittal of second degree child molestation (Class B felony), Sec. 566.068, because that offense requires the child be "less than 12 years of age;" but because third degree child molestation (Class C felony), Sec. 566.069, is a lesser-included offense, and requires the child be "less than 14 years of age," appellate court enters conviction for third-degree molestation and remands for resentencing.

State v. Austin, 2020 WL 7224203 (Mo. App. S.D. Dec. 8, 2020):
Holding: Resisting a lawful stop, Sec. 575.150, does not require State to prove that Defendant knew *why* Officer was trying to pull Defendant over.
Concurring Opinion: Concurring Judge writes to "caution judges and attorneys not to use MAI-CR 4th 429.61 without first modifying it accurately to follow Sec. 575.150" and applicable case law. The fifth paragraph of MAI-CR 4th 429.61 requires the jury to find that defendant knew or reasonably should have known of the basis for the stop. But this finding is not required by Sec. 575.150 or the case law applying the statute.

State v. Johnson, 2020 WL 7584948 (Mo. App. S.D. Dec. 22, 2020):
(1) Sec. 575.150.5 does not enhance resisting arrest for a parole violation to a felony, even if the underlying offense is a felony; thus, trial court did not err in granting Defendant's motion for judgment notwithstanding the verdict (JNOV) when jury found Defendant guilty of felony resisting, and convicting Defendant of misdemeanor resisting arrest; and (2) the State could appeal the grant of JNOV, because when a jury returns a verdict of guilty and a trial judge sets aside the verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not prevent the State from appealing to reinstate the jury's verdict.
Facts: Defendant was on parole for a felony offense. He failed to report to his Parole Officer, who then issued a warrant for his arrest. When he was arrested, he resisted arrest. He was charged with felony resisting arrest, 575.150, on grounds that he resisted arrest for a felony. Defendant was found guilty by a jury. Later, the judge granted Defendant's motion for JNOV on grounds that 575.150 doesn't enhance resisting arrest for a parole violation to a felony. The trial court entered a misdemeanor conviction. The State appealed.
Holding: As relevant here, Sec. 575.150.5 makes resisting arrest a misdemeanor unless the State proves the arrest was for a (1) felony; (2) a warrant for failure to appear on a felony case; or (3) a warrant issued for a *probation* violation on a felony case. Defendant's arrest didn't fall into any of these categories Under the statute's plain

language, resisting an arrest on a parole warrant is not a felony. We presume the omission of parole warrants from the statute was intentional. And the fact that the offense underlying the parole was a felony does not make Defendant's arrest be one for a felony. He was not being arrested "because of" or "an account of" the underlying felony. He was arrested for violating conditions of parole.

State v. Kowalski, 2019 WL 5703480 (Mo. App. S.D. Nov. 5, 2019):
Holding: Even though Defendant sent a fake bill to Victim demanding payment, this did not support conviction for violating the Merchandising Practices Act, Sec. 407.020.1, because this fake bill was not "in connection" with the sale of any actual merchandise for which the debt was being collected.

State v. Morton, 2019 WL 2067116 (Mo. App. S.D. May 10, 2019):
Holding: Even though Defendant on a daily basis for almost a year sexually abused child Victim, the evidence was insufficient to convict of child molestation as a Class A felony under the theory that this was a "ritual or ceremony," §566.067.2(1), because a "ritual or ceremony" must be performed by two or more persons, one of which is not the Victim, §566.061(26); conviction entered for child molestation as a Class B felony.
Discussion: As relevant here, child molestation is a Class B felony unless "the offense is committed as part of a ritual or ceremony, in which case the crime is a class A felony." §566.067.2(1). The State argues that because Defendant repeatedly performed the acts on Victim that this was a "ritual or ceremony." But §566.061(26) defines "ritual or ceremony" as "acts performed by two or more persons as part of an established or prescribed pattern." The State argues that the Victim and Defendant constitute "two persons." But the Victim must be "subjected to" sexual contact to be child molestations, §566.067. A victim in this context does not also "perform" in a ritual or ceremony. Evidence insufficient for Class A felony, but conviction entered for Class B felony.

Austin v. Jarred, 2019 WL 2537437 (Mo. App. S.D. June 20, 2019):
Holding: Even though Defendant-City-Officer (1) repeatedly went to Plaintiff-City-Clerk's adjacent office to make Sunshine Law requests, sometimes in an angry manner; (2) threatened to sue City-Clerk; (3) threatened to arrest City-Clerk on one occasion for not fulfilling Sunshine Law requests; (4) repeatedly drove by City-Clerk's house while on patrol; (5) ran license checks on City-Clerk's boyfriend; and (6) recorded phone calls between City-Clerk and her boss, full order of protection against City-Officer for "stalking" City-Clerk was not supported by sufficient evidence because there was no evidence that City-Clerk reasonably feared physical harm from Officer; Clerk testified that Officer did not physically harm her or threaten harm, and most of Officer's actions had a legitimate purpose, except for the threat to arrest, but stalking requires two or more prohibited actions, Sec. 455.010(14)(b).

State v. Shaw, 2018 WL 5919312 (Mo. App. S.D. Nov. 13, 2018):
Holding: (1) Even though Officer never specifically testified that he was arresting Defendant for "felony" assault, where Officer testified he was arresting Defendant for "attempted assault on me," the evidence was sufficient to convict of felony resisting arrest, Sec. 575.150; (2) cases suggesting that Officer must testify he was making an

arrest for a "felony" are to no longer be followed; and (3) cases which found the evidence insufficient where the Officer "could have" arrested Defendant for either a felony or misdemeanor should no longer be followed.
Discussion: Resisting arrest is a felony if defendant resists arrest for a felony, Sec. 575.150(1). Defendant contends the evidence is insufficient to convict of felony resisting because Officer testified that he was arresting Defendant for "attempted assault on me," which could be either a felony or misdemeanor. The information charged Defendant with resisting as a felony, because he committed "attempted assault 2d degree," which is a felony, Sec. 565.060.3 and 564.011. Here, the was sufficient to show Defendant committed the felony of attempted assault second degree. But Defendant contends that under *State v. Merritt*, 805 S.W.2d 337 (Mo. App. E.D. 1991), the relevant inquiry is what the arrested officer "contemplated" in making the arrest, not whether Defendant is guilty of the underlying charge. While that statement does appear in *Merritt*, that is dicta. *Merritt* should not be read to *require* Officer to testify he "contemplated" an arrest for a felony. To the extent that other cases follow *Merritt*'s dicta, they should no longer be followed. Similarly, *State v. Bell*, 30 S.W.3d 2016 (Mo. App. S.D. 2000), which found the evidence insufficient where the Officer "could have" arrested Defendant for either a felony or misdemeanor, should no longer be followed. Conviction affirmed.

State v. Gay, 2018 WL 3654887 (Mo. App. S.D. Aug. 2, 2018):
Holding: Even though police saw Defendant inhale aerosol from a can of "iHome compressed air duster," the evidence was insufficient to convict Defendant of the misdemeanor of inhalation of a "solvent," Sec. 578.250, because the State presented no evidence that the chemicals in the can were "solvents."
Discussion: Sec. 578.250 makes it a misdemeanor to intentionally "inhale the fumes of any solvent." "Solvent" is not defined in Chapter 578, so must be derived from the dictionary. "Solvent" means a liquid capable of dissolving or dispersing" another substance. The State presented no evidence at trial that the chemical in "iHome" spray (difluoroethane) is a "solvent." The State argues that the particular judge at the bench trial knew that it was a "solvent." But whether evidence is sufficient to support a conviction is not determined by a particular judge assigned to hear a case. Judges can take judicial notice of facts that are commonly known, or a fact, not commonly known, which can be readily determined from a readily available, accurate source. But nothing supports the notion that whether difluoroethane is a "solvent" is commonly known. And the technical journals which the State submits on appeal about the matter are not readily available. In any event, these technical journals were *not* introduced as evidence at trial. Moreover, this chemical is not one which the legislature has specifically listed as a "solvent," which the legislature could do. Conviction reversed.

State v. Brown, 2018 WL 494429 (Mo. App. S.D. Jan. 22, 2018):
Even though (1) after Officer began chasing Defendant-Driver's car; (2) Defendant-Driver slowed down and dropped off Passenger, then sped off; (3) Officer stopped his car and pursed Passenger on foot; and (4) Officer and Passenger had a shootout where Passenger killed Officer (and Passenger was killed too), the trial court did not err in granting judgment of acquittal (after jury verdict of guilty) to felony murder on theory

that Defendant-Driver committed underlying felony of hindering prosecution. This is because Defendant-Driver did not deceive Officer, or take actions that prevented Officer from apprehending Passenger.
Facts: Officer was chasing Defendant-Driver and Passenger in patrol car because Defendant-Driver's car had a headlight out. Defendant-Driver slowed down and let Passenger out of car. Defendant-Driver then sped off. Officer stopped to chase Passenger on foot. Officer and Passenger eventually shot at each other, and both were killed. The State charged Defendant-Driver with felony murder on grounds of hindering prosecution. After a jury convicted, the trial court granted a judgment of acquittal. The State appealed.
Holding: As relevant here, a person commits hindering prosecution, Sec. 575.030, if, for the purpose of preventing apprehension of another person, he prevents, by means of deception, anyone from performing such an act that might aid in the apprehension of such person. The critical question is whether Defendant's actions in slowing down his car so Passenger could exit, then speeding off, amounted to *deception* that *prevented* Officer from apprehending Passenger. The record does not show how Officer was deceived. Deceived about what? Deceived how? Unless someone is misled about something, he is not deceived. The State also fails to show how slowing down and letting Passenger exit car prevented Officer "from performing an act that might aid in the … apprehension of" Passenger, Sec. 570.030.1(4). In the absence of evidence of prevention or obstruction of some act, there is no violation of 570.030.1(4). Judgment granting acquittal of felony murder and hindering prosecution affirmed.

State v. Watkins, 533 S.W.3d 838 (Mo. App. S.D. Nov. 21, 2017):
Holding: Where Defendant was convicted at trial of felony stealing under Sec. 570.030.3, felony enhancement was invalid under *Bazell*; remanded for resentencing as misdemeanor.

State v. Shaw, 535 S.W.3d 391 (Mo. App. S.D. Dec. 12, 2017):
Holding: Even though Sec. 565.050 provides that a person commits the Class B felony of first degree assault if he "attempts" to cause serious physical injury, the use of the "attempt" language does not make the offense of first degree assault punishable under the general attempt statute, Sec. 564.011, which would lower the offense to a Class C felony; Sec. 565.050 makes the attempted crime have the same punishment as the completed crime.

State v. Filbeck, 2016 WL 6804412 (Mo. App. S.D. Nov. 17, 2016):
Holding: (1) Where Defendant had been convicted at trial of felony stealing under Sec. 570.030.3(3)(j) for stealing "animal considered livestock," Defendant's conviction was a misdemeanor pursuant to *Bazell*, and his conviction must be reversed and remanded for misdemeanor sentencing; but (2) even though Defendant claimed his conviction should be dismissed because he was not charged within the one-year statute of limitations for a misdemeanor, Sec. 556.036.2, Defendant waived this claim by not raising it in the trial court.

State v. Turrentine, 2016 WL 6818938 (Mo. App. S.D. Nov. 18, 2016):
Holding: (1) Plain error resulted in convicting and sentencing Defendant for felony stealing over $500 under Sec. 570.030.3 because the offense is a misdemeanor under *Bazell*; (2) trial court plainly erred in sentencing Defendant to 5 years for the Class D felony of first degree property damage, Sec. 569.100, because this sentence exceeded the 4 years authorized for a Class D felony, Sec. 558.011.

In the Interest of T.G. v. Juvenile Office, 2020 WL 4099740 (Mo. App. W.D. July 21, 2020):
Holding: Even though Defendant-Juvenile was seen with other people loading a deer into a pickup truck shortly after the deer was shot by the other people, the evidence was insufficient to convict of "illegally possessing a deer" under Sec. 252.040, because (1) relevant regulations did not require the deer to be reported to the "tele-check" system until 10:00 p.m. the day it was shot, and Defendant was arrested before that time had expired; (2) the conservation agents (police) never checked to see if the shooter had a permit or had properly "notched" their permit; (3) the relevant regulations require a deer to be tagged only when the deer is left unattended, which wasn't the case here; and (4) it would be an absurd result to interpret the statute to hold that only the shooter himself could load a deer into a truck before it was "tele-checked" since that would mean that a group of hunters could never assist the shooter in loading a deer.

In the interest of D.G.E. v. Juvenile Officer, 2020 WL 1918703 (Mo. App. W.D. April 21, 2020):
Holding: Even though Juvenile in an online chat (1) asked child-Victim if he could send her "some nudes;" (2) Victim received via computer a photo of a penis several days later; (3) Juvenile later apologized to Victim for "his" actions; (4) Juvenile bragged at school about sending "nudes" to Victim; and (5) Victim testified she "believed" the photo was on Juvenile's penis, the evidence was insufficient to convict Juvenile of first-degree sexual misconduct, Sec. 566.093.(1), because the evidence was insufficient to prove the photo was of *his* penis; Sec. 566.093.1 prohibits a person from exposing "his" own genitals under circumstances he knows are likely to cause affront or alarm.
Discussion: The State argues that Juvenile's conduct before, during and after the offense allows an inference that the photo was his penis. This is an example of a permissive inference. But the ultimate fact still must be more likely than not to flow from those facts. The question is whether the evidence here supports a finding that the ultimate fact – that Juvenile exposed *his* penis – is more likely than not to flow from the facts presented. The State argues the term "send some nudes" is commonly understood to mean "send your own nudes." But Victim received the photo several days later, so there is no connection between the "send nudes" conversation and when Victim received the photo. Even though Victim "believed" the photo was of Juvenile's penis, Sec. 566.093.1(1) requires proof beyond a reasonable doubt, not that Victim merely "believed" it was his penis, even if her belief was reasonable. The Court cannot give the State the benefit of speculative or forced inferences. Juvenile ordered discharged.

State v. Marley, 2020 WL 1918711 (Mo. App. W.D. April 21, 2020):
Holding: In case of first impression under new statute, even though (1) "physical pain" was removed in 2017 from the definition of "physical injury," Sec. 566.061(36), required for second degree domestic assault, and (2) Defendant claimed this resulted in a more restrictive interpretation of the requisite "physical injury," where Defendant choked Victim causing unconsciousness, this satisfied the new definition of "slight impairment of any function of the body or temporary loss of use of any part of the body."

State v. Howard, 2020 WL 283245 (Mo. App. W.D. Jan. 21, 2020):
Holding: Even though Defendant's adopted Daughter/Victim had her adoption vacated, this did not relive Defendant of criminal liability for incest, Sec. 568.020.1, for having had sex with Daughter/Victim before the adoption was vacated, because the vacation is prospective, not retroactive; trial court erred in dismissing information.

State v. Fikes, 2019 WL 7340515 (Mo. App. W.D. Dec. 31, 2019):
Even though Defendant (mistakenly) did not "know" he had a prior felony conviction because he had received a suspended execution of sentence (SES) for it, the knowledge element for felon-in-possession, Sec. 571.070, goes to knowingly possessing the gun, not knowing of the prior felony conviction.
Facts: Defendant was found during a traffic stop with a gun. He told police he did not have a prior felony conviction, because he had received an SES in a prior felony case. At his later felon-in-possession trial, he claimed the evidence was insufficient to convict because he didn't know he was a felon.
Discussion: Unlike a suspended imposition of sentence (SIS), which is not a conviction under Missouri law, a suspended execution of sentence (SES) is. Defendant claims the State failed to prove he knowingly violated Sec. 571.070, because he didn't know his prior SES was a felony conviction. The elements of unlawful possession are (1) knowing possession of a firearm, (2) by a person who has been convicted of a felony. The "knowingly" mental state applies only to the possession element, not the fact of a prior felony conviction. Defendant cites *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019), which held that under federal statute, a defendant has to both knowingly possess the firearm and know of their prohibited status. But Missouri statute is different.

State v. Usnick, 2019 WL 2504201 (Mo. App. W.D. June 18, 2019):
Holding: Even though Defendant had an unattended birth at home, baby somehow died, and Defendant hid the body, evidence was insufficient to convict of involuntarily manslaughter because: (1) as a matter of first impression, a medically unattended delivery cannot support a criminal prosecution as a matter of law; and (2) the state failed to prove the death was a criminal act, i.e., failed to prove the corpus delecti, since the State's experts did not testify that the failure to seek medical assistance was the cause of the baby's death or that anything else Defendant did caused the death; at most, the experts testified that the cause of death was unknown and the baby might have survived if attended by medical professionals.
Discussion: A person is not guilty of an offense based solely on the omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law. There is no duty imposed on mothers to have a

medically attended birth. Many mothers voluntarily choose to give birth at home without medical assistance, and others don't make that conscious choice but have a baby without assistance due to the unpredictability of birth.

State v. Patrick, 566 S.W.3d 245 (Mo. App. W.D. Jan. 8, 2019):
Holding: (1) Trial court in domestic assault case abused discretion in admitting police body camera footage in which Defendant made a remark about a knife, because the remark about the knife was not relevant in that it referred to an incident that occurred the night before the charged crime, not the charged crime itself, and (2) the remaining evidence was insufficient to convict of the charged offense, so conviction reversed.

State v. Keel, 565 S.W.3d 755 (Mo. App. W.D. Jan. 15, 2019):
Holding: (1) Even though Defendant was found with a digital scale in the back seat of her car and the scale allegedly had a residue substance on it, the State had the burden to prove that the residue was a controlled or imitation controlled substance in order to convict of possession of drug paraphernalia, Sec. 195.233, since a scale also has legitimate uses; and (2) even though Officer testified that the residue looked like methamphetamine and that a field test showed this, where Officer's testimony was admitted solely to show subsequent conduct and not as proof of the substance, the evidence was insufficient to convict.

State v. Barbee, 2018 WL 5795538 (Mo. App. W.D. Nov. 6, 2018):
Holding: (1) Even though child Victim testified that Defendant's penis had "touched" her "private part" and that Defendant had put his penis between her legs, the evidence was insufficient to convict of first-degree statutory rape, because it did not show that Defendant's penis had "penetrated" Victim's sex organ as required by Secs. 566.032.1 and 566.010(4); (2) even though attempted statutory rape is a lesser-included offense of first-degree statutory rape, appellate court cannot enter a conviction for that because the evidence did not support all the elements of that offense, and more important, the jury was never required to find each element, specifically that Defendant took a substantial step toward the completed offense; but (3) appellate court can enter a conviction for first-degree child molestation because all of its elements were found by the jury, specifically, that Defendant had "sexual contact' with Victim, which includes touching of Victim's genitals. Case remanded for entry of conviction of first-degree child molestation and sentence accordingly.

State v. Baker, 2018 WL 2011649 (Mo. App. W.D. May 1, 2018):
Holding: Even though Defendant stole a debit card and used it by entering the correct PIN numbers in the store's debit card machine, this did not constitute the offense of forgery, Sec. 570.090.1(3), because Defendant did not alter anything to give it an attribute it did not in fact have.
Discussion: Sec. 570.090.1(3) provides that a person commits forgery if, with the purpose to defraud, the person makes or alters anything so that it purports to have a genuineness it does not have. The legislative comment to the forgery statute says the offense "covers a thing other than a writing when it is made or altered so as to appear to have some valuable attribute which it does not in fact have." Forgery is an offense aimed

at safeguarding the genuineness of documents or things. It is undisputed that Defendant had the intent to defraud, but he did not make or alter anything here and try to portray it as genuine. The debit card was not altered and the correct PIN number was entered at the store. The State has identified no case where the absence of authority alone to enter into a transaction constitutes forgery. While Defendant's conduct constitutes fraudulent use of a credit device, Sec. 570.130, it does not constitute forgery. The trial court did not err in dismissing the information pre-trial with prejudice for failure to charge an offense.

State v. Crider, 2018 WL 2304163 (Mo. App. W.D. May 22, 2018):
Holding: Even though Sec. 1.205.1(1) states that life begins at conception, the "age" of a victim in a child sex case is determined by the victim's date of birth, not conception date; date of birth is the traditional meaning of a person's "age" and can be determined with certainty, unlike date of conception.

State v. Smith, 2018 WL 2304162 (Mo. App. W.D. May 22, 2018):
Even though (1) before Defendant was handcuffed he yelled at officers; threw down a knife; and generally failed to obey Officers' commands, and (2) after Defendant was handcuffed he made his body go limp and threw his body weight around, the evidence was insufficient to support resisting arrest, Sec. 575.150.1(1), because the "arrest" occurred when Defendant was handcuffed and Defendant did not resist arrest "by using or threatening the use of violence or physical force or by fleeing."
Discussion: *State v. Ajak*, 2018 WL 1599784 (Mo. banc Apr. 3, 2018), held that an "arrest" occurs when Officers obtain "actual restraint of the person of the defendant, or his submission to custody," and that an "arrest" is not a "continuing process that may still be 'effected' even after the arrestee is restrained and in the officer's control and custody." The critical element in determining whether an arrest has been effected is when the Officer has control over the Defendant's movements. Here, that occurred when Defendant was handcuffed and surrounded by two Officers. Having established that an "arrest" occurred at that point, the court can consider only the conduct leading up to that time to determine if Defendant resisted arrest. Even though Defendant yelled at Officers, took his shirt off, threw down a knife in a direction away from Officers, and police described this as "passive resistance," Defendant did not verbally threaten to harm Officers, didn't touch them, or flee from them, which the statute requires. Conviction for resisting arrest reversed.

State v. Wilhite, 2018 WL 2604922 (Mo. App. W.D. June 5, 2018):
Even though (1) Defendant was seen in an intoxicated condition 40 feet from a vehicle that had gone into a ditch, the headlights were on, and the door was open, and (2) after Defendant was taken home and then contacted by police, his BAC was .129 about four hours later, the evidence was insufficient to convict of driving while intoxicated because nothing showed whether Defendant drank before or after the vehicle went into the ditch, i.e., nothing showed that Defendant operated the vehicle in an intoxicated condition.
Facts: About 10:15 p.m., Witness saw vehicle nose-first in a ditch, and found Defendant nearby in an intoxicated condition. Witness drove Defendant home and called police. When Officer arrived at home about 10:45, Defendant appeared intoxicated. Officer

eventually obtained a warrant to test Defendant's blood. At 2:47 a.m., Defendant was determined to have a .129 BAC. Defendant was convicted of DWI.
Holding: The evidence is insufficient to prove Defendant was intoxicated at the time he operated the vehicle. Proof of intoxication at the time of arrest is insufficient, by itself, to prove intoxication at the time Defendant was driving. Here, the evidence was sufficient to reasonably infer that Defendant was driving the vehicle when it went into the ditch, but the evidence is not sufficient to show whether Defendant consumed alcohol before or after this. There was no evidence that the vehicle's motor was still running, that the keys were in the vehicle, or that the engine was still warm. Given the absence of evidence to show the approximate time of Defendant's operation of the vehicle and his lack of access to alcohol between the operation of the vehicle and the time Witness saw him intoxicated, the State failed to prove beyond a reasonable doubt that he operated the vehicle in an intoxicated condition.

State v. Graham, 2018 WL 2922031 (Mo. App. W.D. June 12, 2018):
Holding: Where (1) Defendant had been required to register as a sex offender under Iowa law for 10 years; (2) after the 10-year period expired, Defendant was notified by Iowa that he no longer had to register; and (3) Defendant subsequently moved to Missouri, the evidence was insufficient to convict of failure to register as sex offender in Missouri because the State did not show that Defendant "knowingly" failed to register.
Discussion: The parties agree that Defendant was, in fact, required to register in Missouri under Sec. 589.414, but failure to register is not a strict liability offense. Because the failure to register statute, Sec. 589.425, does not specify a mental state, Sec. 562.021.3 applies and requires "purposely or knowingly" as the mental state. Here, the State presented no evidence that Defendant ever knew he had to register in Missouri. The State claims Defendant should have known this because a witness testified that registration is a "big deal" and "gets a lot of publicity in the news," but Defendant had been affirmatively told by Iowa that he no longer had to register. Although ignorance of the law is generally not an excuse, it can act as a defense where it negates "the existence of the mental state required by the offense," Sec. 562.031.1. Conviction reversed.

State v. Pace, 2018 WL 3118888 (Mo. App. W.D. June 26, 2018):
Holding: Defendant, who was convicted at trial of felony stealing over $500, Sec. 570.030.3(1), and filed direct appeal, was entitled to have conviction reduced to misdemeanor and sentence accordingly under *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016).

L.M.D. v. D.W.D., 2018 WL 1061474 (Mo. App. W.D. Feb. 27, 2018):
Holding: Where (1) Petitioner for order of protection turned around in Defendant's driveway, at which time Defendant "flipped her off," and (2) later, Defendant confronted Petitioner at a restaurant, and told her never to pull into his driveway again or he would blow her head off, the evidence was insufficient to obtain a full order of protection for stalking, because Sec. 455.010(14)(b) requires a course of conduct of two more incidents that cause alarm. Since the original driveway incident was initiated by *Petitioner* when she turned around in Defendant's driveway, it does not count against Defendant. The restaurant incident would count, but one act alone is insufficient to prove stalking.

Watson v. State, 2018 WL 1061729 (Mo. App. W.D. Feb. 27, 2018):
Holding: (1) Even though 24.035 motion court dismissed motion by docket entry which was not signed by judge, an order disposing of a 24.035 or 29.15 motion need not be denominated a "judgment" or signed by judge to be "final" for appeal; (2) even though the motion court did not issue Findings, and summarily denied the timely-filed Rule 78.07(c) motion requesting Findings (which would be error), appellate court will not reverse for Findings because Movant has not raised this issue on appeal; and (3) even though a claim that a sentence is "in excess of the maximum authorized by law" is procedurally cognizable under 24.035, Movant cannot prevail on his timely-filed 24.035 claim that his stealing conviction violated *Bazell* because *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017), held that *Bazell* "applies prospectively only, except in those cases pending on direct appeal."

State v. Rainey, 2018 WL 1061959 (Mo. App. W.D. Feb. 27, 2018):
Holding: Where after jury's guilty verdict (1) trial court granted Defendant's motion for judgment of acquittal on grounds that the evidence was insufficient to convict, but (2) on appeal by State, appellate court reverses on grounds that the evidence was sufficient, case must be remanded for trial court to decide Defendant's alternative motion for new trial, even though this motion was indirectly overruled by operation of law under Rule 29.11(g).

State v. Balbirnie, 2018 WL 1276979 (Mo. App. W.D. March 13, 2018):
Holding: Second-degree statutory rape, Sec. 566.034.1, does not require the State to prove that Defendant knew the victim was less than 17 years old; instead, Sec. 566.020.2 makes mistake-of-age an affirmative defense upon which the defendant bears the burden of persuasion to persuade the jury that the defense is more probably true than not, Sec. 566.056(2). The State's sole burden is to prove the victim was under 17.

State ex rel. Hawley v. Richardson, 533 S.W.3d 850 (Mo. App. W.D. Nov. 21, 2017):
Holding: Petitioners, who were convicted in past of felony stealing under Sec. 570.030.3, were not entitled to habeas relief under *Bazell* in light of *State ex rel. Windeknecht v. Mesmer*, 2017 WL 4479200 (Mo. banc 2017), that *Bazell* holding only applies going forward, except for cases pending on direct appeal.

Editor's Note: The Western District issued identical rulings in several other habeas cases post-*Windeknecht*.

I.L.L. v. T.L.R., 2017 WL 6453625 (Mo. App. W.D. Dec. 19, 2017):
Holding: Even though Petitioner for full order of protection testified that Defendant sent her "threatening" emails and tried to get her fired from her job, the evidence was insufficient to support entry of a full order of protection where Petitioner had initiated the email exchange; the allegedly threatening emails were not made part of the record; and even if Defendant tried to get Petitioner fired, such action does not provide grounds for a protection order.
Discussion: To obtain a protection order, a Petitioner must show (1) that Defendant engaged in a pattern of conduct of at least two or more incidents; (2) that served no

legitimate purpose; (3) that caused Petitioner a fear of danger of physical harm; and (4) that it was reasonable for Petitioner to have a fear of danger of physical harm. Here, the allegedly threatening emails were not admitted into evidence, nor was there any testimony about their content. Further, even assuming Defendant tried to get Petitioner fired, it cannot be said that Defendant's actions might reasonably cause fear of physical harm. Thus, Defendant's actions do not constitute stalking under Sec. 455.010(12).

State v. Shaw, 2017 WL 6559978 (Mo. App. W.D. Dec. 26, 2017):
Holding: Where Defendant was convicted at trial of felony stealing and an associated count of armed criminal action, resentencing to a misdemeanor is required because (1) the felony stealing is actually a misdemeanor under *Bazell*, and (2) the armed criminal action conviction requires commission of a predicate felony, which no longer exists in light of *Bazell*, so that conviction is vacated.

State v. Jacobson, 2017 WL 2118655 (Mo. App. W.D. May 16, 2017):
Holding: Where jury convicted Defendant-Driver of second-degree assault and armed criminal action for running over a pedestrian, trial court erred in granting judgment of acquittal on ACA because (1) even though second-degree assault has a mental state of criminal negligence and ACA required acting purposely or knowingly, ACA applies to conviction for "any felony" so the mental state required for the underlying felony is irrelevant, and (2) Defendant's truck qualified as a "dangerous instrument" under Sec. 566.061(20) under circumstances used here because Defendant drove while intoxicated, had modified the truck to obstruct his line of sight, and knew he hit something but left the scene.
Discussion: Whether something is a "dangerous instrument" depends on whether the item was used in a manner or under circumstances in which it is readily capable of causing death or serious injury. Not every instance of a person involved in an injury accident while intoxicated will automatically support an ACA conviction. The decision here is based on "the unusual facts of this case." In addition to being intoxicated, Defendant knew he was driving in a high pedestrian area, had modified the truck to impair his line of sight, left the scene, and lied to police about the incident, suggesting he was aware of the dangerous nature of his conduct.

State v. Baldwin, 507 S.W.3d 173 (Mo. App. W.D. Jan. 10, 2017):
(1) Trial court erred in convicting and sentencing Defendant for felony stealing of a firearm, Sec. 570.030.3(3)(d), because such offense is a misdemeanor under Bazell, 497 S.W.3d 263 (Mo. banc 2016); case remanded for entry of misdemeanor stealing conviction and resentencing; and (2) in light of Bazell relief, Defendant's felony conviction for victim tampering must also be reduced to a misdemeanor because victim tampering is a felony only if the original charge is a felony; case remanded for entry of conviction for misdemeanor victim tampering and resentencing.
Discussion: Reversal of Defendant's felony stealing conviction also affects his felony victim tampering conviction, which was based on tampering with the stealing victim. Under Sec. 575.270.3, victim tampering is a felony only if the original charge is a felony. Otherwise, the offense is a Class A misdemeanor. Here, the felony tampering offense

must also be reversed, and case remanded for entry of misdemeanor tampering conviction and resentencing.

State v. Davidson, 2017 WL 968824 (Mo. App. W.D. March 14, 2017):
Even though Defendant-Passenger knew he was riding in a stolen truck and ran from police when they stopped the truck, the evidence was insufficient to convict of first degree tampering, Sec. 569.080.1, because State did not prove that Defendant acted in concern with Driver (who stole the truck) to "possess" it.
Facts: On June 1, a truck was stolen. Several weeks later, police saw the stolen truck and stopped it. Driver, Defendant-Passenger and Woman-Passenger ran from the truck. Driver and Defendant were Son (Driver) and Father (Passenger). At trial, Woman-Passenger testified that she and Driver had picked up Defendant (Father) but did not tell him the truck was stolen. She testified, however, that Father had seen Son driving the truck before; Son did not have a job; and it was "pretty clear" that the truck did not belong to Son. Prosecutor argued Defendant-Passenger was guilty of first degree tampering because "it doesn't matter if you're driving or riding … you're possessing that vehicle."
Holding: Defendant argues that merely being inside the stolen vehicle is not evidence of possession necessary for first degree tampering because merely being inside a stolen vehicle is second degree tampering. First degree tampering, Sec. 569.080.1 requires that a person "possess" a vehicle without the consent of the owner. Second degree tampering, Sec. 569.090, is when a person "unlawfully rides" in a vehicle. Possession means actual or constructive possession; constructive possession means the intention to exercise dominion or control over the object either directly or through another person. The State claims that Defendant was acting in concert with Son, and was guilty of first degree tampering via accomplice liability. But no evidence suggests that Defendant-Passenger (Father) acted with Son to take or continue to possess the truck. Defendant's flight from police merely shows he knew the truck was stolen; it does not show he acted with Son to possess the truck. Conviction reversed.

State v. Buch, 2017 WL 1055658 (Mo. App. W.D. March 21, 2017):
Holding: Even though Defendant's stealing firearms conviction, Sec. 570.030, was pending on direct appeal before *Bazell* was decided, *Bazell* applies to reduce conviction to misdemeanor; where cases are silent on the retrospective application of their holdings and if the holdings pertain to substantive matters, they are applied retrospectively.

State v. McMillian, 2016 WL 6081923 (Mo. App. W.D. Oct. 18, 2016):
Holding: Where Defendant was charged with felony stealing over $500, Sec. 570.030.3, more than one year after the offense, the offense was a misdemeanor under *Bazell*, so the one-year statute of limitations for misdemeanors applies, and the case must be dismissed.
Discussion: The State argues that *Bazell* does not apply to stealing over $500. The State is wrong. *Bazell* found that Sec. 570.030.1 does not contain as an element "the value of property or services." Sec. 570.030.3 applies *only* where "the value of property or services is an element." The State claims *Bazell* doesn't apply since the verdict director for the enhanced offense includes value over $500 as an element. But what a verdict director incorporates as an element of the offense is inconsequential, since the law

does not provide for the enhancement. Since by law Defendant's offense was only a misdemeanor, the one-year statute of limitations for misdemeanors, Sec. 566.036.2, applied. Even though the trial court dismissed the charge on other grounds, if the trial court reaches the correct result but for the wrong reason, the appellate court can affirm. Trial court's dismissal of indictment affirmed.

State v. Smith, 2016 WL 6956736 (Mo. App. W.D. Nov. 29, 2016):
Even though an owner of a stolen laptop testified that it was purchased for $550, the State's evidence was insufficient to convict of felony receiving over $500 because there was no testimony as to the amount of time that elapsed between the purchase and the theft.
Facts: Defendant was convicted of felony receiving stolen property of $500 or more, Sec. 570.080. The owner (IT Manager) of the property testified that the "invoice" for the laptop showed the purchase price was $550.
Holding: Sec. 570.020 defines "value" as the market value of property "at the time and place of the crime." 570.020 states that if value cannot be ascertained, it shall be deemed less than $500. In determining value, courts consider the property's purchase price, the amount of time between the property's purchase and its theft, and its condition when stolen. Here, the State failed to present any evidence of how much time elapsed between the time the laptop was purchased and time it was stolen; there is no way to determine based on purchase price alone the laptop's value *at the time of the crime.* Even though an owner's opinion as to value can constitute sufficient evidence, here, owner did not given an "opinion" as to value, but merely testified as to the purchase price. Evidence insufficient to convict of felony receiving, but conviction for misdemeanor receiving entered.

State v. Metternich, 2016 WL 7439121 (Mo. App. W.D. Dec. 27, 2016):
Holding: Trial court plainly erred in convicting Defendant of felony stealing over $500, Sec. 570.030.3, in light of *Bazell's* holding that the felony enhancement applies *only* where "value" is an element, and "value" is not an element of stealing as defined in Sec. 570.030.1. An appellate court reviews for plain error when it can determine from the face of the record that the trial court had no power to enter the conviction; the trial court had no power to enter judgment for felony stealing. Case remanded for conviction as misdemeanor.

State v. Coday, 2016 WL 1579254 (Mo. App. W.D. April 19, 2016):
Even though the State showed that Defendant had two prior convictions for "driving while under the influence of alcohol" under a Kansas statute, where the Kansas statute allowed conviction for "attempting to operate" a vehicle in an intoxicated condition, the evidence was insufficient to prove Defendant's prior offenses, because Missouri requires that a defendant actually "operate" a vehicle.
Facts: Defendant was convicted of DWI as a persistent offender for having two prior DWI convictions. To prove the prior convictions, the State submitted two reports from Kansas that showed that Defendant had been twice convicted of "driving under the influence of alcohol" under a certain Kansas statute.

Holding: The State has the burden to prove prior convictions beyond a reasonable doubt. The Kansas statute allows conviction for DWI for operating or "attempt[ing] to operate" a vehicle while intoxicated. In Missouri, "attempting to operate" a vehicle does not constitute an intoxication-related traffic offense for purposes of Sec. 577.023. In Missouri, to be guilty of DWI, a person must "operate" the vehicle. Thus, the fact that the State showed that Defendant pleaded guilty to two DWI offenses under Kansas law does not establish beyond a reasonable doubt that Defendant "operated" a vehicle in Kansas. When a foreign conviction encompasses acts outside of those prohibited by Missouri statute, the test is whether the acts committed during the commission of the foreign crime would qualify as an intoxicated-related offense under 577.023. The State contends that Missouri can infer that Defendant was "operating" cars in Kansas because he was also charged with speeding in Kansas at the same time. The Kansas speeding charges, however, were dismissed, so Missouri cannot infer guilt from a mere charge. Case remanded for resentencing without persistent offender status.

State v. Chase, 2016 WL 1579193 (Mo. App. W.D. April 19, 2016):
Even though Defendant knew she was wanted on a felony warrant and failed to appear for a court date, the trial court did not err in dismissing a charge for unlawful possession of a firearm as a "fugitive from justice," Sec. 571.070.1(2), because the phrase "fugitive from justice" is ambiguous as to what it entails, and the rule of lenity requires that the ambiguity be resolved in Defendant's favor.
Facts: Defendant was charged with unlawful possession of a firearm as a "fugitive from justice." She possessed a gun, knowing she there was a warrant for her arrest for a felony and that she had failed to appear for a court date. She moved to dismiss the charge on grounds that the statute was ambiguous.
Holding: Sec. 571.070.1(2) makes it unlawful for a person to possess a firearm if the person is a "fugitive from justice." The phrase "fugitive from justice" is not defined by Missouri statute. The appellate court has previously found the phrase to be ambiguous, subject to varying interpretations. The Legislature could clarify the statute, but has not. The rule of lenity requires that ambiguity be resolved in Defendant's favor.

State v. Lee, 2016 WL 2338427 (Mo. App. W.D. May 3, 2016):
(1) Even though Officer smelled marijuana during a traffic stop, Officer could not conduct a warrantless pat-down of Defendant pursuant to Terry when Officer did not believe Defendant had weapons or was dangerous; the pat-down was not justified as a "search incident to arrest" when Officer had no intent to arrest at the time of the pat-down; the "exigent circumstances" exception does not apply because Defendant had been put in a patrol car, and there was no reason Officer could not have obtained a warrant; the "inevitable discovery" exception does not apply because Defendant was stopped for a license plate infraction, and there was no evidence Defendant would have inevitably been arrested and searched because of that; and even though a second pat-down (where drugs were found) was conducted after Defendant fled, the second pat-down was the result of the unconstitutional first pat-down; (2) Even though Officer suspected Defendant had marijuana, where Officer only intended to "detain" Defendant when he fled, the evidence was insufficient to support conviction for felony resisting arrest, because there was no proof that Officer was arresting Defendant for a felony, or

that fleeing from the detention created a substantial risk of serious injury or death, even though Officer and Defendant tumbled down a hill when Officer caught Defendant.
Facts: Defendant was convicted of felony cocaine possession, misdemeanor marijuana possession, and felony resisting arrest. Officer stopped Defendant for driving without a front license plate. Officer smelled raw marijuana coming from the car. Officer put Defendant in the patrol car. Even though Defendant did not have his license, Defendant gave his identify, which Officer confirmed. Defendant said the marijuana smell was from his girlfriend who had a "license" for a marijuana vaporizer. Defendant gave permission to search his car. No drugs were found in the car. Officer then decided to search Defendant for drugs. Officer testified he had no reason to believe Defendant had weapons or was dangerous. Officer patted Defendant down and felt a small, hard object. Officer told Defendant to put his hands behind his back. Officer testified he planned to "detain" Defendant. Instead, Defendant ran away. Officer caught Defendant, and they tumbled down an embankment. Officer handcuffed Defendant, and then found marijuana and cocaine on his person.
Holding: (1) The drugs should have been suppressed because the pat-down search (before Defendant ran) was without a warrant, and without consent. The search was not a *Terry* search because that can only be for weapons; here, Officer testified he did not believe Defendant had weapons or was dangerous. The smell of marijuana and Defendant's nervousness would give rise to a belief that Defendant was involved in crime, but this is tempered by the fact that Defendant did not conceal his identity and was polite and compliant. Under totality of circumstances, a reasonable person would not have feared Defendant had a weapon. The State contends that the smell of marijuana justified the search as one incident to arrest. But there was no testimony that Officer intended to make an arrest at the time he did the search. Under the search-incident-to-arrest exception, the State needs more than probable cause to make an arrest; it needs an *actual arrest*. Nor does the exigent circumstances exception apply. Officer made no effort to obtain consent or a warrant. Given that Defendant was in the patrol car and another Officer could have easily observed him while a warrant was obtained, there is no reason Officer could not have obtained a warrant. The State argues that even if the first pat-down was not justified, the second pat-down after Defendant fled was. But the second pat-down was the direct result of the first unconstitutional pat-down. The flight does not justify the search. Lastly, the State argues the inevitable discovery exception applies. But Defendant was stopped for a license plate violation. Absent the unconstitutional search, there is no indication Defendant would have been arrested leading to the inevitable discovery of drugs. The drugs should have been suppressed. Defendant's drug convictions vacated and Defendant discharged. (2) There is insufficient evidence to prove felony resisting arrest. Sec. 575.150.5 provides that resisting arrest for a felony is a felony, but resisting a detention or stop is only a misdemeanor unless the State proves that it was done in a manner that creates a substantial risk of serious physical injury or death. The relevant inquiry is not whether Defendant is guilty of the charge for which he was arrested, but whether Officer contemplated making a felony arrest. Here, Officer testified he was seeking only to "detain" Defendant. Whether the intent was to arrest for a felony or merely detain is important because the latter is only a misdemeanor. The events here cannot support felony resisting. Officer had suspicion that Defendant had marijuana, but there was

nothing to suggest he had cocaine, which is the felony charge. Even though Officer and Defendant tumbled down a hill, the State does not contend that this created a substantial risk of serious injury or death. Because resisting a lawful stop by fleeing is not a lesser of felony resisting, court discharges Defendant.

State v. Patterson, 2016 WL 2731964 (Mo. App. W.D. May 10, 2016):
Conviction for felony tampering with physical evidence during an investigation, Sec. 575.100.2, requires both (1) that the tampering impair the item's availability in an investigation and (2) that the tampering obstruct a felony prosecution; the test is not whether the purpose of the investigation was to investigate a felony.
Facts: During booking for an unrelated arrest, Defendant grabbed a baggie out of his shoe, and swallowed the pills and flushed others down a toilet. Defendant later said the pills were 25 Vicodin pills. He was convicted of the felony of tampering with physical evidence.
Holding: Sec. 575.100.2 makes tampering with physical evidence a felony if the defendant "impairs or obstructs the *prosecution*" of a felony; otherwise tampering is a misdemeanor. There is a difference between an "investigation" and a "prosecution." In a matter of first impression, the trial court ruled that tampering is a felony if police were investigating a felony, but that is not what the statute requires. The statue requires that the tampering impair the item's availability *and* that the tampering obstruct a felony *prosecution*. Here, however, even though the trial court applied the wrong standard, reversal is not required. That's because the charging document accused Defendant of destroying 25 Vicodin pills, thereby impairing the prosecution for the felony of possession of a controlled substance with intent to distribute.

State v. Craig, 2016 WL 2731575 (Mo. App. W.D. May 10, 2016):
Holding: As matter of first impression, a Defendant can be convicted of attempted enticement of a child, Secs. 566.151 and 564.011, even though he uses an adult intermediary to attempt to solicit the child to engage in sexual conduct; the person with or through whom Defendant arranges the sexual conduct need not be an actual child or law enforcement officer masquerading as a child.

State ex rel. Royal v. Norman, 2016 WL 215236 (Mo. App. W.D. Jan. 29, 2016):
Habeas relief granted reducing conviction from felony to misdemeanor, where Defendant had pleaded guilty to tampering with a victim in an underlying misdemeanor case; Sec. 575.270.3 makes witness tampering a felony only if the underlying case is a felony.
Facts: Defendant pleaded guilty to third degree domestic assault, a misdemeanor. Later, he was charged with the Class C felony of tampering with a victim, involving the victim from the misdemeanor case. He was ultimately sentenced to seven years for victim tampering. He sought a writ of habeas corpus.
Holding: Sec. 575.270.3 provides that witness tampering "is a class C felony if the original charge is a felony. Otherwise, tampering … is a class A misdemeanor." Imposition of a sentence beyond that permitted by the applicable statute may be raised via habeas corpus. Here, his sentence exceeds that permitted by Sec. 575.270.3. The lower court is ordered to amend the conviction to a misdemeanor and sentence accordingly.

State v. Ransburg, 2016 WL 615753 (Mo. App. W.D. Feb. 16, 2016):
Even though Defendant held a taped-up (walking) stick over his chest and charged at Victim, the evidence was insufficient to convict of second-degree assault because this was not a "dangerous instrument" under the facts here, where Defendant did not use the stick as a bludgeon or swing it at anyone, and there was no evidence that the stick, as used, was readily capable of causing death or serious physical injury.
Facts: Defendant forced his way into a residence while carrying a taped-up four-foot stick, similar to a broom handle. He held the stick across his chest and charged at Victim. Defendant was previously known by police and Victim to routinely carry this stick, because he used it for dancing. Defendant was convicted at trial of second-degree assault and a corresponding count of armed criminal action.
Holding: Sec. 565.060 provides that a person commits second-degree assault if he attempts to cause physical injury by means of a "dangerous instrument." Sec. 566.061(9) provides that a "dangerous instrument" is any instrument, which under the circumstances in which it is used, is readily capable of causing death or serious physical injury. Here, Defendant did not swing the stick at anyone or use it as a bludgeon. He was known to always carry the stick for dancing. No evidence was presented that his holding the stick across his chest and charging at Victim was readily capable of causing death or serious physical injury. As such, the evidence was insufficient to convict of second-degree assault, and the corresponding ACA must also be set aside. The appellate court can enter a conviction for a lesser-included offense, however, and so enters conviction for third-degree assault, Sec. 565.070.1, for attempting to cause or recklessly causing physical injury.

State v. Eckert, 2016 WL 1039045 (Mo. App. W.D. March 15, 2016):
Even though Defendant had already been convicted when he wrote letters asking Victim to recant, where his case was still pending on appeal, Defendant could be convicted of victim-tampering under Sec. 575.270.
Facts: Defendant was convicted at a trial of a sex offense. While the case was pending on direct appeal, he wrote letters to his niece, asking her to talk to Victim and try to get Victim to recant her testimony.
Holding: Defendant claims the evidence was insufficient to convict of victim-tampering because his prosecution was already concluded when he wrote the letters. Sec. 575.270.2 provides that a person is guilty of "victim tampering" if they attempt to dissuade a victim from "[c]ausing a complaint, indictment or information to be sought and prosecuted or assisting in the prosecution thereof." It is a matter of first impression whether "prosecution" ceases upon conviction. Because "prosecution" is defined by the dictionary as a process of formal charges that are pursued to "final" judgment, and because court rules allow post-trial appeals that can result in the judgment being set aside, the appellate court concludes that the Sec. 575.270 applies when a case is still pending on appeal. Defendant could have obtained a remand on appeal by showing that the Victim had recanted. Thus, the statute applies when the case is pending on appeal.

*** Kelly v. U.S., ___ U.S. ___, 140 S.Ct. 1565 (U.S. May 7, 2020):**
Holding: The federal wire fraud and program fraud statutes, 18 USC Secs. 1343 and 666(a)(1)(A), only prohibit government officials from taking public money and property; they do not prohibit general government dishonesty or corruption; thus, defendant-employees of Governor did not violate statutes by closing off bridge lanes to cause traffic backups in town whose Mayor did not support Governor's reelection.

*** Maslenjak v. United States, ___ U.S. ___, 137 S.Ct. 1918 (U.S. June 22, 2017):**
Holding: 18 U.S.C. Sec. 1425(a), which makes it a crime to "knowingly procure[], contrary to law, the naturalization of any person" requires the Government to prove that the illegal act played some role in the defendant's acquisition of their own citizenship; when the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result.

*** Salman v. U.S., ___ U.S. ___, 137 S.Ct. 420 (U.S. Dec. 6, 2016):**
Holding: Under Sec. 10(b) of the SEC Act, a tippee is criminally liable for trading on inside information if the tipper "personally benefitted" from disclosing the information; "personal benefit" includes not just financial benefit, but includes a "gift of confidential information to a trading relative or friend"; thus, even though tipper, who gave confidential information to family members did not personally benefit financially from giving the information, the family member (tippee-Defendant) was criminally liable for using the information to trade.

*** Shaw v. U.S., ___ U.S. ___, 137 S.Ct. 462 (U.S. Dec. 12, 2016):**
Holding: 18 U.S.C. Sec. 1344(1), which makes is a crime to "defraud a financial institution," applies to scheme in which Defendant defrauded depositors' accounts; a scheme to fraudulently obtain funds from a bank depositor's account is a scheme to obtain property from a "financial institution."

*** Ocasio v. U.S., ____ U.S. ____, 136 S.Ct. 1423 (U.S. May 2, 2016):**
Holding: A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another co-conspirator with his consent and under color of official right; the money or property "extorted" need not come from someone outside the conspiracy; thus, where Police Officer-Defendant conspired with auto repair shop owners that he would refer business to them, and they would pay him a monetary kickback for doing so, this was an unlawful Hobbs Act "conspiracy" even though shop owners were co-conspirators and willingly participated in the scheme.

*** Taylor v. United States, 2016 WL 3369420, ___ U.S. ___ (U.S. June 20, 2016):**
Holding: The Hobbs Act can be used to convict defendants who rob intrastate marijuana dealers of drugs or proceeds, because this affects interstate commerce; to satisfy the Act's commerce element, Government nee only show that Defendant robbed a drug dealer.

*** McDonnell v. U.S., 2016 WL 3461561, ___ U.S. ___ (June 27, 2016):**
Holding: The federal bribery statute, 18 U.S.C. Sec. 201, must be interpreted in a limited fashion to avoid constitutional concerns over vagueness; under the statute, a government official must take an "official act" in exchange for something of value, but an "official act" does not include merely setting up a meeting, hosting an event, or contacting another government official to talk about an issue or gather information, since these are routine matters that all government officials do and constituents request; the government official must make a decision or take an action "on" a question or matter (similar to how a court decides a question), or agree to do so, to violate the bribery statute.

U.S. v. Eshelu, 103 Crim. L. Rep. 465 (D.C.. Cir. 8/3/18):
Holding: Conviction for having a firearm during a "crime of violence" reversed under U.S. Supreme Court case finding "crime of violence" language to be unconstitutionally vague.

U.S. v. Ford, 99 Crim. L. Rep. 70 (1st Cir. 4/13/16):
Holding: In prosecution as aider and abettor of felon-in-possession of firearm, Defendant-Wife must have more than just "reason to know"' that her husband might have been convicted of a felony; Gov't must prove Wife actually knew the facts that made husband's possession illegal.

U.S. v. Valle, 2015 WL 7774548 (2d Cir. 2015):
Holding: Evidence was insufficient to convict of conspiracy to commit kidnapping where the alleged conspiracy was based on chats in an Internet fantasy sexual fetish website with persons known only by their screen names; the fantastical elements of the chats combined with the impersonal nature of the interactions showed deep fantasy, not real intent to commit kidnapping.

U.S. v. Litvak, 2015 WL 8123714 (2d Cir. 2015):
Holding: Even though Defendant made misrepresentations to the U.S. Treasury regarding certain mortgage securities, the misrepresentations were not "material" since there was no evidence that they influenced the decision of the Treasury.

U.S. v. Bailey, 2016 WL 1426295 (4th Cir. 2016):
Holding: Even though Defendant entered Victim's car when Victim refused to give him a ride and put something "cold and hard" on the Victim's neck while telling him to drive, evidence was insufficient to prove that Defendant had the specific intent to kill or seriously harm the Victim so as to prove carjacking; there was no weapon seen, and Defendant initially said he would pay for a ride.

U.S. v. Palomino-Coronado, 2015 WL 6745914 (4th Cir. 2015):
Holding: Even though Defendant had engaged in sexual activity with 7-year old child and had taken several non-sexually explicit photos of her, and even though one sexually explicit photo was taken but then deleted, evidence was insufficient to prove that Defendant engaged in sexual activity with the child in order to take a photo; court vacates

Defendant's conviction for knowingly using, persuading, inducing, enticing or coercing a minor into sexually explicit conduct for purpose of producing a visual depiction.

Seals v. McBee, 103 Crim. L. Rep. 459 (5th Cir. 8/3/18):
Holding: State law, which criminalized making a threat against public officials, was overbroad under First Amendment in that it not only criminalized physical threats, but also actions such as filing a lawsuit against a public official or threatening to run against them.

U.S. v. Stanford, 2016 WL 2909203 (5th Cir. 2016):
Holding: Trial court erred in determining that Gov't need not prove Defendant's knowledge as to whether the substance he was dealing was a controlled substance analogue in a charge of conspiracy to distribute CSA; court's ruling interfered with Defendant's constitutional right to present a complete defense.

U.S. v. Garcia, 2019 WL 1275330 (7th Cir. 2019):
Holding: Officer's "expert testimony" about meaning of cryptic phone calls between Defendant and drug dealer was merely "educated speculation" rather than proof beyond a reasonable doubt to support conviction for drug dealing.

U.S. v. Weimert, 99 Crim. L. Rep. 48 (7th Cir. 4/8/16):
Holding: Even though Defendant misled parties in a real estate deal about the other side's underlying interest in the deal, this did not violate federal wire fraud laws; buyers and sellers don't break the law if they engage in "sharp dealing" by deceiving each other about their true preferences, priorities or bottom-line terms; Congress could not have meant to criminalize a buyer's or seller's negotiating positions.

U.S. v. Blagojevich, 97 Crim. L. Rep. 554 (7th Cir. 7/21/15):
Holding: Even though Defendant-Governor offered take a public action in exchange for a cabinet position, this did not violate federal bribery laws; this was a form of political logrolling that is unlike the swap of an official act for a private payment.

U.S. v. White, 101 Crim. L. Rep. 481 (8th Cir. 7/11/17):
Holding: Gov't must prove Defendant knew that weapon's characteristics required that it be registered to convict under National Firearms Act.

U.S. v. Stacks, 2016 WL 2620129 (8th Cir. 2016):
Holding: Evidence was insufficient to convict of making a false statement in a loan application, 18 USC 1001, where Defendant certified there had been "no substantial adverse changes" since the initial loan application; even though Defendant had taken out additional loans and a bank had suggested moving a loan to another bank, these changes were not comparable to the liens, bankruptcies and convictions listed in the loan application as examples of "substantial adverse changes."

U.S. v. Wroblewski, 98 Crim. L. Rep. 593 (8th Cir. 3/15/16):
Holding: Even though Defendant on supervised release failed to appear after receiving a summons for a revocation hearing, this did not violate the "bail jumping" statute, 18 USC 3146(a)(1); the statute only applies when a person has failed to appear *after* having been "released" on a summons or following arrest.

U.S. v. Boykin, 2015 WL 4489945 (8th Cir. 2015):
Holding: Evidence was insufficient to prove conspiracy where Gov't proved only that Defendant had a seller relationship with buyer of one ounce of marijuana, where Gov't did not prove that Defendant sold a resale quantity of marijuana or knew what buyer planned to do with the marijuana; this was true even if buyer had a subjective, undisclosed intent to share the marijuana.

U.S. v. Ochoa-Oregel, 103 Crim. L. Rep. 467 (9th Cir. 8/2/18):
Holding: Defendant's conviction for illegal re-entry reversed because the two prior removal orders on which the conviction were based were collaterally attacked on grounds that one did not qualify as a crime of violence, and the other was infected by the first.

U.S. v. Espinoza-Valdez, 103 Crim. L. Rep. 173 (9th Cir. 5/7/18):
Holding: Even though Defendant (1) was stopped in a known drug smuggling area near the border near an apparent drug smuggling camp, (2) was equipped with sophisticated radio equipment, and (3) had previously recently been arrested for drugs in the same area, where no actual drugs were found on or near Defendant, evidence was insufficient to convict him of conspiracy to smuggle drugs.

U.S. v. Pepe, 103 Crim. L. Rep. 382 (9th Cir. 7/11/18):
Holding: Defendant who had sex with children in Cambodia cannot be convicted under statute which criminalized child sex while "traveling" in other countries if Defendant had established temporary residency in Cambodia (but statute has since been changed to also cover "resides, either temporarily or permanently, in a foreign country.").

U.S. v. Loveland, 99 Crim. L. Rep. 307 (9th Cir. 6/3/16):
Holding: Conviction for conspiracy to distribute drugs requires proof of an agreement between Seller and Buyer to distribute drugs; even though Seller sold large amounts of drugs to Buyer and should have known Buyer was reselling them, this wasn't sufficient proof of an agreement to prove conspiracy.

U.S. v. Reza-Ramos, 2016 WL 890777 (9th Cir. 2016):
Holding: Gov't bears burden of proving that Victim is Native American whenever Gov't charges a defendant under the Indian General Crimes Act based upon the status of the Victim.

U.S. v. Cisneros-Rodriguez, 98 Crim. L. Rep. 287 (9th Cir. 12/23/15):
Holding: Alien's conviction for illegal re-entry vacated because customs agent misled her into waiving her right to counsel at the original removal proceeding by telling her that an attorney would not be able to help her.

U.S. v. Rodriguez, 97 Crim. L. Rep. 511 (9th Cir. 6/24/15):
Holding: Even though Defendant shined a laser pointer at an aircraft, this did not violate 18 USC 32(a)(5) and (8), making it illegal to interfere with safe operation of an aircraft, absent proof he knew that he might blind or distract the pilot or intended to do so.

U.S. v. Katakis, 2015 WL 5090792 (9th Cir. 2015):
Holding: Removing an email from one folder and placing it another folder by pressing computer's delete key was not sufficient to conceal it, so as to give rise to obstruction of justice charge; obstruction requires some likelihood the item will not be found in the course of a search of Defendant's computer without using forensic tools.

U.S. v. Pauler, 101 Crim. L. Rep. 204 (10th Cir. 5/23/17):
Holding: Defendant convicted of municipal domestic violence offense can't be convicted under federal law that prohibits gun possession by persons convicted of "state" misdemeanors involving domestic violence; the Gov't argued that "state" meant "state and local," but other parts of the Gun Control Act differentiate between "state and local," so Congress could have included municipal offenses in the statute if it intended.

U.S. v. Makkar, 98 Crim. L. Rep. 200 (10th Cir. 11/23/15):
Holding: Even though Defendants sold a substance called "Grim Reefer, the jury should not have been instructed that it could infer they had knowledge they were selling JWH-18 from the fact that they were aware that the substance they were selling had marijuana-like effects; just because a drug has similar effects does not mean that Defendants know the chemical structure of the drug they are selling.

U.S. v. Clarke, 2016 WL 2754018 (11th Cir. 2016):
Holding: Defendant did not have a prior "conviction" for felon-in-possession statute, where the alleged prior conviction was a felony guilty plea for which adjudication was "withheld" under Fla. law, and Fla. law did not consider the prior adjudication to be a felony conviction.

U.S. v. Jenkins, 2013 WL 3338650 (E.D. Ky. 2013):
Holding: Plain meaning of words "because of" in Hate Crimes Prevention Act means that sexual orientation of Victim is a necessary prerequisite to the assault to be a violation of the Act.

U.S. v. Patterson, 2016 WL 865220 (D. Mass. 2016):
Holding: Even though (1) Defendant was observed walking in front of a bank for a period of time, (2) Defendant had his face covered with a hat and sunglasses, and (3) Defendant was wearing gloves and had a concealed pellet gun, the evidenced was insufficient to convict of attempted bank robbery where he never entered bank, spoke to anyone at bank, or removed gun from his person.

U.S. v. Gyamfi, 2019 WL 1029101 (S.D. N.Y. 2019):
Holding: To convict of aiding and abetting felony murder, Gov't must prove that Defendant knew a gun would be used in attempted robbery and knew that there was a genuine risk someone would be killed during robbery.

U.S. v. Armijo-Banda, 2018 WL 6201964 (W.D. Tex. 2018):
Holding: Defendant's prior removal proceeding could not support conviction for re-entry where the prior proceeding was without jurisdiction because Defendant's notice to appear didn't state a date and time.

U.S. v. Hill, 2016 WL 1650767 (E.D. Va. 2016):
Holding: Where Defendant assaulted a co-worker at an internet retailer using only his fists, there was not a sufficient effect on interstate commerce that Defendant could be prosecuted under the federal Hate Crimes Prevention Act.

Cott v. State, 2014 WL 10212898 (Ark. 2014):
Holding: Defendant could not be convicted of failure to appear in court when he had not yet been charged with any criminal offense; even though Defendant had been arrested, he had not yet been charged, and the failure to appear statute required that there be a "pending charge."

Arms v. State, 98 Crim. L .Rep. 73 (Ark. 10/8/15):
Holding: Even though pregnant Defendant caused her fetus to ingest drugs, she could not be convicted of introducing drugs into the body of another "person" because, as a matter of statutory construction, a fetus is not so defined under state law; various state laws contained conflicting provisions about when harm to a fetus is criminal; "the courts cannot, through construction of a statute, create an offense that is not in express terms created by the legislature."

Gill v. State, 2015 WL 70963029 (Ark. 2015):
Holding: Even though Defendant-Driver killed someone in a car accident, and the Victim's vehicle had the right of way at an intersection, evidence was insufficient to support negligent homicide were there was no evidence that Defendant was speeding, driving erratically, under the influence of alcohol, or that Defendant's actions constituted gross deviation from the standard of care.

Dobson v. McClennen, 2015 WL 7353847 (Ariz. 2015):
Holding: In charge of driving with a marijuana metabolite in body, a Defendant may establish an affirmative defense by showing that they are a qualified user of medical marijuana under state medical marijuana law, and that the metabolite would not cause impairment.

People v. Castillolopez, 99 Crim. L. Rep. 306 (Cal. 6/2/16):
Holding: Where statute criminalized possessing a dirk or dagger which has a blade that "is exposed and locked into position," Defendant's Swiss Army knife, which had a blade that closed simply by applying pressure to the back of the blade, did not qualify as a

prohibited item under the statute because this didn't constitute being "locked into position."

People v. Garcia, 98 Crim. L. Rep. 508 (Cal. 2/16/16):
Holding: Even though burglary statute used the term "room" to define burglary, where Defendant entered a store with the intent to commit a robbery and then took a victim into a store bathroom where he raped her, there was only one burglary, not two; the risk to personal safety occurred when Defendant initially entered the store to commit a felony, and the bathroom itself did not provide a separate, reasonable expectation of additional protection.

State v. Baccala, 101 Crim. L. Rep. 452 (Conn. 7/11/17):
Holding: Even though Defendant had profane argument with a store manager, his words were protected by First Amendment, did not cross line into "fighting words" (which aren't protected by First Amendment), and he could not be convicted of disturbing the peace.

Harper v. State. 2015 WL 4776515 (Del. 2015):
Holding: Carjacking is not a continuing offense; thus, where Defendant got into a car that had already been stolen (without his knowledge) and even though Victim was in the trunk (without Defendant's knowledge), Defendant was not guilty of carjacking, though Defendant is liable for criminal acts he participated in after the carjacking.

Sydnor v. U.S., 2016 WL 187942 (D.C. 2016):
Holding: Burglary statute which applied to a "yard" where "goods are kept for the purpose of trade" did not apply to a construction site because the Gov't did not prove that anything at the site would later be sold.

Doubleday v. People, 2016 WL 15323 (Colo. 2016):
Holding: To convict of felony-murder, the State must prove all the elements of the predicate offense, including the inapplicability of any affirmative defenses; thus, where jury acquitted Defendant of the predicate offense of robbery based on the affirmative defense of duress, the Defendant's felony-murder conviction must be reversed.

Clarke v. U.S., 2016 WL 533898 (Fla. 2016):
Holding: Felon-in-possession statute requires proof of prior felony adjudication of guilt.

State v. Dorsett, 2015 WL 790472 (Fla. 2015):
Holding: Under hit-and-run statute, State is required to prove as element that Defendant had actual knowledge he had hit someone.

Ramroop v. State, 2015 WL 5165545 (Fla. 2015):
Holding: Knowledge of Victim's status as law enforcement officer was a necessary element of crime of attempted murder of law enforcement officer.

Neptune v. Lanoue, 2015 WL 6735348 (Fla. 2015):
Holding: Even though Defendant was stalking Officer online, an injunction prohibiting Defendant from posing anything about the Officer on the internet was overly broad and violated 1st Amendment, because it went beyond prohibiting stalking to prohibiting legitimate expression about Officer's alleged police misconduct.

Chavez v. State, 2020 WL 129458 (Ga. 2020):
Holding: Evidence was insufficient to convict Defendant of possession of firearm while "on probation" where Defendant's probation had expired by operation of law before he possessed the gun.

People v. Bradford, 99 Crim. L. Rep. 8, 2016 WL 1165492 (Ill. 3/24/16):
Holding: Where "burglary by remaining" statute required that a person "without authority remain" in a building, Defendant, who shoplifted from Wal-Mart, did not commit the offense by staying in a public area of Wal-Mart and leaving before closing time; the offense requires exceeding authority to be in the building, such as hiding, entering an unauthorized area, or continuing to remain after authority is revoked; "[I]t strains logic to presume that the legislature intended most incidents of retail theft to be prosecuted as burglaries."

Layman v. State, 2015 WL 5474389 (Ind. 2015):
Holding: Evidence was insufficient to support felony murder where Defendant and co-defendants, who were juveniles, entered a home with the intent to steal, but the homeowner then shot and killed one of the co-defendants; none of the juveniles were armed or engaged in violent conduct before the homeowner shot at them.

State v. Meyers, 2019 WL 1086595 (Iowa 2019):
Holding: Even though screening test of Defendant's urine showed "possible" presence of amphetamines or marijuana metabolites, this did not support DWI conviction absent a confirmatory test to verify and identify a quantifiable amount of drug.

Iowa v. Lopez, 102 Crim. L. Rep. 428 (Iowa 2/2/18):
Holding: Even though Defendant sent a photo of his penis to another person via text, this did not violate "indecent exposure" law, because that crime requires a temporal and physical proximity between the exposed genitals and the viewer; indecent exposure is a crime of visual assault, and assault requires proof of physical contact or fear of physical contact; sending a photo is offensive but insufficient.

State v. Paye, 2015 WL 3636201 (Iowa 2015):
Holding: The outside front stairs of Defendant's home was not a "public place" within the meaning of public intoxication statute.

State v. Downing, 2020 WL 398646 (Kan. 2020):
Holding: For a place to qualify as a "dwelling" under burglary statute, it must be based on proof that someone has the subjective, present intent at time of burglary to use the

building as a home or residence; proof cannot be based merely on fact that building was designed for human habitation.

Shouse v. Com., 2015 WL 5666019 (Ky. 2015):
Holding: Crime of leaving a child in a car, causing death, is a carve-out to the offenses of wanton murder and second-degree manslaughter that precludes conviction of the latter two.

State v. Brown, 2019 WL 1187380 (Me. 2019):
Holding: In measuring 1000 foot distance between Defendant's drug sale and school, the difference in elevation between the points must be taken into account.

Grimm v. State, 2016 WL 2342875 (Md. 2016):
Holding: Defendant's confession to child sex offense was not corroborated by Victim's testimony that Victim could not remember any sexual acts by Defendant, even though Victim's testimony was "preposterous;" thus, there was no corpus delicti and evidence was insufficient to convict.

Com v. Brown, 101 Crim. L. Rep. 655 (Mass. 9/20/17):
Holding: Felony-murder as first degree murder cannot be allowed to be a free-standing crime because it is "not consonant with justice;" Defendant provided a gun and hood that were later used in a robbery and murder, and participated in the murders only on the "remote outer fringes"; but Defendant can be convicted of a lower degree of murder.

Com v. Tejeda, 101 Crim. L. Rep. 67 (Mass. 4/20/17):
Holding: Even though Defendant swallowed a bag of drugs, this did not "mislead" the police under statute which made it illegal to directly or indirectly mislead police with intent to obstruct or interfere with an investigation.

Com. v. Squires, 100 Crim. L. Rep. 603 (Mass. 3/27/17):
Holding: Even though Defendant was carrying a backpack at night with a crowbar, screwdriver, gloves, a flashlight and a walkie-talkie, the evidence was not sufficient to convict of possession of burglary tools, because although the conduct was suspicious, it did not show intent to commit burglary.

Com. v. Walters, 97 Crim. L. Rep. 716 (Mass. 9/18/15):
Holding: Even though Defendant's Facebook page contained a picture of him holding a gun and, in a different section of the page, a quotation that he would bring alleged Victim of threat "to justice," this did not constitute a criminal threat because (1) the picture with the gun merely expressed Defendant's interest in guns, military and veterans matters, and (2) the words "bring to justice" were subject to different reasonable interpretations that did not involve violence.

Com. v. Dagraca-Teixeira, 26 N.E.3d 741 (Mass. 2015):
Holding: Even though firearms were located in an apartment attic above Defendant's bedroom, evidence was insufficient to convict of constructive possession where there was no evidence the attic was accessible from the bedroom or that Defendant had knowledge of what was in the attic.

Com. v. Tejeda, 98 Crim. L. Rep. 221, 2015 WL 8055893 (Mass. 12/2/15):
Holding: Mass. rejects proximate cause test for felony-murder that would make defendants liable for any killings so long as the use of deadly force was a reasonably foreseeable consequence of the felony; the difference between criminal law and tort law and the harsh penalties of criminal law make it unreasonable to expand the felony-murder rule to conduct that neither Defendant nor an accomplice committed or intended; court rejects felony-murder for a robbery Defendant whose accomplice was killed in the robbery by the robbery victim.

State v. Carson, 102 Crim. L. Rep. 71 (Minn. 10/11/17):
Holding: Conviction for DWI can't be based on being under influence of a chemical not listed in Minnesota's chemical laws; here, Defendant was under influence of DFE, a propellant used to clean electronic equipment.

State v. Struzyk, 97 Crim. L. Rep. 670, 2015 WL 5081129 (Minn. 8/26/15):
Holding: Even though Defendant took blood from his Taser wound and wiped it on Officer's shirt, this was not felony assault, which requires physical assault, pain or discomfort; mere potential of bodily harm through blood or feces is not sufficient.

Schofield v. State, 2016 WL 1593967 (Nev. 2016):
Holding: Phrase "intent to keep" used in kidnapping statute required an intent to keep Victim permanently or for a prolonged period; the phrase was ambiguous and rule of lenity required this interpretation.

State v. Washington, 99 Crim. L. Rep. 11 (N.H. 4/1/16):
Holding: Where identify theft law made it illegal to misuse personal data of "another person," Defendant did not violate law by using a fake name (not of an actual person) to get a credit card.

State v. Mandatory Poster Agency, Inc., 2015 WL 5954284 (N.H. 2015):
Holding: Criminal violations of the Consumer Protection Act require mental state of "purposely," not merely "knowingly."

State v. Nichols, 2015 WL 7297087 (N.M. 2015):
Holding: Evidence insufficient to prove child endangerment by medical neglect where State offered no evidence that, even if Defendant would have obtained medical help earlier, the deceased child would have lived or had a significantly greater chance of living.

State v. Fede, 2019 WL 1118751 (N.J. 2019):
Holding: Even though Defendant refused to unchain the lock on his door to permit a warrantless entry by police, this did not constitute "obstruction" since the statute exempted from liability the "failure to perform a legal duty;" Defendant's actions were not an affirmative act of interference.

People v. Berry, 2016 WL 3244840 (N.Y. 2016):
Holding: Even though Defendant was found in an apartment with children where drug activity took place, evidence was insufficient to convict of child endangerment where Defendant never cared for or had authority over the children, and merely spent the night at the apartment.

In re J.T., 97 Crim. L. Rep. 695, 2015 WL 5255271 (Ohio 9/10/15):
Holding: Even though Defendant was carrying a broken gun in his pants, this did not constitute a carrying a concealed deadly weapon; the broken gun was no more a deadly weapon than a "laptop or a briefcase;" the State had argued the gun could be used as a bludgeon, club or nightstick.

State v. Barry, 98 Crim. L. Rep. 287, 2015 WL 9483531 (Ohio 12/30/15):
Holding: Even though, during a traffic stop for a drug investigation, Defendant was found with a drug-filled condom in her vagina, this was insufficient to convict of tampering with evidence in the absence of proof that Defendant knew the car would be stopped and searched; the tampering statute required proof that that Defendant conceal evidence when they know an official investigation is taking place.

State v. Nascimento, 99 Crim. L. Rep. 570 (Or. 7/22/16):
Holding: Employees who violate their employers' acceptable-use computer policy are not committing the computer crjme of accessing a computer system "without authorization."

Com. v. Wyatt, 2019 WL 470525 (Pa. 2019):
Holding: Even though (1) Defendant-Driver's phone records showed he received texts while driving, and (2) Defendant had dogs in his car, evidence was insufficient to convict of vehicular homicide and manslaughter, where there was no evidence Defendant was reading the texts or distracted by the dogs, and his driving wasn't erratic before the crash.

Com. v. Doughty, 2015 WL 7283109 (Pa. 2015):
Holding: Pecuniary inducement alone, without proof of intimidation, is not sufficient to convict of intimidation of witnesses or victims.

State v. Doyal, 2019 WL 94402 (Tex. Crim. App. 2019):
Holding: (1) Statute making it unlawful to "circumvent" the Sunshine Law was unconstitutionally vague; and (2) since the Sunshine Law only applies when there is a "quorum" at a public meeting, an attempt to avoid having a quorum can't violate the Sunshine Law.

State v. Graham, 2016 WL 1729593 (Vt. 2016):
Holding: High school employee-Defendant who was between employment contracts during summer break when she had sex with minor-student Victim was not in a position of authority over Victim.

State v. Tracy, 2015 WL 5123855 (Vt. 2015):
Holding: Even though Defendant called his daughter's basketball coach a "bitch," this did not constitute "fighting words" to support conviction for disorderly conduct; "fighting words" are those that are reasonably expected to cause the average listener to respond with violence.

Washington v. James-Buhl, 103 Crim. L. Rep. 80 (Wash. 4/19/18):
Holding: Defendant-Teacher did not have mandatory duty to report her own daughter's sexual abuse by stepfather, because there needs to be a connection between Teacher's "professional identity" and the criminal offense to trigger mandatory reporting; the law does not impose an "unlimited, ever present duty" to report merely because of one's occupation.

State v. EJ.J., 2015 WL 3915760 (Wash. 2015):
Holding: Even though Defendant yelled profanity at Officer who was arresting his sister, this could not support conviction for obstructing a law enforcement officer because Defendant's words were protected by 1st Amendment.

State v. Butler, 101 Crim. L. Rep. 156 (W.Va. 5/9/17):
Holding: Even though Defendant assaulted two men for kissing, this did not constitute a hate crime under state law defining hate crimes based on "sex" because this meant male and female gender, not sexual orientation.

State v. Louk, 99 Crim. L. Rep. 308, 2016 WL 3086176 (W.Va. 5/27/16):
Holding: Statute criminalizing "child neglect resulting in death" does not apply to prenatal conduct of pregnant Defendant; thus, even though Defendant ingested drugs while pregnant, causing death if later-born child, statute did apply.

State v. Houghton, 2015 WL 4208659 (Wis. 2015):
Holding: Statute prohibiting obstruction of windshields did not prohibit any object being present in the windshield but only those that caused material obstruction; the definition of "obstructs" indicates the object needs to have more than de minimus effect on driver's vision to be an obstruction.

Collier v. State, 2015 WL 1780069 (Ala. App. 2015):
Holding: The phrase "discovery of such person" in hindering prosecution statute is limited to hindering the finding or locating of such person, and does not include identifying the person as being involved in crime; even though Defendant made false statements that he shot the victim (to falsely exculpate his son) and even though

Defendant concealed a gun, this was not hindering prosecution where none of Defendant's actions actually prevented discovery or apprehension of the son.

People v. Garrett, 2016 WL 3356566 (Cal. App. 2016):
Holding: Even though Defendant entered a store with the intent to use a stolen credit card to buy something and even though this was identity theft, the offense fell into the "shoplifting" exception to commercial burglary statute, so was misdemeanor shoplifting instead of burglary.

People v. Thompson, 2015 WL 9437524 (Cal. App. 2015):
Holding: The value of a stolen debit card is only the minimal intrinsic value of the plastic for purposes of theft statute's $950 threshold for petty theft; however, a separate statute allows this to be prosecuted as felony theft if the card is actually used to purchase more than $950.

People v. Ramirez, 2016 WL 462647 (Cal. App. 2016):
Holding: Officer's expert testimony about how various persons had aligned themselves with various street gangs was conclusory and insufficient to establish that the umbrella gang had committed nonparty gang members' crimes.

People v. Brown, 2015 WL 5315595 (Cal. App. 2015):
Holding: Where (1) Victim was raped at two different locations, but only the first location involved use of force, (2) prosecutor during closing argument elected to base the charge only on the second incident, and (3) no unanimity instruction was given, then in reviewing the sufficiency of the evidence for forcible rape the appellate court is bound by the prosecutor's election, so reviews only whether the evidence was sufficient to support the second incident (which it wasn't); otherwise, the Court may be reviewing a non-unanimous verdict.

People v. Johnson, 184 Cal. Rptr.3d 850 (Cal. App. 2015):
Holding: Where statute made it illegal to use a concealed camera to video underneath an "identifiable" person's clothing, this means that the person be capable of identification or being recognized from the video, and includes the victim being able to recognize herself.

People v. Valencia, 2015 WL 5725517 (Cal. App. 2015):
Holding: DWI Defendant-Driver's refusal to submit to chemical test does not, by itself, constitute resisting, delaying or obstructing a police officer.

In re Chase C., 2015 WL 9254161 (Cal. App. 2015):
Holding: Even though Juvenile told other minors not to cooperate with police, and refused to identify himself when arrested, this did not constitute obstruction of justice or resisting arrest; Juvenile's verbal protests to the other minors were protected political speech under 1st Amendment, and his failure to identify himself was an assertion of silence under the 5th Amendment.

People v. Rivera, 184 Cal. Rptr.3d 801 (Cal. App. 2015):
Holding: The natural and probable consequences doctrine was not applicable to convict a co-Defendant for premeditated murder where the target offense was firing a firearm at a vehicle.

Crapps v. State, 2015 WL 8114247 (Fla. App. 2015):
Holding: Even though Defendant posted nude pictures of his ex-girlfriend on her Instagram account, this did not support conviction for unauthorized access to a computer, because there was no evidence regarding how Defendant's actions amounted to accessing a specific computer or network.

Randolph v. State, 2015 WL 7291513 (Ga. App. 2015):
Holding: Even though Defendant introduced fellow gang members to a drug dealer and helped distribute drugs from the dealer to the members, Defendant's actions were not in furtherance of gang interests so as to convict of violating the Street Gang Act; Defendant's actions did not provide the gang with monetary profit or enhanced reputation.

Gordon v. State, 2015 WL 7269782 (Ga. App. 2015):
Holding: Where Defendant's conduct could be either a misdemeanor or felony depending what offense was charged, rule of lenity required that court deem it a misdemeanor.

People v. Davis, 2016 WL 3385078 (Ill. App. 2016):
Holding: Even though parties stipulated that an Officer would testify that the distance from a school to a gas station was 822 feet, this did not satisfy the State's burden to prove that the sale of drugs was within 1000 feet of the school, because there was no evidence of where on the gas station property the offense occurred.

Trimnell v. State, 119 N.E.3d 92 (Ind. App. 2018):
Holding: Even though Defendant-Seller sold drugs to a buyer who injected it into Victim and then delayed taking Victim to hospital when Victim overdosed, this did not support conviction for felony murder because Defendant-Seller could not have anticipated or reasonably foreseen these events, since he had previously sold drugs without incident.

Prophitt v. State, 2016 WL 1035435 (Ga. App. 2016):
Holding: Even though Defendant masturbated while watching, from outside and underneath a house (in the crawlspace), a child-victim take a shower (apparently through a hole in the floor), evidence was insufficient to convict of child molestation because Defendant was not "in the presence" of the victim, and victim was not aware that Defendant was watching.

Lindsay v. State, 2016 WL 1102611 (Ga. App. 2016):
Holding: For Defendant to be convicted of "receiving stolen property," the State must prove that the tangible goods he received were actually stolen; where Defendant received

goods that were lawfully purchased by his girlfriend with money she had embezzled, Defendant had not received "stolen property."

People v. Casciaro, 2015 WL 5451299 (Ill. App. 2015):
Holding: Evidence was insufficient to support the crime of felony intimidation as predicate for felony murder, where the only evidence was that Defendant allegedly told a witness that someone else would be his "enforcer," but the alleged "enforcer" denied that Defendant had him threaten or intimidate anyone.

People v. Fields, 2015 WL 927092 (Ill. App. 2015):
Holding: Where Defendant's prior conviction for sex abuse was reversed, this required reversal of his conviction at trial in another sex case where the prior conviction was used as propensity evidence to convict.

Cowans v. State, 2016 WL 1664984 (Ind. App. 2016):
Holding: If a reasonable driver would have felt unsafe to come to an immediate stop where Officer began trying to stop Defendant, then Defendant is not fleeing for purposes of resisting arrest statute; whether adequate justification existed for not stopping is a question for the fact-finder.

State v. Holstead, 2016 WL 1391931 (Kan. App. 2016):
Holding: Marijuana clippings with no roots, which had been transplanted into an aeroponic/hydroponic grow system, were not "plants," and thus, could not be used to convict of cultivating marijuana.

State v. Lemoine, 2015 WL 2126823 (La. App. 2015):
Holding: Even though Defendant overbilled customers for fuel and then deposited the excess funds into his bank, the evidence was insufficient to convict of money laundering where Defendant's identity as the seller of the fuel was always known and available.

State v. Perry, 2015 WL 869373 (N.J. App. 2015):
Holding: Statute making it a crime to drive with a suspended license following a DWI did not criminalize driving without reinstatement of the license after the imposed term of suspension had expired.

State v. Kalinowski, 2019 WL 7346300 (N.M. App. 2019):
Holding: Where contract between home buyers and Defendant did not specify how deposits for construction of homes was to be used, title and ownership of deposits vested in Defendant at time of receipt, so he could not be convicted of embezzlement of the funds.

State v. Maak, 2018 WL 6729763 (Minn. App. 2018):
Holding: Defendant's mere knowledge that her husband allowed a person who had meth drugs to live in their basement was insufficient to support a conviction for engaging in the activity of storing meth in a home with children.

People v. Lawrence, 31 N.Y.S.3d 388 (N.Y. App. 2016):
Holding: Even though Defendant-school official grabbed a child with disabilities' face and yelled at her, evidence was insufficient to convict of child endangerment because Defendant did this in order to protect student from being trampled by other students who were rushing out the door.

State v. Miller, 2016 WL 984258 (N.C. App. 2016):
Holding: Even though State law made it illegal for a person who had a prior conviction for methamphetamine to possess pseudoephedrine, evidence was insufficient to convict Defendant because the statute failed to give fair notice and warning to defendants that such possession was illegal, and thus, the statute violated due process; a reasonable citizen would not know that possession of a legal product is "illegal," and there was no proof that Defendant actually knew his possession was illegal.

State v. Young, 2016 WL 1295951 (Ohio App. 2016):
Holding: Evidence was insufficient to convict of failure to report a change of address for moving from a "current address" to a "secondary address" as identified on the registration form; the form and statute did not define "current address" or "secondary address," and, in any event, the State had actual notice of Defendant's actual address during the entire reporting period.

State v. Hottenstein, 2015 WL 7428559 (Ohio App. 2015):
Holding: Even though Defendant, on a gun application, answered that he had not been found "delinquent" before, the evidence was insufficient to convict of making a false statement where his juvenile court case did not specify whether he had been found "delinquent" or "unruly"; further, the juvenile "drug offense" did not necessarily constitute a disqualifying drug-related conviction for gun application purposes.

State v. Johnson, 2014 WL 4624478 (Ohio App. 2015):
Holding: Even though Defendant had a BB gun during a burglary, the gun did not establish aggravated burglary (requiring use of a deadly weapon), because there was no testimony about the size or design of the BB gun, and it was not used as a bludgeon.

State v. Clay, 2019 WL 7183330 (Or. App. 2019):
Holding: Even though Defendant would have seen Victim's genitals while committing child sex abuse, this did not support separate conviction for using a child in a display of sexually explicit conduct; Defendant's viewing of the genitals would have been intertwined with and incidental to the sexual abuse charge.

Tate v. State, 2015 WL 2341042 (Tex. App. 2015):
Holding: Even though Defendant-Driver owned the car in which a drug-syringe was found near the front seat during an inventory search, evidence was insufficient to prove he possessed syringe where two passengers remained in the car for five minutes after Defendant was removed from it by police for questioning about an outstanding warrant.

Sutton v. State, 2015 WL 431110 (Tex. App. 2015):
Holding: Even though Defendant-School Employee worked for the school district, evidence was insufficient to convict of improper sexual conduct with a student under a statute which required that the employee's sexual conduct be with students at the same school where employee worked; although Defendant was employed by the same school district as student-victim, Defendant worked at a different school than the student-victim.

Wright v. State, 2015 WL 5602578 (Tex. App. 2015):
Holding: Even though Defendant-Mother failed to get medical attention for daughter who was sexually assaulted by Mother's boyfriend, evidence was insufficient to convict of recklessly causing seriously bodily injury to a child because the evidence did not show that the daughter's injuries were the result of Mother's failure to act.

Liverman v. State, 2105 WL 5579418 (Tex. App. 2015):
Holding: Even though Defendant filed a false mechanics lien with the clerk, this was not sufficient to convict of "execution" of documents affecting property by deception, because merely filing a document does not cause it to be "executed."

Williams v. State, 2015 WL 6560521 (Tex. App. 2015):
Holding: Even though Defendant had a crack pipe in his pocket, evidence was insufficient to convict of knowingly possessing drugs where the drug residue on the pipe was too small to be seen or measured, and there was no evidence Defendant knew that the purpose of the pipe was to smoke crack.

Ex parte Perry, 2015 WL 4514696 (Tex. App. 2015):
Holding: Statute regarding coercion of a public servant violated 1st Amendment's free speech protection to the extent it was applied to Governor who was charged with coercion for acts related to his ordinary use of line-item veto.

State v. Hawker, 2016 WL 3145143 (Utah App. 2016):
Holding: Prostitution statute which criminalized (1) "offering or agreeing to commit any sexual activity with another person for a fee" and (2) "offering or agreeing to engage in, or requesting or directing another to engage in" acts such as masturbation for a fee, did not apply to Defendant who agreed to self-mastrubate for a fee; this is because section (1) required sexual activity "with another person," and even though the conduct would violate section (2), the court found that if a person has no intent to violate (1), then she cannot violate (2).

State v. Kohonen, 2016 WL 492651 (Wash. App. 2016):
Holding: High-school-student-Defendant's social network post that he wanted to punch a fellow student and that the student "must die" did not constitute a "true threat" and was protected speech; even though the alleged Victim was upset by the posting, the statements were hyperbolic expressions of frustration; hence, the statement did not support conviction for cyberstalking.

State v. Rose, 2015 WL 9203927 (Wash. App. 2015):
Holding: Even though Defendant's marijuana prosecution was pending when voter-approved initiative took effect which legalized marijuana, the prosecution "savings statute" did not apply to allow the prosecution to proceed; by legalizing marijuana, voters were making a common law assumption that prosecutions would be "stopped" on the effective date of the legalization, not that prosecutions would be "saved" by a contrary law.

State v. Oatman, 2015 WL 5554299 (Wis. App. 2015):
Holding: Statute prohibiting sex offenders from photographing minors without their parents' permission was overbroad under 1st Amendment; statute was not content neutral, and statute did not further any Gov't interest in protecting children, because children are not harmed by nonpornographic photos taken in public places.

People v. Orta, 98 Crim. L. Rep. 592 (N.Y. Crim. Ct. 3/15/16):
Holding: Where Defendant was charged with being in a park "after dusk," evidence was insufficient to convict based on testimony that the sun had set and "nightfall" had begun, because "dusk" doesn't end until the sun drops below the horizon.

People v. Aleynikov, 2015 WL 4110801 (N.Y. Sup. 2015):
Holding: Conviction for unlawful use of secret scientific material was not supported by sufficient evidence that Defendant made a tangible reproduction or representation of the material, where Defendant merely downloaded a source code to his computer; the source code was not in tangible form.

People v. Marian, 97 Crim. L. Rep. 530 (N.Y. Crim. Ct. 7/14/15):
Holding: A work email address is not a "place of employment" under stalking statute that prohibited contacting someone at their "place of employment."

Com. v. Phillips, 2015 WL 8708232 (Penn. Super. 2015):
Holding: Crime of flight to avoid apprehension requires that Defendant has been charged with a crime at time he flees.

Sunshine Law
(See also "Discovery" for Sunshine Law cases prior to 2020)

City of Byrnes Mill v. Limesand, 2020 WL 543937 (Mo. App. E.D. Feb. 4, 2020):
Holding: (1) Sunshine Law, Sec. 610.027.6, authorizes gov't body to seek judicial guidance as to what must be disclosed by filing declaratory judgment action, but gov't body is liable for reasonable attorney's fees to requester; and (2) even though a record is closed under Sunshine Law, it may still be available under criminal or civil discovery rules, because the Sunshine Law exemptions do not apply in non-Sunshine Law contexts.

Malin v. Mo. Assoc. of Community Task Forces, 2020 WL 4091561 (Mo. App. W.D. July 21, 2020):
Holding: Sunshine Petitioner was entitled to discovery to determine if non-profit agency qualified as a "quasi-public governmental body," Sec. 610.010(4)(f)(a), subject to the Sunshine Law; court must look beyond agency's articles of incorporation to determine this; Sunshine Law applies to private agencies that contract primarily to carry out government services, or that perform public functions via statutory authority.

Gross v. Parson, 2020 WL 2630995 (Mo. App. W.D. May 26, 2020):
Holding: (1) The fees Agency can charge under Sunshine Law depends on whether the record is paper or electronic; paper records are covered by 610.026.1(1), electronic by .1(2); when charging for attorney review, Agency must charge at lowest paid attorney rate; when charging for clerical review, must charge at lowest clerical rate; (2) Agency cannot charge attorney time to "research" electronic records, but can charge for review of paper records (e.g., for redaction); (3) Agency response that it would take "120 business days to complete request" was not "detailed explanation" required by Sunshine Law, 610.023.3 for reason for delay; (4) Agency bears burden to establish redacted material fell within an exemption, and where Agency provided no reason for redaction, trial court cannot grant judgment on pleadings to Agency without having reviewed the redacted material *in camera*; burden was on Agency to request *in camera* review; (5) "knowing" violation of Sunshine Law requires plaintiff allege (a) Agency had knowledge of law; (b) law required production, and (c) Agency did not produce the documents; a plaintiff who asserts redaction is improper has satisfied the second element.

Transcript – Right To

S.H. v. P.B., 2019 WL 4420520 (Mo. App. E.D. September 17, 2019):
Holding: Even though Defendant failed to appear at order of protection hearing and a full order was entered against him, where he timely appealed but no transcript was available of the order of protection hearing, trial court failed to comply with Secs. 478.072 and 512.180.2, which require the court to make a record, and case must be remanded so a proper record can be made.

In the Interest of J.M.H. v. G.M.H., 518 S.W.3d 256 (Mo. App. S.D. April 6, 2017):
Holding: Where trial transcript could not be produced for appeal due to a recording equipment malfunction, appropriate remedy is to remand for new trial, because the complete lack of transcript is prejudicial to appellant's right of appeal.

In the Interest of C.J.D. v. Greene County Juvenile Office, 479 S.W.3d 648 (Mo. App. S.D. Jan. 8, 2016):
Holding: Where, through no fault of the parties, a trial transcript could not be produced for appeal because the recording tapes were blank, the judgment is reversed and remanded for a new trial.

Petsch v. Jackson County Prosecuting Attorneys Office, 2018 WL 3118455 (Mo. App. W.D. June 26, 2018):
Holding: Where the presiding judge refused to conduct a 600.063 conference (regarding public defender caseloads) on the record, case must be remanded because the lack of record precludes meaningful appellate review.

Trial Procedure

State v. Waters, 2020 WL 1270751 (Mo. banc March 17, 2020):
Holding: Where (1) a jury convicts on some counts of an indictment or information and Defendant is sentenced on those counts, but (2) the jury hung on other counts and those counts remain pending, the judgment is not "final" because all counts have not been disposed, so appellate court lacks jurisdiction for appeal.
Discussion: Sec. 547.070 authorizes appeals only of final judgments. A judgment in a criminal case is final only if the judgment disposes of all disputed issues and leaves nothing for future adjudication. Here, Defendant was sentenced on some counts, but other counts on which the jury hung remain pending. There is not a final judgment so long as any count in the indictment or information remains pending. Thus, the appellate court lacks jurisdiction for appeal. Cases to the contrary should no longer be followed. In situations such as the one here, trial courts can avoid a defendant being incarcerated on some sentences with no right to appeal by avoiding imposing sentence on all counts until all counts are finally disposed, though this is not required. Appeal dismissed.

State v. Zuroweste, 2019 WL 1446943 (Mo. banc April 2, 2019):
Holding: (1) The State violated Rule 25.03(C) by not timely disclosing until four days before trial inculpatory recorded jail phone calls made by Defendant because such recordings were "in the possession or control of other governmental personnel" and the Rule requires the State to use diligence and make good faith efforts to provide such material to Defendant; but (2) the trial court did not abuse discretion in not excluding the recordings because the discovery violation did not warrant the drastic sanction of exclusion and could have been remedied by granting a continuance; and (3) since Defendant did not request a continuance, the judgment of conviction is affirmed.
Discussion: (1) Rule 25.03(A)(2) requires the State to disclose recorded statements of a defendant. Rule 25.02 requires such disclosure be made within 10 days of Defendant's

discovery request. Rule 25.03(C) provides that if the defense requests discovery of information that would be discoverable under the Rule if in possession or control of the State but which is "in the possession or control of other governmental entities," the State must use diligence and make good faith efforts to cause the material to be disclosed. Here, the State waited months after Defendant filed her discovery request to disclose the jail recordings, and did so only four days before trial. The State argues that Defendant could have obtained the recordings on her own. But the State's attempt to put responsibility on Defendant ignores the fundamental nature of a criminal prosecution. If the State seeks to deprive Defendant of her liberty, the State must fulfill its discovery obligations. The State clearly violated Rule 25.03(C) and the 10-day deadline mandated by Rule 25.02 for disclosure. (2) Rule 25.18 sets for the sanctions and remedies for a discovery violation. The Rule provides a court "may" grant a continuance, exclude the evidence, or order other appropriate relief. Here, Defendant asked only for exclusion of the evidence. She did not ask for a continuance. But the drastic remedy of exclusion is warranted only to prevent fundamental unfairness. Before ordering exclusion, a court must consider employing less severe remedies to address the prejudice, and achieve fundamental fairness for the Defendant and State. If Defendant truly needed additional time to investigate the recordings, a continuance would have remedied those concerns and any unfairness. Significantly, Defendant was out of custody and had requested continuances before. Another continuance would not have prejudiced her. Since she didn't ask for a continuance, the judgment of conviction is affirmed.

State v. Hughes, 563 S.W.3d 119 (Mo. banc Dec. 18, 2018):
Holding: (1) Taking a motion to suppress evidence "with the case" during a bench trial largely negates the purpose of a motion to suppress, one of which is to avoid delays during trial in determining the issue, but since the parties didn't object to the procedure, any error in failing to rule on the motion before trial is not preserved; (2) even though defense counsel stated "no objection" during the bench trial to introduction of evidence that was the subject of the motion to suppress, this did not waive the claim under the facts of this case because under the mutual understanding doctrine, the parties understood that this meant no objection other than those stated in the motion to suppress; however, this should be avoided by making objections to admission of contested evidence during the bench trial and having the motion to suppress ruled before trial; but (3) there was no prejudice in denying the motion to suppress because defense counsel introduced evidence through questioning of police (about whether they found drugs in Defendant's property) or stipulated to other evidence (lab reports) which proved Defendant's guilt; Defendants waive any objections to evidence made part of the record through their own questioning even if counsel's actions in doing so were strategic.

State ex rel. Gardner v. Boyer, 2018 WL 6321238 (Mo. banc Dec. 4, 2018):
Holding: Even though Prosecutor was investigating Officer-Witness for possible illegal use of force in Defendant's case, this was not a conflict of interest in Defendant's case and did not create an appearance of impropriety for Defendant's case, so trial court should not have disqualified Prosecutor or the entire Prosecutor's Office from prosecuting Defendant's case.

Facts: Defendant was charged with unlawful use of a weapon and resisting arrest in an incident involving Officer-Witness. Prosecutor's Office had a policy that any use of force by police would be investigated for possible illegal use of force, so Prosecutor's Office was conducting a routine investigation of Officer-Witness. Thus, Officer was both a witness in Defendant's case, and a person under investigation. Officer-Witness moved to disqualify Prosecutor and Prosecutor's Office from Defendant's case on grounds that there was an "appearance of impropriety" and that statements Officer made in the criminal case could be used against him in the investigation. The trial court disqualified Prosecutor's Officer.
Holding: An entire Prosecutor's Office can be disqualified from a case if, first, a particular attorney in the office has a conflict of interest, and second, that conflict is imputed to the entire officer either through the Rules of Professional Conduct, or because it creates an "appearance of impropriety." Here, there was no finding that any attorney in Prosecutor's Office even had a conflict of interest. Absent a finding of a conflict, the trial court's disqualification inquiry should have ended. Nevertheless, when applying the "appearance of impropriety" test, a court should look at the fairness of the trial for the *defendant*, not to a third party. It is the fairness of Defendant's trial which the court should have been concerned with, not an appearance of fairness toward Witness.

State ex rel. Peters-Baker v. Round, 2018 WL 6320826 (Mo. banc Dec. 4, 2018):
Holding: Even though postconviction Movant's former Public Defender on direct appeal had joined Prosecutor's Office, where the Prosecutor's Office screened former Public Defender off from postconviction case and there was no claim that the screening was inadequate, trial court erred in disqualifying entire Prosecutor's Office from postconviction case.
Discussion: An entire Prosecutor's Office can be disqualified from a case if, first, a particular attorney in the office has a conflict of interest, and second, that conflict is imputed to the entire officer either through the Rules of Professional Conduct, or because it creates an "appearance of impropriety." Here, former Public Defender had a conflict of interest because she previously represented Movant. But the Rules of Professional Conduct do not impute that conflict to the entire office, and there is no "appearance of impropriety" where former Public Defender was screened from the postconviction case. This does not mean that screening will always suffice to prevent disqualification. E.g., where the "boss" of the Prosecutor's Office is the attorney who has the conflict, an entire Office may need to be disqualified. But courts should be cautious in disqualifying entire Prosecutor's Offices because the elected Prosecutor represents the people who elected her to make prosecutorial decisions for their county.

Brainchild Holdings LLC v. Cameron, 534 S.W.3d 243 (Mo. banc Dec. 5, 2017):
Holding: Even though Sec. 535.110 was amended in 2014 to remove a provision that allowed a trial *de novo* in circuit court where a jury trial could occur in rent and possession cases, nothing in Sec. 535.040.1 specifically excludes a jury trial, so parties are entitled to a jury trial in associate circuit court; Mo. Const. Art. XIII, Sec. 8, provides that right to jury trial "shall remain inviolate."

State ex rel. Tipler v. Gardner, 2017 WL 405805 (Mo. banc Jan. 31, 2017):
Art. I, Sec. 18(c) regarding prior bad acts and propensity evidence in child sex cases applies to all prosecutions which occur after Dec. 4, 2014 (its effective date), even though the charged crimes occurred earlier; the amendment is prospective (not retrospective) because the "event" it applies to is "prosecutions" (trials) which occur after its effective date.
Facts: Defendant was charged with a child sex offense which occurred in 2013. In December 2014, amended Art. I, Sec. 18(c), Mo. Const. took effect. Defendant's trial was in 2016. Before trial, the trial court ruled it would allow prior bad act and propensity evidence under the new amendment. Defendant sought a writ of prohibition.
Holding: Normally, a defendant cannot use an extraordinary writ to challenge a pretrial evidentiary ruling; instead, a defendant must object at trial, and raise the issue on direct appeal. Here, however, Defendant is not challenging *how* the trial court applied the new amendment, but whether the trial court can apply it *at all*, so this may be decided via a writ. Art. I, Sec. 18(c) states that in "prosecutions" for crimes involving a victim under 18 years old, "relevant evidence of prior criminal acts, whether charged or uncharged, is admissible" to corroborate the victim's testimony or demonstrate defendant's propensity to commit the presently charged crime. The amendment further states that the court "may exclude" the evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Defendant claims the amendment cannot be applied retrospectively, and thus, cannot be applied to crimes which occurred before its effective date. Constitutional amendments apply prospectively only. The issue here is what "event" the new amendment applies to – the crime or the trial. The amendment did not make previous conduct illegal or change the punishment for previous conduct. The amendment applies to "prosecutions." The amendment is analogous to changes in rules of evidence, which generally apply to existing cases. Thus, the amendment applies to cases which are tried after its effective date, even though the crimes occurred earlier; this is prospective application of the amendment. The Supreme Court emphasizes it is not deciding here whether the particular evidence to be admitted at Defendant's trial is proper under the amendment, or whether a conviction based on that evidence violates any other state or federal constitutional provision; such issues need to be preserved through objection at trial and raised on direct appeal.

State v. Chambers, 2016 WL 503030 (Mo. banc Feb. 9, 2016):
(1) Even though Defendant timely filed his application for change of venue, where he failed to pursue it for nine months and affirmatively told the trial court there were no pending motions in the case until the day before trial, Defendant waived his right to change of venue; and (2) where pro se Defendant voluntarily chose not to attend the trial, he has no 6th Amendment right to be protected from the prejudice that results, but where a pro se Defendant is removed from the courtroom due to disruptive behavior, a different standard may apply, because if the trial continues without counsel, neither Defendant's nor the Gov't's interest will be adequately protected.
Facts: Defendant, through counsel, filed a timely application for change of venue as of right under Rule 32.03. Defendant then changed counsel. For nine months thereafter new counsel, unaware of the venue application, told the court there were no pending motions. After a continuance motion was denied shortly before trial, counsel then

discovered the venue application and sought to invoke it the day before trial. The trial court found Defendant waived the venue motion by not bringing it to the court's attention in a timely fashion. Defendant then discharged counsel, and absented himself from the trial.

Holding: (1) Even though Defendant timely filed his change of venue application, a defendant may waive constitutional or statutory rights by implied conduct. Here, Defendant waived his right to change of venue by not pursuing it for nine months, and affirmatively telling the court there were no pending motions. This is true even though the second counsel did not know the motion had been filed; it was defense counsel's responsibility to know the file. Asserting the change of venue the day before trial was an attempt to circumvent the denial of a continuance; Defendant should not be rewarded for that. (2) Regarding whether another of Defendant's claims is preserved for appeal, Defendant is held to the same standard as an attorney, even though he proceeded pro se and absented himself from the trial. Where a pro se Defendant voluntarily absents himself from trial, he has no 6th Amendment right to be protected from the prejudice that may result; that's the case here. A different standard may apply, however, where a pro se defendant is removed from the courtroom for disruptive behavior. There, if the trial continues and if counsel is not appointed, neither the Defendant's nor Gov't's interests may be protected.

State v. Hartman, 2016 WL 1019271 (Mo. banc March 15, 2016):

(1) Where the State alleged that only one person shot Victim, trial court abused discretion in excluding testimony that a person other than Defendant said he (the other person) did the shooting; this was an out-of-court statement that would have exonerated Defendant and it had indicia of reliability; and (2) even though Defendant-Juvenile was convicted of second-degree murder during a "Hart procedure" penalty phase where the jury found LWOP to be inappropriate, Defendant can be tried again for first-degree murder on remand under the "Hart procedure" again.

Facts: Defendant-Juvenile was charged with first-degree murder. He was not charged as an accomplice. He was alleged to have committed the shooting. The evidence at trial was somewhat conflicting, but was that a group of people went to Victim's house and Victim was shot. Various witnesses made plea agreements to testify against Defendant. The trial court precluded Defendant from calling a Witness to testify that one of the other people who went to the house ("Other Person") said he (the Other Person) shot Victim. Defendant was convicted of first-degree murder. Pursuant to the "*Hart* procedure," a penalty phase was held, during which the jury found that life without parole was not appropriate; thus, the trial court vacated the first-degree murder verdict and found Defendant guilty of second-degree murder.

Holding: Hearsay statements, or out-of-court statements used to prove the truth of the matter asserted, are generally inadmissible. However, due process requires that such statements be admitted where they exonerate the accused and are made under circumstances providing assurance of reliability. To meet this test, the statement must be made spontaneously to a close acquaintance shortly after the crime occurred, be corroborated by some evidence in the case, and be self-incriminatory and against interest. The Other Person's statements to Witness meet this test. Other Person made the statements to a friend (Witness) on the night of the murder. Other witnesses placed Other

Person at the scene of the crime. Other Person's statements implicate only him (the Other Person). Defendant denied any participation in the crime. Had Witness' testimony been admitted, the jury could have exonerated Defendant. A new trial is ordered. On retrial, Defendant can be tried for first-degree murder, but the court must again use the "*Hart* procedure" because Defendant was a juvenile at the time of the crime, even though he is now an adult.

State ex rel. Becker v. Lamke, 2019 WL 3294563 (Mo. App. E.D. July 23, 2019):
In child sex case, trial court cannot, *sua sponte*, order pretrial that the State file a memorandum stating the corpus delecti of the charges independent of Defendant's confession, because this would require the State to disclose its privileged work product, opinions, theories, conclusions and mental impressions of the case.
Facts: The trial court, *sua sponte*, ordered the State to file a memorandum stating the corpus delicti of the case. The defense did not request this. The State sought a writ of prohibition. The defense, on appeal, again did not request this memorandum.
Holding: Appellate court notes the unusual posture of this case, since the defense is not requesting the memo at issue. Judge argues his pretrial order was intended to promote a fair and expeditious trial. But the fact that Defendant isn't asking for the memo and isn't contesting corpus delecti indicates that this will not likely be an issue at trial. Meanwhile, the State will suffer irreparable harm if it has to file the memo, because it will require the State to disclose privileged work product, opinions, theories, conclusions and mental impressions of the case. Writ granted.

State v. Emerson, 2019 WL 1442356 (Mo. App. E.D. April 2, 2019):
Holding: (1) Even though Sec. 491.120 provides that a subpoena may be served by reading a subpoena aloud to the witness being served, this conflicts with Rule 26.02, which requires that a subpoena be delivered to the witness, and the Rule controls because it is procedural; thus, trial court did not err in refusing to issue writ of body attachment to Witness because Witness was not properly served under Rule 26.02; and (2) Prosecutor's closing argument in guilt phase that jury should convict of first-degree assault and not third-degree assault because that's a "misdemeanor" was improper because it informed the jury of sentencing matters that weren't at issue in guilt phase (but not prejudicial here).
Discussion: Arguments which suggest that a jury determine guilt on the basis of a desired punishment are improper. The argument may have dissuaded the jury from considering the lesser-included third-degree assault because a lay person generally understands that the punishment for misdemeanors is less than for felonies. The classification of offenses directs jurors' attention to sentencing matters not properly before them in guilt phase.

State v. Davis, 2019 WL 2180364 (Mo. App. E.D. May 21, 2019):
Holding: In case of first impression, even though Defendant waived counsel, proceeded pro se and refused to attend his trial, the trial court was not obligated to appoint counsel to conduct the trial, and there was no error in allowing the trial to proceed without Defendant or a defense counsel.

B.J.T. v. D.E.C., 2019 WL 273055 (Mo. App. E.D. Jan. 22, 2019):
Holding: (1) Trial court abused discretion in order of protection case in preventing Witness from testifying on behalf of Petitioner; testimony is only cumulative "when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute;" and (2) trial court erred in imposing a "10 minute rule" on length of witness testimony, because "ten minutes is seldom, if ever, sufficient for a proper adversarial hearing."

State v. Bolden, 2016 WL 7106291 (Mo. App. E.D. Dec. 6, 2016):
Even though Defendant wanted to represent himself, trial court deprived him of his 6th Amendment right to counsel by allowing him to waive counsel, without representation of an attorney, before determining his competency.
Facts: Defendant, who did not have any counsel, wanted to proceed *pro se*. The trial court granted the request, but because it did not find Defendant's behavior to be "particularly rational" in rejecting counsel, ordered a mental examination. The exam found Defendant to be competent. The trial proceeded with Defendant representing himself. After conviction, he appealed. He claimed he was denied his 6th Amendment right to counsel during his competency determination.
Holding: The trial court plainly erred in allowing Defendant to waive counsel without representation of an attorney before determining competency. A person choosing self-representation must be competent to do so. When competency is at issue, the 6th Amendment requires that Defendant be represented by counsel whose duty it is to assure that the evidence supporting competency is closely examined. Here, the trial court believed Defendant's competency was in question; it should have appointed counsel at least until that issue was resolved. Nevertheless, a new trial is not required, at least at this stage. Because there is a contemporaneous competency report, case is remanded for a competency hearing with counsel, and finding on whether Defendant was competent. If he was not, he shall receive a new trial.

State v. Hobbs, 2016 WL 4435689 (Mo. App. E.D. Aug. 23, 2016):
Trial court abused discretion in child molestation case in admitting at penalty phase Officer's testimony that Defendant was charged with other unadjudicated child sex offenses, because such evidence is admissible in penalty phase only if the State proves by preponderance of the evidence that Defendant committed the conduct alleged; the State offered no supporting evidence, such as testimony by Victims or admissions by Defendant.
Facts: Defendant was convicted of child molestation, and the case proceeded to a penalty phase. During penalty phase, the State presented Officer's testimony that Defendant was presently charged with other unadjudicated child sex offenses.
Holding: Although evidence pertaining to a defendant's criminal conduct may be admissible in penalty phase as history and character evidence, Sec. 577.036.3, such evidence is admissible only if the State proves by a preponderance of evidence that Defendant committed the alleged conduct. Such proof may include testimony by Victims of the alleged conduct, or Defendant's admissions to the alleged conduct. Here, however, there were no witnesses to support the alleged conduct, or admissions by Defendant.

The State merely referred to additional charges without supporting evidence. Reversed and remanded for new penalty phase.

State v. Voss, 2016 WL 145727 (Mo. App. E.D. Jan. 12, 2016):
(1) Defendant can be convicted of first-degree involuntary manslaughter for involvement in a death of a Victim from a drug overdose, where Defendant's reckless conduct caused Victim's death in that Defendant supplied heroin to Victim, helped Victim ingest it, saw signs that Victim was overdosing, and failed to seek medical attention; (2) trial court abused discretion in penalty phase in admitting hearsay testimony from the mother of a different victim than the one in this case in which she claimed that Defendant had caused her son's death, too; allowing a mother of a different victim than the one in this case to read a "victim-impact" statement, because this mother was not a family member of the victim in this particular case; allowing Victim's sister to testify to hearsay that she believed Defendant was involved in five other heroin overdose deaths; and allowing a probation officer to testify to hearsay from a police report that Defendant was involved in another person's overdose death. However, the penalty phase testimony was harmless given other admissible penalty phase evidence.
Facts: Defendant was convicted at a jury trial of first-degree involuntary manslaughter for recklessly causing the heroin overdose death of Victim. During penalty phase, trial court admitted testimony by various witnesses that Defendant had also caused other people to die of heroin overdoses, though none of those witnesses had personally witnessed this. The court also allowed a mother of a victim in one of those other alleged deaths to read a victim-impact statement about her son's death.
Holding: (1) It is a matter of first impression in Missouri whether a person can be convicted of first-degree involuntary manslaughter for involvement in a victim's death from drug overdose. The involuntary manslaughter statute is not defined in terms of a Defendant's failure to act, and thus, any duty to act must be otherwise imposed by law. The comment to Sec. 562.011.4 provides an example of liability for manslaughter based on the failure to perform an act "such as supplying medical assistance to a close relative." A Defendant can be criminally liable for a failure to act where "one stands in a certain status relationship to another." Here, that standard was met because Defendant created or increased the risk of injury to Victim by providing Victim heroin, helping to prepare it for ingestion, and after observing signs of overdose, leaving Victim alone and not contacting medical help. This is sufficient evidence from which a reasonable juror could find recklessness, i.e., conscious disregard of risk of death to Victim and such disregard was a gross deviation from what a reasonable person would do in such circumstances. (2) In penalty phase, "history and character" evidence of prior unadjudicated criminal conduct is admissible under Sec. 557.036.3 if it satisfies the preponderance of evidence standard, which means it must be based on a witness' "firsthand knowledge" of the unadjudicated criminal conduct. Here, the witnesses who testified that Defendant had caused other heroin overdose deaths did not have firsthand knowledge of those incidents. Their knowledge was based on hearsay. Hearsay testimony is admissible during penalty phase only if it falls within a recognized hearsay exception, which the testimony from these witnesses did not. With regard to the mother of a victim in a different incident than the one charged who read a victim-impact statement about how her son's death affected her, this mother-witness was not a victim in the instant case and her statement did not concern

the facts of the instant case. Although Sec. 557.041 does not define the term "victim," Sec. 595.200(6) provides a definition of "victim" as a direct victim of a crime or family members of a direct victim. Sec. 557.041.2 allows the "victim of such offense" to make a victim-impact statement in a particular case. This language only authorizes a victim of *the offense at issue* (charged offense) to make a statement. Although this was a close case, the inadmissible evidence was harmless when considered with other admissible penalty phase evidence, particularly damaging admissions made by Defendant. Howver, courts should be "cautious" about admitting alleged prior unadjudicated conducted.

State v. Hancock, 2020 WL 4462680 (Mo. App. S.D. Aug. 4, 2020):
Holding: (1) Even though trial court mistakenly said the time for filing a New Trial Motion was longer than that allowed in Rule 29.11(b) and Defendant relied on that advice, courts aren't authorized to extend the time for filing a New Trial Motion; Defendant's late-filed New Trial Motion waived preserved review for appeal; (2) even though Defendant made an Offer of Proof on the admissibility of his Voice Identification Expert, where the Offer was made using an affidavit from the Expert (in order to save money) rather than calling the Expert to testify, the trial court did not abuse discretion in finding that Offer was "hearsay," and also finding that the affidavit did not demonstrate the "reliability" of Expert's testimony under Sec. 490.065.2; (3) where Defendant sought to call a gun shop owner to testify as an Expert on gun color and barrel length, this wasn't admissible because jurors' could use their own observations and common sense to determine these matters, so the testimony wasn't necessary or helpful to jurors under Sec. 490.065.2(1).
Discussion: Two weeks before trial, Defendant sought to endorse a Voice Identification Expert. The trial court denied the request but said Defendant could make an Offer of Proof at trial. At trial, Defendant, citing cost concerns, presented an affidavit from Expert as the Offer of Proof. The trial court denied the Offer as "hearsay," but also ruled the Offer didn't prove Expert's testimony was "reliable" under Sec. 490.065.2. Appellate court holds trial court did not abuse discretion in finding Offer to be "hearsay." Had Defendant hoped by this method to obtain appellate review of this testimony without even trying to offer it in admissible form at trial, he effectively sought an advisory opinion, which this Court will not give. Where evidence is excluded by pretrial ruling, proper procedure contemplates an attempt to admit the evidence at trial, and if an objection is sustained, then an Offer of Proof.

In the Interest of C.L.F. and S.A.R. v. K.J.R., 2020 WL 7416747 (Mo. App. S.D. Dec. 18, 2020):
Holding: Even though Mother objected to the appearance of the GAL by Webex because Sec. 210.160 states the GAL should "appear for" the minor, the Webex appearance was authorized by Sec. 561.031.1(8) which allows a person to appear by means of a two-way video conference in "any civil proceeding other than trial by jury."

In the interest of K.L.C. v. Reynolds County Juvenile Officer, 562 S.W.3d 358 (Mo. App. S.D. Oct. 19, 2018):
Holding: Juvenile court erred in convicting Juvenile of acts that would be a crime if committed by an adult based on standard of "clear, cogent and convincing" evidence, rather than more stringent "proof beyond a reasonable doubt" standard.
Discussion: In juvenile proceedings, where a juvenile is accused of committing an act that would be a crime if committed by an adult, the constitutionally required standard of proof is "beyond a reasonable doubt." Applying the lesser-standard was structural error that requires reversal.

State v. Tice, 2018 WL 2296538 (Mo. App. S.D. May 21, 2018):
Holding: (1) Suppression of evidence is not the same thing as exclusion of evidence; (2) "suppression" (motion to suppress) is used for evidence which is not objectionable as violating any rule of evidence, but which has been illegally obtained; (3) exclusion of evidence that is not illegally obtained (such as inadequate foundation) is done via a motion in limine, not motion to suppress.

In the Matter of the Care and Treatment of Braddy, 2017 WL 5784678 (Mo. App. S.D. Nov. 29, 2017):
Holding: Trial court has no authority to extend the 30-day time for filing a new trial motion under Rule 78.04, because Rule 44.01(b) expressly prohibits this; thus, even though Defendant filed his new trial motion within the additional time granted by the trial court, the new trial motion was untimely and issues raised therein are not preserved for appeal.

State ex rel. Bollinger v. Bernstein, 2016 WL 6750712 (Mo. App. S.D. Nov. 15, 2016):
Holding: (1) Where Defendant pleaded guilty to an offense charged by traffic ticket, was sentenced to a fine, and a written judgment and sentence was entered, the judgment in the criminal case was "final" and the trial court could not, *sua sponte*, set it aside later the same day without stating any grounds for doing so; (2) even though Rule 29.13(a) allows a trial court to set aside a criminal judgment within 30 days of entry if either the facts stated in the indictment or information did not constitute an offense *or* the court lacked jurisdiction, where the trial court waited 16 months to claim that it had lacked jurisdiction because the State had not filed an information (and also claimed Defendant had not paid the fine) but then abandoned that argument on appeal, the Rule did not authorize setting aside the final judgment. Writ of prohibition prohibiting setting aside the plea made permanent.

Spence v. BNSF Railway Co., 2016 WL 7439115 (Mo. App. S.D. Dec. 27, 2016):
Holding: Rule 69.025, which requires a party to conduct a "reasonable investigation" on Case.net of potential jurors' "litigation history," did not apply to situation where juror failed to answer voir dire question as to whether any jurors had "been in an auto accident;" although a Case.net search would have revealed that Juror had been involved in a *lawsuit* over an auto accident, Rule 69.025 applies to *litigation history only* and the

question asked was not about that, so defendant did not waive claim of Juror's nondisclosure by failing to discover this on Case.net before trial; Juror's intentional non-disclosure requires new trial.

State ex rel. Jackson v. Parker, 2016 WL 1211326 (Mo. App. S.D. March 28, 2016):
(1) Even though Sec. 492.304 provides that a recording of an alleged child sex victim shall not be admissible if the Interviewer does not testify, the statute contains an exception that the recording is admissible if it qualifies for admission under Sec. 491.075; thus (2) even though Interviewer of child was not available to testify, trial court erred in excluding the video of the interview, because although the video was not admissible under 492.034, it was admissible under 491.075 because the child's statements had sufficient indicia of reliability.
Facts: In child sex case, Child was interviewed by a Forensic Interviewer at a Child Advocacy Center. The interview was video recorded, and observed by other CAC Witnesses. Subsequently, the Interviewer herself became unavailable. The trial court held a 491 hearing, and determined that there was sufficient indicia of reliability in the statements made by Child so that the CAC Witnesses to the interview would be able to testify. However, the court ruled that the video itself would not be admitted due to noncompliance with Sec. 492.304, in that Forensic Interviewer was unavailable to testify. Sec. 492.304.1(6) provides that a recording of an alleged sex victim under age 14 is admissible if the "person conducting the interview … in the recording is present at the proceeding and available to testify or be cross-examined by either party." The State sought a writ of prohibition to allow the video to be admitted at trial.
Holding: The trial court did not properly apply Secs. 491.075 and 492.304. Sec. 492.304 provides an *alternative*, rather than exclusive, procedure for determining admissibility of a recording. Sec. 492.304.2 provides that if the child does not testify, the recording shall not be admissible "unless the recording qualifies for admission under section 491.075." Thus, recordings that do not meet the criteria for admission under Sec. 492.304 may still be admissible if they qualify under 491.075. Here, the recording was found to be admissible under 491.075. Writ granted.

State v. Alqabbaa, 2016 WL 1253847 (Mo. App. S.D. March 30, 2016):
Even though after Prosecutor filed a nolle prosequi, the trial court purported to dismiss the case with prejudice, the trial court had no authority to take any action after the nolle prosequi; thus, trial court erred in dismissing the re-filed case on grounds that it had dismissed the prior case with prejudice.
Facts: Defendant was charged with various offenses. On the morning of trial, the State entered an oral nolle prosequi. The trial court then dismissed the case "with prejudice" on grounds that allowing the State to refile would violate Defendant's constitutional rights, although the court did not specify which rights. Later, the State refiled the case. The trial court granted a motion to dismiss on grounds that the first case was dismissed with prejudice. The State appealed.
Holding: Sec. 56.087 allows a prosecutor to dismiss a case without prejudice before double jeopardy has attached. Once the State dismisses, there is no case before the trial court, and any purported actions by the trial court are nullities. Here, the trial court was

without authority to dismiss with first case "with prejudice," because the State had already dismissed it. Thus, it could not rely on that dismissal to dismiss the re-filed case.

State v. Hudson, 2020 WL 5160463 (Mo. App. W.D. Sept. 1, 2020):
Holding: (1) Trial court erred in conducting Defendant's sentencing via Polycom over Defendant's objection that he had a right to be personally present, because Sec. 546.550 and Rule 29.07(b)(2) require in-person sentencing, as does due process, and Sec. 561.031.1(6) provides for sentencing by Polycom only upon waiver of in-person appearance by Defendant; new sentencing ordered; and (2) Western District notes in footnote that even though Defendant's case arose before COVID-19, the Missouri Supreme Court has encouraged all courts to use teleconferencing during COVID, but this "does not change applicable statutory provisions," even though the Supreme Court has suspended certain court rules.

State v. Mosley, 2020 WL 534917 (Mo. App. W.D. Feb. 4, 2020):
Holding: A "continuing objection" signifies the mutual understanding between counsel and the court that counsel intends to keep an objection alive "throughout" trial; thus, it was unnecessary for counsel to repeat the objection at each different stage of the trial in order to preserve it for appeal.

State v. Cooper, 2020 WL 1016608 (Mo. App. W.D. March 3, 2020):
Holding: Where Defendant had not yet been convicted or sentenced, Defendant could not appeal denial of his pretrial motion to dismiss criminal charge as unconstitutional and "summary judgment" on the pleadings, because there is no final judgment in a criminal case until sentence is entered, so appellate court lacks jurisdiction.

State v. Rainey, 2018 WL 1061959 (Mo. App. W.D. Feb. 27, 2018):
Holding: Where after jury's guilty verdict (1) trial court granted Defendant's motion for judgment of acquittal on grounds that the evidence was insufficient to convict, but (2) on appeal by State, appellate court reverses on grounds that the evidence was sufficient, case must be remanded for trial court to decide Defendant's alternative motion for new trial, even though this motion was indirectly overruled by operation of law under Rule 29.11(g).

City of Raymore v. O'Malley, 527 S.W.3d 857 (Mo. App. W.D. Aug. 29, 2017):
Even though Defendant charged with municipal violation claimed she had a legal justification defense that could be determined from the evidence in the municipal trial, where Defendant was seeking a trial de novo in circuit court, circuit court erred in granting pretrial motion to dismiss because a justification defense must be supported by evidence and a trial de novo proceeds as if no action had been taken in municipal court.
Discussion: Regarding Defendant's justification defense, she had the burden of injecting the issue and it was required to be supported by evidence. Here, Defendant presented her motion to dismiss to the circuit court before her requested trial de novo. Her claim could not have been supported by any evidence, given that none had been adduced at the time the circuit court granted the motion to dismiss. Defendant seeks to rely on evidence presented at the municipal court trial to support her claimed defense. But the concept of

a trial de novo is that it is a new prosecution. The trial de novo proceeds as if no action had been taken in the municipal court (division). Even so, it is possible for a court to properly grant a motion to dismiss based on an affirmative defense if the defense is irrefutably established *by the pleadings*. But the only pleadings in this case are the uniform citation and amended information which charged the offense; neither irrefutably establishes that Defendant's conduct was justified as a matter of law. Grant of motion to dismiss reversed.

Elliott v. State, 2016 WL 6081673 (Mo. App. W.D. Oct. 18, 2016):
Holding: (1) Because a prosecutor has discretion to nolle prosequi a case and then refile charges, trial court did not plainly err in allowing Prosecutor to dismiss charges against Juvenile and then refile them, even though the resulting delay might have caused Juvenile to lose the opportunity for dual jurisdiction sentencing under Sec. 211.073.1 because he would be more than 17 years six months old at time of "conviction;" but (2) appellate court notes that Sec. 211.073.1 appears to indicate that a Juvenile need only be under 17 years six months at the time of **transfer** to court of general jurisdiction to be eligible for dual jurisdiction, not under this age at time of "**conviction**." However, since the parties assume the Juvenile's age is determined at time of "conviction," the appellate court doesn't decide this.
Discussion: Juvenile contends that an offender must be under 17 years six months years old at time of "conviction" in order to be considered for dual jurisdiction in sentencing. But there is no authority holding that age at time of "conviction" is the correct rule. Sec. 211.073.1 states that "the court shall, when the offender is under 17 years and six months of age, and has been transferred to a court of general jurisdiction … and whose prosecution results in conviction … consider dual jurisdiction." A plain reading of Sec. 211.073.1 would suggest the Juvenile need only be under 17 years six months when transferred to a court of general jurisdiction in order to be eligible for the dual jurisdiction program. This reading would make the delay that occurred here (which caused Juvenile to be over that age at time of "conviction") to be irrelevant, as Juvenile would be eligible for dual jurisdiction. However, as this issue was not raised by the parties, the court does not address it.

State v. William, 2016 WL 6585981 (Mo. App. W.D. Nov. 8, 2016):
Holding: (1) Under Sec. 476.803, which requires courts to appoint qualified interpreters for non-English speaking defendants or witnesses, a trial court has discretion to decide whether an individual is a non-English speaker, thus mandating appointment of an interpreter; (2) where the record indicated that Defendant understood some English and conversed on-the-record with the trial court in English, trial court did not abuse its discretion in finding that Defendant had the ability to speak and understand English, and in not appointing an interpreter.

Larsen v. Union Pacific Railroad Co., 2016 WL 4480770 (Mo. App. W.D. Aug. 23, 2016):
Holding: Rule 78.08's plain error provision can be used to raise issue of Juror nondisclosure after time for filing New Trial Motion has expired.

State v. Kunonga, 2016 WL 1211434 (Mo. App. W.D. March 29, 2016):
Even though the trial court failed to obtain a written waiver of counsel from Defendant which fully complied with Sec. 600.051, where the court orally covered the same information in Sec. 600.051 with Defendant at a Faretta hearing, there was no manifest injustice requiring a new trial.
Facts: Defendant discharged his public defender, and proceeded to trial pro se. Prior to trial, the court held a *Faretta* hearing, at which the court explained various rights and gave various warnings regarding self-representation. After conviction, Defendant appealed, with counsel.
Holding: The written waiver of counsel in this case did not strictly follow the statutory requirements of Sec. 600.051. No Missouri case has previously addressed the intersection of the State's burden to prove a waiver of counsel with plain error review of a Sec. 600.051 violation. The statute allows waiver of counsel at trial provided that the Defendant sign a written waiver that "contains at least the following information," and lists various rights and warnings. Here, the written waiver provided by the trial court did not contain all the rights and warnings listed in the statute. This was evident, obvious and clear error. A violation of Sec. 600.051 facially establishes grounds to believe that manifest injustice has occurred. A violation of Sec. 600.051 sustains a defendant's burden to prove manifest injustice. Although a violation of Sec. 600.051 will usually constitute reversible error, even under plain error review, here, the trial court went over the same information in Sec. 600.051, nearly verbatim, at the *Faretta* hearing. Thus, nothing would have been added to Defendant's knowing, voluntary and intelligent waiver of counsel by a correct written form. "We conclude that in a plain error case, a defendant will not be rewarded with reversal when the State effectively demonstrates that an unpreserved violation of Sec. 600.051 is a mere technical violation having no impact on the knowing, voluntary, and intelligent waiver of counsel because the content omitted from the a written waiver form was covered, nearly verbatim, in a *Faretta* hearing."

* **Dietz v. Bouldin, ___ U.S. ___, 136 S.Ct. 1885 (U.S. June 9, 2016):**
Holding: Federal judges can, in limited circumstances, recall a jury after it has been dismissed in order to correct a legal mistake in the verdict. In determining whether a jury can be recalled, courts should consider the length of delay between discharge and recall; whether jurors have spoken to anyone after discharge or accessed information about the case from external sources, including the internet; and courtroom or public reaction to the verdict which might bias recalled jurors. The Court expressly noted it was not deciding whether judges can recall juries in criminal cases: "Given additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here whether it would be appropriate to recall a jury after discharge in a criminal case."

U.S. v. Moreno, 98 Crim. L. Rep. 309 (3d Cir. 1/5/16):
Holding: Prosecutor cannot cross-examine Defendant during sentencing allocution; allocution is designed to give Defendant chance to raise personal and mitigating circumstances and allow judge to show mercy.

Stephenson v. Neal, 101 Crim. L. Rep. 514 (7th Cir. 8/4/17):
Holding: New penalty phase ordered where jurors saw that Defendant wore a stun belt during penalty phase.

U.S. v. Bethea, 103 Crim. L. Rep. 114 (7th Cir. 4/26/18):
Holding: Even though Defendant consented to having his guilty plea by videoconference, this violates Federal Rule of Criminal Procedure which states that a felony Defendant "must be present" at his initial appearance, arraignment and plea; nothing can substitute for a face-to-face encounter between a judge and Defendant; sentence vacated.

U.S. v. Mackin, 97 Crim. L. Rep. 528, 2015 WL 4190212 (7th Cir. 7/13/15):
Holding: Defendant granted new trial in felon-in-possession case where before trial Gov't failed to disclose complete chain of custody information regarding the gun, and Defendant based his defense on the Gov't not following proper chain of custody; during trial, the Gov't disclosed the complete chain of custody, but the Gov't's error had misled Defendant to believe he had a viable defense.

U.S. v. Sanchez-Gomez, 101 Crim. L. Rep. 241 (9th Cir. 5/21/17):
Holding: Policy of automatically shackling Defendants in courtrooms violates presumption of innocence.

U.S. v. Murguia-Rodrigues, 2016 WL 791241 and 2016 WL 721714 (9th Cir. 2016):
Holding: Defendant did not validly waive language interpreter at sentencing where Defendant initially said he wanted an interpreter, but when court said the interpreter had "other duties" and asked again if he needed one, Defendant replied he would proceed in English.

U.S. v. Sanchez-Gomez, 97 Crim. L. Rep. 662 (9th Cir. 8/25/15):
Holding: Even though court security office may have staff shortages or budget problems, this does not justify routine shackling of defendants for every nonjury court appearance.

U.S. v. Alcantara-Castillo, 2015 WL 3619853 (9th Cir. 2015):
Holding: Prosecutor's cross-exam of Defendant by asking him if Officer who testified was "inventing stories" was improper, because it effectively asked Defendant to comment on Officer's veracity at trial.

U.S. v. Cavallo, 2015 WL 3827099 (11th Cir. 2015):
Holding: Defendant was denied 6th Amendment right to counsel during critical stage where trial court refused to allow him to consult with counsel during overnight recesses in the course of his multi-day testimony.

People v. Tafoya, 2019 WL 983020 (Colo. 2019):
Holding: Where Defendant was charged with felony DWI (as opposed to misdemeanor DWI with a sentence enhancement), he was entitled to a preliminary hearing.

State v. Expose, 98 Crim. L. Rep. 248, 2015 WL 8343119 (Minn. 12/9/15):
Holding: Even though psychologists have a duty to warn third-parties of threats by patients, there is no exception to the psychologist-patient privilege for terroristic threats that permits psychologist to testify in court; these concepts are not inconsistent since the psychologist can warn a third-party but still be incompetent to testify in court about matters the patient disclosed in confidence.

State v. Laux, 2015 WL 2437858 (N.H. 2015):
Holding: Circuit court had inherent authority to order State to disclose police reports prior to preliminary hearing; even though the purpose of a preliminary hearing is not to provide discovery to a defendant, a defendant must be given an opportunity to contest the existence of probable cause, which may require discovery.

State v. Jones, 98 Crim. L. Rep. 371 (N.J. 1/20/16):
Holding: When evaluating the reliability/suggestibility of a showup identification, the court should consider only the reliability/suggestibility of the showup itself, and not extrinsic evidence of the guilt of Defendant.

People v. Mendez, 2015 WL 6455348 (N.Y. 2015):
Holding: Where certain recordings admitted during trial were in Spanish and jurors were allowed to use a Spanish-to-English transcript at trial as an aid to understanding the recordings, but the transcripts themselves were not admitted into evidence, the trial court erred in simply telling jurors that the transcripts were not in evidence when the jurors asked for them during deliberations; the jury would need the transcripts to understand the recordings, and the judge had invited them to ask for the transcripts.

F.C.L. v. Agustin, 2015 WL 2248175 (Or. 2015):
Holding: Trial court violated due process and gave overly coercive warnings to Defendant about the risks of testifying falsely, where before Defendant took the stand, trial court warned Defendant that it had already found the State's witnesses to be credible; a reasonable person in Defendant's position would believe that the court had abandoned its role as a neutral factfinder and already decided that Defendant was lying if he testified.

Black v. State, 102 Crim. L. Rep. 204 (Wyo. 11/17/17):
Holding: Defendant entitled to new trial under "cumulative error" doctrine where Prosecutor failed to get victim's internet records for defense despite being ordered to do so; Prosecutor argued defense lawyer's arguments were "offensive;" and Defendant forced to wear leg restraints during trial without a hearing on their necessity.

Lindsay R. v. Cohen, 2015 WL 161147 (Ariz. App. 2015):
Holding: Even though Victim's Rights provision gives victims the right to have counsel present, victim's counsel invaded the province of the State by filing memos of law and notice of intent to introduce records regarding restitution.

People v. Morris, 2015 WL 3932754 (Cal. App. 2015):
Holding: Defendant's right to a fair trial was violated when State called an excused juror to testify that juror overheard Defendant make incriminating remarks at the courthouse; there was an unacceptable probability that other jurors would be biased toward the testimony since they had served with the juror.

People v. Johnson, 195 Cal. Rptr.3d 561 (Cal. App. 2015):
Holding: A court considering whether Defendant made a prima facie showing of good cause to obtain juror information cannot judge credibility based merely on the affidavits submitted with the petitioner for disclosure; rather, the prima facie showing triggers an evidentiary hearing where a court can judge credibility.

Gordon v. State, 2015 WL 7269782 (Ga. App. 2015):
Holding: Where Defendant's conduct could be either a misdemeanor or felony depending what offense was charged, rule of lenity required that court deem it a misdemeanor.

People v. Fields, 2015 WL 927092 (Ill. App. 2015):
Holding: Where Defendant's prior conviction for sex abuse was reversed, this required reversal of his conviction at trial in another sex case where the prior conviction was used as propensity evidence to convict.

Barcroft v. State, 2015 WL 664244 (Ind. App. 2015):
Holding: In murder prosecution, due process prohibited State from using evidence that Defendant asked to consult an attorney to rebut his claim of insanity.

Simpson v. State, 2020 WL 220102 (Tex. Crim. App. 2020):
Holding: Even though Defendant pleaded "true" to various probation violations related to assaults, collateral estoppel did not bar defendant from asserting self-defense in his later trial for assault, because there were additional probation violations, any one of which could have supported revocation, and burdens of proof and procedural protections are different in revocation proceedings and trials.

Nixon v. State, 2016 WL 735867 (Tex. App. 2016):
Holding: Where jury returned verdict form with a note saying that its sentences should be consecutive, this was an unauthorized verdict, not an "informal verdict," and so court was required to reform the verdict to comport with the law by omitting the unauthorized portion (that sentences be consecutive), rather than sending the jury back to resume deliberations.

Melton v. State, 2015 WL 167207 (Tex. App. 2015):
Holding: Even though the fine that the jury assessed exceeded that permissible by law, trial judge violated right to jury secrecy in deliberations and Defendant's right to have a jury free from outside influence, when trial judge required jury to deliberate in open court over a new fine amount; the remedy was to remand for a new punishment hearing on the fine only, not the other sentences that were also imposed.

Guthrie-Nail v. State, 2015 WL l5449642 (Tex. App. 2015):
Holding: Where (1) Defendant had pleaded guilty to a conspiracy "exactly as charged in the indictment," and (2) at the time of the plea, the judge had written "N/A" on a form asking whether a weapon was used, a later entry of a nunc pro tunc judgment, without notice to Defendant, stating that a weapon was used violated due process; this was not a mere clerical error, since the plea record did not conclusively establish that a weapon was used.

State v. Mahoney, 2016 WL 687142 (N.J. Super. Ct. 2016):
Holding: Jurors from trial are not permitted to participate in Defendant's sentencing hearing; thus, jurors could not testify that they believed Defendant needed treatment, instead of punishment.

Venue

State ex rel. Universal Credit Acceptance, Inc. v. Reno, 2020 WL 3529370 (Mo. banc June 30, 2020):
Holding: Where Plaintiff filed its motion for change of venue one week after its motion for change of judge, the venue motion should not have been granted because Rule 51.06(a) provides that a "party who desires both a change of venue and a change of judge must join and present both in a *single* application"; because the change of venue motion was not filed at the same time as the change of judge motion, writ of mandamus to retransfer the case back to the original county is granted.

State ex rel. Vacation Mgmt. Solutions LLC v. Moriarty, 610 S.W.3d 700 (Mo. banc Nov. 24, 2020):
Holding: Where Defendant filed a motion to transfer venue and Plaintiff did not file a reply as required by Rule 51.045(b), the action must be transferred pursuant to Rule 51.045(c); writ of mandamus requiring transfer to other county granted.
Discussion: Rule 51.045(b) provides that within 30 days of filing of a motion to transfer for improper venue, an opposing party "may" file a reply. Rule 51.045(c) provides that "if no reply is filed, the court shall order transfer to one of the counties specified in the motion."

State ex rel. Helperbroom LLC v. Davis, 566 S.W.3d 240 (Mo. banc Jan. 29, 2019):
Holding: Even though Rule 51.045(b) does not impose a time limit for when a court must rule on a motion to transfer venue because of improper venue, Sec. 508.010.10 requires a court to rule within 90 days; if a court does not rule, the motion is granted.

State ex rel. Hawley v. Midkiff, 534 S.W.3d 604 (Mo. banc April 3, 2018):
Holding: Even though Petitioner was held in Jackson County Jail waiting to testify in a case when he filed his habeas corpus petition under Rule 91 in Jackson County, where he was also serving a DOC sentence and was returned to DeKalb County, venue must be transferred to DeKalb County, because Petitioner was always in the legal "custody" of

DOC even when he was in Jackson County Jail; Rule 91.02(a) provides that the petition shall be filed in "the county in which the person is held in custody;" and the named Respondent must be the Warden, Rule 91.04(a)(1), who can effectuate a change in Petitioner's custody as directed by the habeas court.

Discussion: The term "custody" is not limited to actual physical incarceration. Missouri statutes provide that a person in the custody of DOC remains in its custody, even when the person is temporarily outside the physical custody of the department. Similarly, persons on house arrest or parole are in the legal "custody" of DOC. Thus, when Petitioner filed his petition while detained in Jackson County, he was nonetheless in the custody of DOC.

State v. Chambers, 2016 WL 503030 (Mo. banc Feb. 9, 2016):

(1) Even though Defendant timely filed his application for change of venue, where he failed to pursue it for nine months and affirmatively told the trial court there were no pending motions in the case until the day before trial, Defendant waived his right to change of venue; and (2) where pro se Defendant voluntarily chose not to attend the trial, he has no 6th Amendment right to be protected from the prejudice that results, but where a pro se Defendant is removed from the courtroom due to disruptive behavior, a different standard may apply, because if the trial continues without counsel, neither Defendant's nor the Gov't's interest will be adequately protected.

Facts: Defendant, through counsel, filed a timely application for change of venue as of right under Rule 32.03. Defendant then changed counsel. For nine months thereafter new counsel, unaware of the venue application, told the court there were no pending motions. After a continuance motion was denied shortly before trial, counsel then discovered the venue application and sought to invoke it the day before trial. The trial court found Defendant waived the venue motion by not bringing it to the court's attention in a timely fashion. Defendant then discharged counsel, and absented himself from the trial.

Holding: (1) Even though Defendant timely filed his change of venue application, a defendant may waive constitutional or statutory rights by implied conduct. Here, Defendant waived his right to change of venue by not pursuing it for nine months, and affirmatively telling the court there were no pending motions. This is true even though the second counsel did not know the motion had been filed; it was defense counsel's responsibility to know the file. Asserting the change of venue the day before trial was an attempt to circumvent the denial of a continuance; Defendant should not be rewarded for that. (2) Regarding whether another of Defendant's claims is preserved for appeal, Defendant is held to the same standard as an attorney, even though he proceeded pro se and absented himself from the trial. Where a pro se Defendant voluntarily absents himself from trial, he has no 6th Amendment right to be protected from the prejudice that may result; that's the case here. A different standard may apply, however, where a pro se defendant is removed from the courtroom for disruptive behavior. There, if the trial continues and if counsel is not appointed, neither the Defendant's nor Gov't's interests may be protected.

State v. Allen, 2017 WL 4247998 (Mo. App. E.D. Sept. 26, 2017):
Even though Defendant was driving a truck in Arkansas which had been stolen in Missouri a week earlier, the evidence was insufficient to show jurisdiction in Missouri in order to convict of first-degree tampering because there was no evidence Defendant operated the truck in Missouri.
Facts: Truck was stolen in Missouri. About a week later, Defendant traded the truck in Arkansas for another vehicle, even though Defendant did not have a title for the truck. Defendant was convicted of first-degree tampering, Sec. 589.080.
Holding: Defendant argues the trial court lacked territorial jurisdiction to convict him because there was no evidence that any part of the offense occurred in Missouri. A claim challenging a court's lack of jurisdiction because the State failed to prove the offense occurred in Missouri attacks the sufficiency of evidence to support the conviction. Missouri courts lack jurisdiction to prosecute violations of Missouri law unless the conduct constituting the offense, or some substantial part of it, occurred in Missouri. The only relevant basis for jurisdiction was Sec. 541.191.1(1) which requires some element of the offense to occur in Missouri. But there is simply no evidence that Defendant ever operated the truck in Missouri. The State argues this can be inferred from stealing and burglary cases which hold that where a defendant has possession of recently stolen property, this raises an inference of guilt. But this is not a stealing or burglary case; Defendant was not charged with stealing the truck. Operating a stolen vehicle in Arkansas, without more, does not allow an inference of guilt to convict of first-degree tampering in Missouri.

U.S. v. Casellas-Toro, 98 Crim. L. Rep. 240 (1st Cir. 12/7/15):
Holding: Change of venue should have been granted where another high-publicity-related trial of Defendant ended in conviction shortly before Defendant's trial at issue; while a jury may be able to set aside opinions by the news media, it is more difficult for them to set aside knowledge that Defendant is guilty because another jury in a related case found guilt.

Sales v. State, 2015 WL 662300 (Ga. 2015):
Holding: Where trial court stated in voir dire that "this happened in Taylor County," this impermissibly expressed a judicial opinion on a disputed factual issue at trial (venue).

Waiver of Appeal & PCR

Witthar v. U.S., 2015 WL 4385675 (8th Cir. 2015):
Holding: Defendant's affidavit that she instructed her attorney to file a notice of appeal and he refused to do so was sufficient to warrant a hearing on her claim of ineffective counsel, even though her plea agreement contained an appeal waiver, and her attorney denied such a request was ever made.

U.S. v. Puentes-Hurtado, 2015 WL 4466279 (11th Cir. 2015):
Holding: Defendant's appeal waiver in plea agreement did not bar his appeal where Defendant alleged that the Gov't breached the plea agreement, and that his counsel's ineffectiveness rendered his plea involuntary; appellate review of a plea agreement is allowed where the claim is that the Gov't breached the very agreement that includes the waiver; also, if the plea was involuntary due to ineffective counsel, the plea is not constitutional.

U.S. v. Hardman, 2014 WL 7877497 (11th Cir. 2014):
Holding: Even though Defendant's original sentence contained an appeal waiver, where the sentence was subsequently modified based on a Gov't motion for reduction based on substantial assistance, Defendant could appeal the modified sentence; the waiver was effective for the original sentence only.

Roberts v. State, 2016 WL 1072846 (Ark. 2016):
Holding: Defendant was not competent to waive his postconviction rights where both State and defense expert testified that Defendant's psychosis impaired his ability to make rational decisions about waiving rights.

N.Y. State Bar Ass'n Comm. on Prof. Ethics Op. 1098 (6/10/16):
Holding: New York ethics committee holds that it is unethical for prosecutors to structure plea bargains that require defendants to give up right to pursue ineffective assistance of counsel claims.

Waiver of Counsel

State v. Chambers, 2016 WL 503030 (Mo. banc Feb. 9, 2016):
(1) Even though Defendant timely filed his application for change of venue, where he failed to pursue it for nine months and affirmatively told the trial court there were no pending motions in the case until the day before trial, Defendant waived his right to change of venue; and (2) where pro se Defendant voluntarily chose not to attend the trial, he has no 6th Amendment right to be protected from the prejudice that results, but where a pro se Defendant is removed from the courtroom due to disruptive behavior, a different standard may apply, because if the trial continues without counsel, neither Defendant's nor the Gov't's interest will be adequately protected.
Facts: Defendant, through counsel, filed a timely application for change of venue as of right under Rule 32.03. Defendant then changed counsel. For nine months thereafter

new counsel, unaware of the venue application, told the court there were no pending motions. After a continuance motion was denied shortly before trial, counsel then discovered the venue application and sought to invoke it the day before trial. The trial court found Defendant waived the venue motion by not bringing it to the court's attention in a timely fashion. Defendant then discharged counsel, and absented himself from the trial.

Holding: (1) Even though Defendant timely filed his change of venue application, a defendant may waive constitutional or statutory rights by implied conduct. Here, Defendant waived his right to change of venue by not pursuing it for nine months, and affirmatively telling the court there were no pending motions. This is true even though the second counsel did not know the motion had been filed; it was defense counsel's responsibility to know the file. Asserting the change of venue the day before trial was an attempt to circumvent the denial of a continuance; Defendant should not be rewarded for that. (2) Regarding whether another of Defendant's claims is preserved for appeal, Defendant is held to the same standard as an attorney, even though he proceeded pro se and absented himself from the trial. Where a pro se Defendant voluntarily absents himself from trial, he has no 6th Amendment right to be protected from the prejudice that may result; that's the case here. A different standard may apply, however, where a pro se defendant is removed from the courtroom for disruptive behavior. There, if the trial continues and if counsel is not appointed, neither the Defendant's nor Gov't's interests may be protected.

State v. Davis, 2019 WL 2180364 (Mo. App. E.D. May 21, 2019):

Holding: In case of first impression, even though Defendant waived counsel, proceeded pro se and refused to attend his trial, the trial court was not obligated to appoint counsel to conduct the trial, and there was no error in allowing the trial to proceed without Defendant or a defense counsel.

State v. Bolden, 2016 WL 7106291 (Mo. App. E.D. Dec. 6, 2016):

Even though Defendant wanted to represent himself, trial court deprived him of his 6th Amendment right to counsel by allowing him to waive counsel, without representation of an attorney, before determining his competency.

Facts: Defendant, who did not have any counsel, wanted to proceed *pro se*. The trial court granted the request, but because it did not find Defendant's behavior to be "particularly rational" in rejecting counsel, ordered a mental examination. The exam found Defendant to be competent. The trial proceeded with Defendant representing himself. After conviction, he appealed. He claimed he was denied his 6th Amendment right to counsel during his competency determination.

Holding: The trial court plainly erred in allowing Defendant to waive counsel without representation of an attorney before determining competency. A person choosing self-representation must be competent to do so. When competency is at issue, the 6th Amendment requires that Defendant be represented by counsel whose duty it is to assure that the evidence supporting competency is closely examined. Here, the trial court believed Defendant's competency was in question; it should have appointed counsel at least until that issue was resolved. Nevertheless, a new trial is not required, at least at this stage. Because there is a contemporaneous competency report, case is remanded for a

competency hearing with counsel, and finding on whether Defendant was competent. If he was not, he shall receive a new trial.

State v. Campanella, 609 S.W.3d 526 (Mo. App. S.D. Oct. 29, 2020):
Holding: Even though Defendant apparently fired her retained defense counsel shortly before trial because counsel was having memory problems and the trial court told her she'd have to hire new counsel, the trial court record did not establish that Defendant knowingly, voluntarily and intelligently waived counsel for trial where Defendant never said she wanted to represent herself; did not sign a waiver of counsel; and the court failed to inquire into her indigency or conduct a *Faretta* hearing; trial where Defendant represented herself reversed.

Stark v. State, 2018 WL 2731401 (Mo. App. S.D. June 7, 2018):
(1) Where Movant waived counsel in the mistaken belief that he was not eligible for a Public Defender, the waiver was not knowing, intelligent and voluntary; and (2) even though Rule 24.035 applies only to felony convictions, where (a) the motion granted relief on both felony and misdemeanor convictions but (b) the State failed to object to the misdemeanor relief in the motion court, the State failed to preserve that issue for appeal, and the grant of misdemeanor relief did not constitute plain error (manifest injustice).
Facts: Movant (Defendant) had been convicted of various felonies and misdemeanors. Before his guilty plea, he applied for Public Defender services but was rejected because he made too much money and rejected in the mistaken belief that he was charged with misdemeanors only. A local court rule prohibited the Public Defender from accepting misdemeanor clients without court approval. Movant later reapplied for Public Defender services after he lost his job, but the Public Defender did not review his second application. Movant was not informed he could appeal the Public Defender's rejection. Movant, in the mistaken belief that he wasn't eligible for a Public Defender, then told the judge that he did not want to retain private counsel or apply for the Public Defender, and signed a waiver of counsel form. He was not informed by the judge of the possibility of consecutive sentencing before his plea, although the Prosecutor said he informed Movant of this. Movant pleaded guilty, and received the maximum sentences possible, with all time to run consecutively. Later, he filed a 24.035 motion, which contended his plea was involuntary because he had not voluntarily waived counsel. The motion court vacated his convictions. The State appealed.
Holding: (1) The State contends that the motion court erroneously granted relief on the irrelevant factor of the Public Defender's mistake in rejecting Movant. However, the motion court found Movant's testimony that he did not know he was eligible for appointed counsel to be credible. When Movant signed the waiver of counsel form, he had no reason to believe he was eligible for a Public Defender, since he had been rejected already. Waiver of counsel is knowing and intelligent only if the Defendant knows he has the right to appointed counsel if he cannot afford one. Movant was prejudiced by lack of counsel since he received the maximum sentences. (2) Even though Rule 24.035 applies only to felony convictions, the State did not object in the motion court that the court lacked authority to grant relief on the misdemeanors, too. The lack of objection failed to preserve the issue for appeal. Granting relief on the misdemeanors does not constitute plain error (manifest injustice) here.

State v. Grant, 2018 WL 618734 (Mo. App. S.D. Jan. 30, 2018):
Holding: Even though Defendant signed a written waiver of counsel form under Sec. 600.051, his waiver of counsel at trial was not knowing and intelligent because trial court failed to ask him about his knowledge of possible defenses, and the dangers of proceeding *pro se*.
Discussion: The burden to prove that a Defendant's waiver of counsel was knowing and intelligent is on the State. If the record does not show a knowing and intelligent waiver, there is a presumption the waiver was not. In general, a waiver is not knowing and intelligent unless the trial court informs the Defendant of the nature of the charges, potential sentences, potential defenses, the nature of the trial proceedings, and the dangers of proceeding *pro se*. Here, the trial court informed Defendant of some, but not all, of these requirements. Reversed and remanded for new trial.

State v. Kunonga, 2016 WL 1211434 (Mo. App. W.D. March 29, 2016):
Even though the trial court failed to obtain a written waiver of counsel from Defendant which fully complied with Sec. 600.051, where the court orally covered the same information in Sec. 600.051 with Defendant at a Faretta hearing, there was no manifest injustice requiring a new trial.
Facts: Defendant discharged his public defender, and proceeded to trial pro se. Prior to trial, the court held a *Faretta* hearing, at which the court explained various rights and gave various warnings regarding self-representation. After conviction, Defendant appealed, with counsel.
Holding: The written waiver of counsel in this case did not strictly follow the statutory requirements of Sec. 600.051. No Missouri case has previously addressed the intersection of the State's burden to prove a waiver of counsel with plain error review of a Sec. 600.051 violation. The statute allows waiver of counsel at trial provided that the Defendant sign a written waiver that "contains at least the following information," and lists various rights and warnings. Here, the written waiver provided by the trial court did not contain all the rights and warnings listed in the statute. This was evident, obvious and clear error. A violation of Sec. 600.051 facially establishes grounds to believe that manifest injustice has occurred. A violation of Sec. 600.051 sustains a defendant's burden to prove manifest injustice. Although a violation of Sec. 600.051 will usually constitute reversible error, even under plain error review, here, the trial court went over the same information in Sec. 600.051, nearly verbatim, at the *Faretta* hearing. Thus, nothing would have been added to Defendant's knowing, voluntary and intelligent waiver of counsel by a correct written form. "We conclude that in a plain error case, a defendant will not be rewarded with reversal when the State effectively demonstrates that an unpreserved violation of Sec. 600.051 is a mere technical violation having no impact on the knowing, voluntary, and intelligent waiver of counsel because the content omitted from the a written waiver form was covered, nearly verbatim, in a *Faretta* hearing."

In re sealed case, 103 Crim. L. Rep. 515 (D.C. Cir. 8/17/18):
Holding: A generic waiver of right to appeal does not waive ineffective assistance claim regarding counsel at sentencing.

U.S. v. Duncan, 97 Crim. L. Rep. 693 (4th Cir. 9/2/15):
Holding: Appellate review of trial court's finding that Defendant forfeited his right to counsel by his conduct is de novo, even if Defendant failed to object.

U.S. v. Laney, 102 Crim. L. Rep. 427 (9th Cir. 2/5/18):
Holding: Defendants who waive jury trials in favor of bench trials must, in general, sign a written waiver for the waiver to be effective.

U.S. v. Kowalczyk, 98 Crim. L. Rep. 142 (9th Cir. 11/4/15):
Holding: A criminal Defendant cannot waive his statutory right to be represented by counsel at a competency hearing, because it is illogical to find that a Defendant whose competency is in question can knowingly and intelligently waive their right to counsel.

Carrick v. State, 2016 WL 903774 (Ark. 2016):
Holding: Court cannot impose contempt for Defendant's failure to hire an attorney, because this denies the right to self-representation.

People v. Becerra, 2016 WL 3471102 (Cal. 2016):
Holding: Court abused discretion in terminating self-representation merely because Defendant asked for additional continuances to complete discovery, where State acknowledged that discovery had not yet been completed.

Ronquillo v. People, 102 Crim. L. Rep. 67 (Colo. 10/16/17):
Holding: The right to retain counsel of choice also includes Defendant's right to fire retained counsel without proof of "good cause" for doing so, but in deciding whether to allow change of counsel, court can consider procedural matters such as whether new counsel would have time to prepare before trial.

Ayers v. Hall, 103 Crim. L. Rep. 539 (Ky. 8/22/18):
Holding: Even though Defendant was an experienced criminal defense lawyer, trial court erred in failing to get a valid waiver of counsel from him before requiring him to proceed without counsel in criminal charges against him.

Osbey v. State, 2019 WL 1053251 (S.C. 2019):
Holding: Even though Defendant allegedly waived his right to counsel by conduct by failing to contact Public Defender's Office, waiver was invalid where court did not warn Defendant of dangers of self-representation; waiver by conduct still requires warnings.

People v. Ramos, 100 Crim. L. Rep. 187 (Cal. App. 11/21/16):
Holding: Even though pro se Defendant was disruptive, court denied him right to counsel when it removed him from the courtroom during the State's direct examination of a critical witness without warning Defendant that the trial would continue without him; this was structural error which didn't require proof of specific prejudice.

Kowalskey v. State, 2015 WL 4577843 (Ind. App. 2015):
Holding: Even though Defendant repeatedly questioned the competence of appointed counsel such that three appointed counsel withdrew from his case, he did not waive or forfeit his right to counsel, absent warnings about the dangers and disadvantages of self-representation.

McCollum v. State, 2016 WL 700279 (Miss. App. 2016):
Holding: Even though Defendant disparaged his appointed attorney, Defendant did not impliedly waive or forfeit his right to counsel where trial court gave no warnings to Defendant that he might forfeit counsel by continuing to disparage counsel.

People v. Hamilton, 2015 WL 7463850 (N.Y. App. 2015):
Holding: Even though Defendant had not previously gone through a trial and was unfamiliar with trial procedures, trial court erred in denying him right to represent himself.

State v. Blakeney, 2016 WL 611119 (N.C. App. 2016):
Holding: Even though Defendant requested a continuance to hire new counsel, this was not "misconduct" that forfeited his right to appointed counsel where Defendant did nothing to disrupt the proceedings.

N.H. Bar Ass'n Ethics Comm., Op. 2015-16/9, 99 Crim. L. Rep. 15:
Holding: Lawyer appointed to be "standby counsel" in a case should seek guidance from trial court as to what lawyer's duties as "standby counsel" are in terms of investigation, discovery, hearing attendance, legal research, and advice; given that a Defendant has a right to self-representation, the scope of "standby counsel's" duties will "need to be developed through consultation between the court and the defendant, and not simply imposed."

Waiver of Jury Trial

Holm v. Wells Fargo Home Mortgage, 2017 WL 7700979 (Mo. banc Feb. 28, 2017):
Holding: (1) Where Defendant had engaged in repeated obstructive discovery tactics, trial court did not abuse discretion in ordering as sanctions that Defendant would be precluded from presenting any evidence at trial, objecting to Plaintiff's evidence, and cross-examining Plaintiff's witnesses; but (2) even though Defendant waited until day of trial to demand a jury trial, trial court erred in denying one because Defendant had a constitutional right to have a jury determine the extent of actual and punitive damages.
Discussion: (1) Rule 61.01 gives trial courts significant discretion to impose "just" sanctions for discovery violations. Here, despite warnings by the trial court that sanctions could result, Defendant repeatedly failed to produce requested documents, misled the court and opposing counsel about the existence of documents, and repeatedly failed to produce witnesses for deposition. Sanctions were not an abuse of discretion. (2) The trial court denied a jury trial because Defendant had never requested one until day of

trial, and did not submit jury instructions. Mo. Const. Art. I, Sec. 22(a) states that the right to a jury trial "as heretofore enjoyed shall remain inviolate." Sec. 510.190.2 provides that a party may waive a jury trial by not appearing at trial; filing a written waiver; giving oral consent to a bench trial; or proceeding to bench trial without objection. These are the *exclusive* ways to waive a jury trial. A party need not demand a jury trial to preserve its right to a jury trial. Failing to affirmatively request a jury trial until the day of trial or submit jury instructions are not among the ways in which a jury trial can be waived. Even though the sanctions here effectively amounted to a judgment that Defendant was liable at trial, the right to a jury trial includes the right to have a jury determine damages. Imposition of sanctions does not strip a party of the right to have a jury determine damages. Case remanded for a jury trial on damages.

State v. Feldt, 2107 WL 900082 (Mo. App. E.D. March 7, 2017):
Holding: (1) Even though (a) counsel filed a motion with the court indicating the parties had agreed to waive a jury trial; (b) Defendant said after he was found guilty and sentenced that he and counsel had "discussed" whether to have a jury trial; and (c) Defendant never objected to a bench trial, trial court plainly erred in conducting bench trial because the record did not reflect with unmistakable clarity that Defendant *personally* understood and voluntarily waived his right to a jury trial; and (2) even though appellate court is granting new trial, it must first consider Defendant's sufficiency of evidence claim on appeal because to fail to do so would possibly subject Defendant to double jeopardy, if State had presented insufficient evidence to convict (but evidence was sufficient here).

State v. Whitaker, 2016 WL 6236640 (Mo. App. S.D. Oct. 25, 2016):
Holding: Even though the State claimed that Defendant waived his right to a jury trial as part of an agreement regarding a polygraph, where (1) the judge never questioned Defendant personally on the record about the jury trial waiver, (2) the agreement was somewhat unclear as to waiver, and (3) even after the agreement was entered, the State didn't object to Defendant's demand for a jury trial for some time, the record did not demonstrate with "unmistakable clarity" that Defendant waived his right to a jury trial; trial court plainly erred in denying right to jury trial.
Discussion: A jury trial can be waived, but the record must demonstrate with unmistakable clarity that Defendant knowingly and voluntarily waived it. Best practice calls for the judge to personally question Defendant on the record about the waiver. This never happened here. Even though there was a written agreement allegedly to waive a jury in conjunction with a polygraph, the agreement's text is somewhat unclear and doesn't meet the constitutional standard of "unmistakable clarity." Further, even after the agreement, the State didn't object promptly when Defendant sought a jury trial; if the waiver had been unmistakably clear, it seems the State would have objected sooner.