

# Case Law Update

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## Editor's Note

October 1, 2011

Dear Readers:

This edition of *Case Law Update* contains all Missouri appellate opinions from July 1, 2011 to September 30, 2011, which resulted in reversals, or in my opinion, were otherwise “noteworthy,” and federal and foreign state opinions from the *Criminal Law Reporter* and *Criminal Law News (WL)*, which I found “noteworthy.” I have also included a few “noteworthy” cases from other sources.

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

I do not know subsequent history on all cases. Before citing a case, be sure to Shepardize it to be sure it remains good law.

Sincerely,

Greg Mermelstein  
Division Director

## **Appellate Procedure**

### **State ex rel. Thompson v. Dueker, No. ED96570 (Mo. App. E.D. 8/9/11):**

*Even though Husband consulted with Attorney about a potential divorce case, where Husband did not end up hiring Attorney, Husband was only a “prospective client” of Attorney under Rule 4-1.18, and where Wife later hired Attorney in regard to the divorce, Husband could not disqualify Attorney without showing that Attorney received confidential information that could be significantly harmful to Husband in the matter.*

**Facts:** Husband met with Attorney about a potential divorce case, and Husband claimed he discussed confidential matters with Attorney. Husband ended up, however, hiring a different lawyer for the case. Wife later hired Attorney in relation to the divorce case. Husband moved to disqualify Attorney, claiming he was a former client of Attorney under Rule 4-1.9. Trial court disqualified Attorney.

**Holding:** A writ of prohibition is proper where a court disqualifies a lawyer from representing a client because the judgment, if erroneously entered, would cause considerable hardship and expense and the issue would otherwise escape appellate review. Rule 4-1.9(a) applies to conflict of interest with former clients. To establish a conflict under Rule 4-1.9, a movant for disqualification must prove (1) the Attorney had a former attorney-client relationship with movant; (2) the interests of Attorney’s current client are materially adverse to movant’s interests; and (3) the current representation involves the same or substantially related matter as Attorney’s former representation of movant. Here, however, Husband (movant) did not have an attorney-client relationship with Attorney because Husband did not seek or receive any legal advice from Attorney. Rule 4-1.18(a) provides that “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” Rule 4-1.18(b) provides that an Attorney must keep information of prospective clients confidential. However, Rule 4-1.18(c) provides that a lawyer shall not represent former prospective clients in the same or substantially related matter only if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. This provides a more restrictive standard for disqualification than does 4-1.9 for former clients. Under 4-1.18(c), the movant asserting disqualification bears the burden of proving that Attorney received “significantly harmful” information. Mere speculation of receipt of such information is not enough. Here, Husband did not demonstrate what “significantly harmful” information Attorney had received. Disqualification of Attorney reversed.

### **State v. Cannafax, No. SD30327 (Mo. App. S.D. 7/22/11):**

*Where Defendant’s sexual offenses occurred during a time span from early 2006 to 2008, but it was unclear if they occurred after August 28, 2006, and the trial court’s judgment made no findings about this, it is unclear whether the lifetime supervision requirements of Sec. 217.735 apply to Defendant, but the issue is not ripe until the Board of Probation and Parole attempts to apply them to him; at that time, he may bring a writ of mandamus to challenge their applicability.*

**Facts:** Defendant was convicted of sexual offenses alleged to have occurred between June 7, 2006 and November 2008. The trial court did not expressly find that the offenses occurred after August 28, 2006 and did not state in its judgment that Defendant was

subject to lifetime supervision under Sec. 217.735, which provides that offenders are subject to lifetime supervision for certain sexual offenses “based on an act committed on or after August 28, 2006.”

**Holding:** Defendant’s claim on appeal is that he is improperly subject to lifetime supervision under Sec. 217.735 because there was not sufficient evidence to prove his offenses happened after August 28, 2006. However, since the trial court made no findings about this and made no mention of it in its judgment, it is unclear if Defendant will be subjected to lifetime supervision when he completes his prison sentence. Thus, this issue is not ripe for review. However, if the Board of Probation and Parole seeks to apply Sec. 217.735 to him in the future, he may challenge that via a writ of mandamus.

**Jack v. State, No. SD30512 (Mo. App. S.D. 8/9/11):**

**Holding:** Denial of Rule 29.07(d) motion to correct manifest injustice is appealable and is governed by rules of civil procedure; judgment becomes final 30 days after entry and notice of appeal is due not later than 10 days thereafter.

**Shaw v. State, No. SD30814 (Mo. App. S.D. 8/17/11):**

*Even though trial judge “thought” he imposed consecutive sentences, where the transcript said “concurrent” and State did not challenge the accuracy of the transcript pursuant the procedures of Rule 30.04(g), the appellate court must accept the accuracy of the transcript and the oral pronouncement of sentence controls.*

**Facts:** Defendant entered into a plea bargain whereby prosecutor would recommend consecutive sentences, but Defendant could argue for something less. However, the plea and sentencing transcript refer to the State’s offer as being for “concurrent” sentences and the transcript of the oral pronouncement of sentence said the sentences were “concurrent.” However, the written sentence and judgment said they were “consecutive.” Defendant filed a 24.035 motion alleging the oral pronouncement controlled. At the evidentiary hearing on the 24.035 motion, the trial judge said he “thought” he had said “consecutive,” and his notes reflected that. Also, the plea attorney and prosecutor testified they thought it was “consecutive.” The motion court denied relief based on this.

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

**State v. DeLong, No. SD30928 (Mo. App. S.D. 9/30/11):**

**Holding:** Footnote 3 states that where appellate court is reviewing an issue under *de novo* standard (such as whether interstate agreement on detainers applied), it does not

matter whether party “properly preserved” issue for appellate review or whether there is a transcript of the legal arguments in the court below.

**T.C.T. v. Shafinia, No. WD72336 (Mo. App. W.D. 9/20/11):**

**Holding:** Where order of protection had expired during pendency of appeal, the appeal was moot and Appellant “does not argue that the order’s mere existence subjects him to significant collateral consequences that might justify us in exercising our discretion to consider his claims.”

\* **U.S. v. Juvenile Male, \_\_\_ U.S. \_\_\_, 89 Crim. L. Rep. 574 (U.S. 6/27/11):**

**Holding:** Where Juvenile challenged certain provisions of SORNA as violating ex post facto, but the court order of juvenile supervision which required Juvenile to register as sex offender has expired, the case is moot.

**Cleveland Hts. v. Lewis, 2011 WL 2275817 (Ohio 2011):**

**Holding:** Completion of a sentence will not render an appeal moot where Defendant did not acquiesce in the sentence or abandon the right to appeal.

### **Armed Criminal Action**

**State v. Donelson, No. ED95132 (Mo. App. E.D. 7/5/11):**

*Where in 2009, Defendant was charged with two counts of murder and two counts of armed criminal action, for offenses which occurred in 2000 and 2005 respectively, the ACA charges were barred by the three-year statute of limitations for ACA.*

**Holding:** Under Sec. 556.036 RSMo Cum. Supp. 2009, the prosecution of the felony of ACA is limited to three years because armed criminal action is an unclassified code felony and cannot be designated an A felony, which has no statute of limitations. Convictions for ACA vacated.

### **Brady Issues**

**State ex rel. Griffin v. Denney, No. SC91112 (Mo. banc 8/2/11):**

*Even though State prosecutors may not have known about a DOC incident report that was favorable to Defendant in a prison stabbing case, State is responsible for its disclosure under Brady and failure to disclose it prejudiced Defendant; habeas corpus relief is available and granted.*

**Facts:** In the 1980’s, Defendant (Petitioner) was convicted of first degree murder due to a fatal stabbing that occurred at a DOC prison. The primary witnesses against Defendant were two fellow inmates of questionable credibility. No physical evidence connected Defendant to the murder. In 2005, Defendant filed a habeas petition alleging newly discovered evidence that the State failed to disclose a DOC report that prison guards had seized a sharpened screwdriver from another inmate immediately after the stabbing.

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

### **Closing Argument & Prosecutor’s Remarks**

**State v. Monday, 89 Crim. L. Rep. 548 (Wash. 6/9/11):**

**Holding:** Prosecutor injected racial bias into trial by pronouncing the word “police” as “po-leese” during questioning and by arguing that the reason the state’s witnesses weren’t more forthcoming was that “black folk” follow a code that frowns on cooperating with authorities.

### **Confrontation & Hearsay**

**Ocampo v. Vail, 2011 WL 2275798 (9<sup>th</sup> Cir. 2011):**

**Holding:** Admission of police detective’s testimony about a non-testifying witness who confirmed that Defendant was at scene of crime and was the shooter violated Confrontation Clause.

**Com v. Parenteau, 2011 WL 2239003 (Mass. 2011):**

**Holding:** A certificate of mailing from the Dept. of Motor Vehicles verifying that a notice of driver’s license suspension had been sent to Defendant was “testimonial” and its admission violated the Confrontation Clause in prosecution for operating vehicle after license had been revoked.

**State v. Turnipseed, 2011 WL 1991752 (Wash. Ct. App. 2011):**

**Holding:** Defendant’s 6<sup>th</sup> Amendment right to confrontation was violated by a partially distorted and inaudible video of defense counsel’s earlier cross-examination of an expert.

## Continuance

### **U.S. v. Sellers, 2011 WL 1935735 (7<sup>th</sup> Cir. 2011):**

**Holding:** Denial of Defendant’s pretrial motion for a continuance to change counsel, without conducting a balancing test to determine if a continuance was warranted, denied Defendant his 6<sup>th</sup> Amendment right to counsel of his choice.

## Counsel – Right To – Conflict of Interest

### **State ex rel. Thompson v. Dueker, No. ED96570 (Mo. App. E.D. 8/9/11):**

*Even though Husband consulted with Attorney about a potential divorce case, where Husband did not end up hiring Attorney, Husband was only a “prospective client” of Attorney under Rule 4-1.18, and where Wife later hired Attorney in regard to the divorce, Husband could not disqualify Attorney without showing that Attorney received confidential information that could be significantly harmful to Husband in the matter.*

**Facts:** Husband met with Attorney about a potential divorce case, and Husband claimed he discussed confidential matters with Attorney. Husband ended up, however, hiring a different lawyer for the case. Wife later hired Attorney in relation to the divorce case. Husband moved to disqualify Attorney, claiming he was a former client of Attorney under Rule 4-1.9. Trial court disqualified Attorney.

**Holding:** A writ of prohibition is proper where a court disqualifies a lawyer from representing a client because the judgment, if erroneously entered, would cause considerable hardship and expense and the issue would otherwise escape appellate review. Rule 4-1.9(a) applies to conflict of interest with former clients. To establish a conflict under Rule 4-1.9, a movant for disqualification must prove (1) the Attorney had a former attorney-client relationship with movant; (2) the interests of Attorney’s current client are materially adverse to movant’s interests; and (3) the current representation involves the same or substantially related matter as Attorney’s former representation of movant. Here, however, Husband (movant) did not have an attorney-client relationship with Attorney because Husband did not seek or receive any legal advice from Attorney. Rule 4-1.18(a) provides that “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” Rule 4-1.18(b) provides that an Attorney must keep information of prospective clients confidential. However, Rule 4-1.18(c) provides that a lawyer shall not represent former prospective clients in the same or substantially related matter only if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. This provides a more restrictive standard for disqualification than does 4-1.9 for former clients. Under 4-1.18(c), the movant asserting disqualification bears the burden of proving that Attorney received “significantly harmful” information. Mere speculation of receipt of such information is not enough. Here, Husband did not demonstrate what “significantly harmful” information Attorney had received. Disqualification of Attorney reversed.

**Sanford v. State, No. WD72291 (Mo. App. W.D. 7/26/11):**

**Holding:** Where motion court failed to appoint counsel for movant in 24.035 case who had indicated she was indigent, this was erroneous because Rule 24.035(e) mandates that counsel be appointed for indigent movants.

**U.S. v. Sellers, 2011 WL 1935735 (7<sup>th</sup> Cir. 2011):**

**Holding:** Denial of Defendant's pretrial motion for a continuance to change counsel, without conducting a balancing test to determine if a continuance was warranted, denied Defendant his 6<sup>th</sup> Amendment right to counsel of his choice.

## **Discovery**

**State v. Jackson, No. SD30129 (Mo. App. S.D. 8/12/11):**

*"Internal affairs" report that contained a written statement of charged incident by Officer was discoverable under Rule 25.03 and was not shielded from discovery by the Sunshine Law.*

**Facts:** Defendant was charged with assault on a law enforcement officer. Defendant filed a motion under Rule 25.03 for any written or recorded statements reporting or summarizing witnesses' testimony. During a deposition of the arresting officer, Officer testified that he had completed a "resistance control form" which contained his written statement of what happened and must be completed whenever a certain level of force is used. The prosecutor refused to provide the form, claiming it was under the control of the police department. Subsequently, Defendant served a subpoena duces tecum on the custodian of records of the police department to produce the document. The police department filed a motion to quash, claiming the document was a privileged personnel record under the Sunshine Law. The trial court denied a motion to compel and held the document was a privileged, closed record under the Sunshine Law. At trial, Defendant sought to question Officer about the report, but the trial court would not allow it.

**Holding:** The resistance control form was a written statement of a witness that the State was required to disclose to the defense pursuant to their written request under Rule 25.03(A)(1). As a prior statement by the State's primary witness, the resistance control form contains highly relevant and material information that could be used for impeachment or as substantive evidence if it contained anything inconsistent with Officer's police report, his deposition or trial testimony. *See* Sec. 491.074. The fact that the record is closed to the public under the Sunshine Law does not mean that the record is immune from discovery by a party in litigation. The report was not privileged, was discoverable, and its production was required by Rule 25.03. The trial court abused its discretion in denying the motion to compel. For the same reason, the court's preclusion of defense counsel's attempt to question Officer about this at trial was erroneous. Reversed and remanded for new trial.

**State ex rel. Adkins v. Moore, No. SD31503 (Mo. App. S.D. 8/25/11):**

*Even though local rule said that discovery had to be complete at the time of trial setting, court could not preclude the parties from conducting additional discovery after the trial setting date because that would cause local rule to conflict with Rule 56.01(e).*

**Facts:** Court had local rule which provided that “[r]equests for trial setting shall state that discovery is complete.” Plaintiff requested a trial setting and trial was set in the future. After the setting, the parties sought to take additional depositions. The trial court ordered them to stop discovery under the local rule.

**Holding:** Prohibition is the proper remedy where a trial court issues a discovery order that is an abuse of discretion. Here, a plain reading of the local rule does not indicate that it is intended to bar discovery after a trial setting. Such an interpretation would be hard to reconcile with Rule 56.01(e)’s supplementation requirements and the practicalities involved in setting a trial more than a year in the future. To bar discovery under these circumstances is against the logic of the circumstances, arbitrary and unreasonable.

**U.S. v. Loughner, 2011 WL 1705865 (D. Ariz. 2011):**

**Holding:** Bureau of Prisons’ intake assessment records of Defendant (including psych reports) were generated pursuant to routine prison protocols and were not barred from disclosure by either the doctor-patient privilege or the 5<sup>th</sup> or 6<sup>th</sup> Amendment because the records were not intended for diagnosis or treatment.

## **Double Jeopardy**

**City of Joplin v. Marston, 2011 WL 2931075 (Mo. App. S.D. 7/21/11):**

*Where City failed to introduce city ordinance under which Defendant was convicted into evidence, the evidence is insufficient to convict because courts cannot take judicial notice of city ordinances, and double jeopardy precludes retrial.*

**Facts:** Defendant was convicted at a trial de novo of violation of various city ordinances, including driving under the influence of drugs. The City at trial failed to introduce the ordinances into evidence. Defendant appealed.

**Holding:** Municipal prosecutions require proof of the ordinances upon which conviction rests. Courts cannot take judicial notice of municipal ordinances that are not properly introduced into evidence. There are three ways to introduce municipal ordinances: (1) introducing a certified copy under Sec. 490.240; (2) bringing the printed volume of ordinances to court and proving the ordinance through the book, Sec. 490.240; or (3) under Sec. 479.250, filing a certified copy with the court provided it is available for inspection by the parties. None of these were done here. Hence, the record is devoid of proof of the ordinance violation. Principles of double jeopardy preclude a retrial where the evidence is found to be legally insufficient. Reversed and remanded for entry of judgment of acquittal.

**City of Joplin v. Klein, 2011 WL 2936401 (Mo. App. S.D. 7/21/11):**

*Even though City introduced ordinances making certain actions a municipal offense, where City failed to introduce the penalty portions of the ordinances, a court cannot*

*judicially notice them and the charging information and proof were insufficient; furthermore, City is precluded from getting another opportunity to prove penalty.*

**Facts:** Defendant was convicted of violation of various city ordinances. At trial, City properly placed the ordinances creating violations before the trial court by filing certified copies of the ordinances with the clerk of the circuit court under Sec. 479.250. However, the penalties for violation of these ordinances were in separate ordinances that were not provided. Defendant appealed.

**Holding:** A court cannot take judicial notice of a city ordinance that is not properly introduced into evidence. Here, the information (citation) charging the offenses failed to list the ordinance providing a penalty, and the penalty ordinances were not admitted into evidence or otherwise properly before the court. Thus, the charging information does not comply with Rule 37.35(b)(4). *State v. Collins*, 328 S.W.3d 705 (Mo. banc 2011), held that where the State failed to offer sufficient evidence to prove enhanced DWI status, the State does not get a second opportunity to do so. Applying *Collins*, City does not get a second opportunity to prove penalty here. Because City failed to allege the penalty ordinances in the charging information or prove them during trial, it is prevented from doing so at a re-sentencing. The only remedy is discharge of Defendant.

## **DWI**

### **State v. Wilson, No. ED95423 (Mo. App. E.D. 7/12/11):**

*Where trial court failed to find Defendant's prior DWI convictions before the case was submitted to the jury but did so afterwards, this violated the timing requirements of 577.010 RSMo. Cum. Supp. 2008, and required that Defendant's sentence as a chronic offender be vacated.*

**Facts:** Defendant was charged with DWI as a chronic offender under Sec. 577.010 RSMo. Cum. Supp. 2008. Before the case was submitted to the jury, the State introduced four exhibits showing four prior DWI convictions. However, the trial court did not make any finding about Defendant being a chronic offender until after the jury's guilty verdict. Defendant was then sentenced to 12 years.

**Holding:** Sec. 577.023.7(3) RSMo. Cum. Supp. 2008 provided that in a jury trial, the facts pleaded for prior convictions shall be established and found prior to submission of the case to the jury. Here, the court violated the timing requirements of the statute by not doing this until after the jury's verdict. This was plain error, and requires that Defendant's sentence as a chronic offender be vacated. Case remanded for resentencing without any type of prior offender status.

### **State v. Lemons, No. SD30959 (Mo. App. S.D. 8/25/11):**

*(1) Where State submits Defendant's "Driver's Record" to prove prior DWI convictions, the Driver's Record must specifically identify the convicting court; (2) State need no longer prove that Defendant had counsel or waived counsel in prior DWI convictions, but Defendant may prove that the prior convictions were unconstitutional.*

**Facts:** Defendant was charged with DWI as a "chronic offender" for having four prior DWI convictions. To prove the convictions, the State submitted Defendant's Missouri

“Driver’s Record” which showed that Defendant was convicted “on 4-02-1991 in Arkansas by circuit court.” Defendant claimed he never had such a conviction.

**Holding:** (1) The Driver Record was insufficient to prove the Arkansas conviction because it did not specifically identify the convicting court. Some minimal information is necessary to use a Driver Record to prove prior convictions to allow Defendant the opportunity to rebut the conviction. The requirement of court identification for violations of foreign law is included in the Driver License Compact, Sec. 302.600, Article III, so that an aggrieved person would have only one county or city to contact in order to rebut the conviction. Here, the Driver’s Record did not identify a specific Arkansas Circuit Court, but only the entire state of Arkansas. This was insufficient, and the Arkansas conviction should not have been counted as a prior DWI. Case remanded for resentencing as an “aggravated offender” (three priors). (2) On a separate issue, Defendant contends that the State didn’t prove that his prior convictions were with counsel or counsel was waived. However, the DWI statute was amended in 2009 to no longer require proof that the defendant was represented by counsel or waived counsel. Sec. 577.023.1(4) RSMo. Cum. Supp. 2009. However, while the State need not prove this, a Defendant may still prove that the prior convictions were unconstitutional because he did not have counsel, but Defendant has not done that here.

**Hilkemeyer v. Director of Revenue, No. SD30811 (Mo. App. S.D. 9/15/11):**

**Holding:** Where Driver contended -- and trial court found -- that Officer did not satisfy the 15-minute observation period because Officer was not always looking directly at Driver during the period but was also doing other activities including driving the patrol car and entering data on a computer, the Director is wrong in contending that the only way the breathalyzer results could have been excluded by trial court was if Driver had presented evidence that she smoked vomited, or orally ingested something during the 15-minute period. *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. banc 2010), held that nothing in Sec. 302.535 creates a presumption that the Director’s evidence establishing a prima facie case is true or shifts the burden to Driver to produce evidence to rebut such a presumption. Prior cases implying a “presumption of validity” were overruled by *White*. Judgment in favor of Driver affirmed.

**State v. Hatfield, No. WD72468 (Mo. App. W.D. 8/30/11):**

*Even though Officer found intoxicated Defendant in a driveway by a wrecked car, evidence was insufficient to convict of DWI because there was no showing that Defendant had driven the car while intoxicated, as opposed to become intoxicated later.*

**Facts:** Officer was called to a home at 11:00 a.m. for a motor vehicle accident, and found a wrecked car parked in the home’s driveway. Defendant was next to it and was intoxicated. Officer asked what happened, and Defendant said, “I lost it making the turn.” Officer arrested Defendant for DWI. Defendant refused to provide a breath, blood or urine sample. Defendant was convicted of DWI at trial.

**Holding:** The evidence is insufficient to sustain a conviction for DWI because although the evidence showed that Defendant was intoxicated when standing by the car, there was insufficient evidence to prove that Defendant actually drove the car *while* intoxicated. Prior cases have made clear that where a Defendant is found outside the car, there must be some evidence linking in time the Defendant’s intoxication and operation of the motor

vehicle. Here, there was no evidence as to the time Defendant drove the car, or how much time elapsed between the accident and the arrest. There was no evidence that the car was running, whether the keys were in the car, the temperature of the car's motor, or other factors that would show that the car had recently been driven. The State argues that Defendant's refusal to take a BAC test establishes consciousness of guilt for DWI. However, this reasoning has previously been rejected in another case where the court held that such a denial could not be regarded as highly probative of DWI where there is a lapse of time between the defendant's driving and refusal, and the defendant's apparent access to alcohol in the interim. DWI conviction reversed.

**Zahner v. Director of Revenue, No. WD72801 (Mo. App. W.D. 9/13/11):**

**Holding:** Where (1) there was dispute between Officer and Driver about whether Driver was properly informed of Implied Consent Law, (2) Officer told court that he could produce a video to prove his version of events, and then (3) a week later, Officer said the video had been "destroyed as part of the post-arrest routine," trial court was permitted to discredit Officer's version of events due to the destruction of the video, even though the spoliation doctrine (which states that if a party intentionally destroys evidence, the party is subject to an adverse inference) does not apply to the Director of Revenue since when police destroy evidence, they don't do so at the direction of the Director. However, trial courts may still consider destruction of evidence in determining witness credibility in a case. Judgment crediting Driver's version of events and reinstating Driver's license affirmed.

## **Evidence**

**State v. McArthur, No. ED95094 (Mo. App. E.D. 7/5/11):**

**Holding:** Where Defendant charged with sodomy had a bifurcated trial, State may present in penalty phase testimony of a prior sexual assault victim of Defendant about that prior bad act.

**Editor's Note:** An interesting dissenting opinion argues that State went too far in being allowed to present prior victim and then argue jury should impose maximum sentence to avenge prior victim's assault, since that was not the subject matter of this particular case.

**John Doe v. Roman Catholic Diocese of St. Louis, No. ED94720 (Mo. App. E.D. 7/5/11):**

**Holding:** Alleged "grooming" of a victim to engage in sexual abuse does not constitute sexual abuse itself.

**U.S. v. Colon-Ledee, 2010 WL 6675045 (D.P.R. 2010):**

**Holding:** Defendant's conviction for failure to pay child support was not a crime involving dishonesty or false statement and, hence, could not be used to impeach Defendant's credibility.

**State v. Victor O., 2011 WL 2135671 (Conn. 2011):**

**Holding:** Results of an Abel Assessment of Sexual Interest (Abel test), which purports to show sexual interest minors, were not sufficiently reliable in a nontreatment context to be admitted in criminal case.

**Boring v. State, 2011 WL 2119377 (Ga. 2011):**

**Holding:** Evidence of Defendant's "gothic" lifestyle was not admissible in murder prosecution where there was no nexus between victim's murder and Defendant's "gothic" beliefs or subculture.

**State v. Herring, 2010 WL 4904646 (Vt. 2010):**

**Holding:** Exclusion of victim's prior inconsistent videotaped statement as impeachment evidence in child sexual assault prosecution was error.

**State v. Almanza-Garcia, 2011 WL 1486076 (Or. App. 2011):**

**Holding:** Admission of testimony of a diagnosis of child sexual abuse in the absence of physical evidence of abuse was plain error, even in a bench trial.

**Evidentiary Hearing (Rules 24.035 & 29.15)**

**Brown v. State, No. ED94429-01 (Mo. App. E.D. 7/12/11):**

**Holding:** Where (1) Movant claimed that guilty plea counsel was ineffective because counsel told him he'd only serve 3 to 5 years and (2) the plea record showed the court only asked Movant whether or not any threats or promises had been made to him, Movant's statements were insufficient to clearly refute the claim that counsel promised him a lesser sentence; Movant entitled to evidentiary hearing.

**Experts**

**State v. Victor O., 2011 WL 2135671 (Conn. 2011):**

**Holding:** Results of an Abel Assessment of Sexual Interest (Abel test), which purports to show sexual interest minors, were not sufficiently reliable in a nontreatment context to be admitted in criminal case.

**Ex Post Facto**

**State v. Davis, No. SC91368 (Mo. banc 8/30/11):**

*Supreme Court – on procedural grounds -- upholds trial court's ruling that Sec. 566.150 (which creates the crime of sex offenders being in certain parks), is retrospective as applied to offenders who committed their sex offenses before the effective date of the law; Supreme Court holds that the State failed to preserve claim that ban on retrospective laws applies only to civil laws, and not criminal laws.*

**Facts:** Defendant was convicted of sex offense in 1983. Under SORNA, he has to register as a sex offender in Missouri. Sec. 566.150 makes it a Class D felony for a registered sex offender to knowingly be present or loiter within 500 feet of a public park that contains playground equipment or a public swimming pool. Sec. 566.150 became effective in August 2009. In 2010, Defendant was charged with violating Sec. 566.150. He filed a motion to dismiss, claiming that Sec. 566.150 violated the Mo. Constitution's ban on retrospective laws as applied to him because his sex conviction was before the law's effective date. The trial court granted the motion to dismiss. The State appealed.

**Holding:** The State claims that the prohibition on retrospective laws in Art. I, Sec. 13 applies only to civil statutes, and that Sec. 566.150 is a criminal statute. However, the State never presented this issue to the trial court, and cannot raise it for the first time on appeal. That issue is not preserved for appeal, and is not reviewed. Dismissal affirmed.

### **Findings of Fact, Conclusions of Law (Rules 24.035 and 29.15)**

#### **Burgess v. State, No. SC91571 (Mo. banc 7/19/11):**

**Holding:** Where motion court dismissed postconviction motion without findings of fact and conclusions of law, case is remanded for entry of findings.

**Editor's Note:** This case is noteworthy not because of the holding, but because the case posed the question of whether a movant can waive his postconviction rights as part of a plea bargain. The Supreme Court did not decide this issue because of the remand. However, in a footnote, the Supreme Court discussed Formal Opinion 126 (which states that it is not being permissible for defense counsel to advise a client regarding waiver of ineffective assistance of counsel by defense counsel): "The binding effect of a formal opinion is limited to disciplinary proceedings that occur after the formal opinion is issued and, even then, is subject to review by this Court when petitioned by any member of the bar who is substantially and individually aggrieved by the opinion. Formal Opinion 126 expressly stated that analysis of whether a waiver of postconviction rights would violate the Constitution or other laws was beyond the scope of the opinion." There is currently pending another case at the Supreme Court which also raises the issue of the validity of waiver of postconviction rights as part of a plea bargain, so the Supreme Court will likely rule on the merits of that issue later.

#### **Smith v. State, No. WD72074 (Mo. App. W.D. 7/19/11):**

**Holding:** Where (1) motion court denied postconviction claims summarily by finding that "Movant failed to allege specific facts" and that counsel made "trial strategy" decisions regarding the claims; and (2) Movant filed a motion to amend the judgment pursuant to Rule 78.07(c) asking the court for additional findings (which was denied), the findings are not sufficient under Rule 29.15(j) for meaningful appellate review; reversed and remanded for detailed findings.

## **Guilty Plea**

**Brown v. State, No. ED94429-01 (Mo. App. E.D. 7/12/11):**

**Holding:** Where (1) Movant claimed that guilty plea counsel was ineffective because counsel told him he'd only serve 3 to 5 years and (2) the plea record showed the court only asked Movant whether or not any threats or promises had been made to him, Movant's statements were insufficient to clearly refute the claim that counsel promised him a lesser sentence; Movant entitled to evidentiary hearing.

**Jack v. State, No. SD30512 (Mo. App. S.D. 8/9/11):**

**Holding:** Denial of Rule 29.07(d) motion to correct manifest injustice is appealable and is governed by rules of civil procedure; judgment becomes final 30 days after entry and notice of appeal is due not later than 10 days thereafter.

**U.S. v. Mendez-Santana, 2011 WL 1901545 (6<sup>th</sup> Cir. 2011):**

**Holding:** Defendant had absolute right to withdraw an unaccepted guilty plea, and did not have to show legal error to do so.

**State v. Fannon, 2011 WL 1900285 (Iowa 2011):**

**Holding:** Prosecutor's breach of plea agreement not to recommend consecutive sentences was not cured by the prosecutor's withdrawal of his remarks, for purposes of determining if Defendant's counsel was ineffective in failing to object to the breach or request appropriate relief.

**Ex parte Tankleskaya, 2011 WL 2132722 (Tex. App. 2011):**

**Holding:** Plea counsel was ineffective in failing to inform permanent legal resident-Defendant that her guilty plea to misdemeanor drug possession would render her presumptively inadmissible upon re-entry to the U.S. if she left the country; this rendered her plea involuntary, especially when counsel knew that Defendant was planning an out-of-country trip.

## **Immigration**

**Ex parte Tankleskaya, 2011 WL 2132722 (Tex. App. 2011):**

**Holding:** Plea counsel was ineffective in failing to inform permanent legal resident-Defendant that her guilty plea to misdemeanor drug possession would render her presumptively inadmissible upon re-entry to the U.S. if she left the country; this rendered her plea involuntary, especially when counsel knew that Defendant was planning an out-of-country trip.

## **Indictment and Information**

### **McGill v. Superior Court, 2011 WL 2120179 (Cal. App. 2011):**

**Holding:** Where a perjury charge against Defendant for testifying falsely before a grand jury was heard by the same grand jury that heard the underlying case where the perjury occurred, the perjury charge was subject to dismissal.

## **Ineffective Assistance of Counsel**

### **State v. Fannon, 2011 WL 1900285 (Iowa 2011):**

**Holding:** Prosecutor's breach of plea agreement not to recommend consecutive sentences was not cured by the prosecutor's withdrawal of his remarks, for purposes of determining if Defendant's counsel was ineffective in failing to object to the breach or request appropriate relief.

## **Interrogation – Miranda – Self-Incrimination – Suppress Statements**

### **U.S. v. Perry, 2011 WL 1900388 (8<sup>th</sup> Cir. 2011):**

**Holding:** Where proffer agreement was ambiguous in that one provision stated that Defendant's statements may not be used in the case-in-chief (suggesting they could be used elsewhere), but another provision stated the statements could not be used in any legal proceedings unless Defendant made an inconsistent statement, the agreement had to be construed against the Gov't and the statements could not be used in determining the Sentencing Guidelines range.

## **Jury Instructions**

### **State v. Lumpkins, No. WD71602 (Mo. App. W.D. 9/20/11):**

*To the extent that MAI-CR3d 314.00 Notes on Use No. 4(C)2 requires that when felony murder is the highest degree of homicide submitted, an involuntary manslaughter in the second degree instruction "will be given," the Note conflicts with Sec. 565.025.2(2) because involuntary manslaughter in the second degree is not a lesser-included offense of felony murder. Thus, the Note should not be followed.*

**Holding:** Defendant, who was convicted of felony murder, contends that the trial court erred in failing to give an instruction on second degree involuntary manslaughter because this was a lesser-included offense of felony murder. Sec. 565.025.2(2) says the lesser offenses of second degree murder are voluntary manslaughter under Sec. 565.023.1(1) and involuntary manslaughter under Sec. 565.024.1(1). Sec. 565.024 says a person commits involuntary manslaughter in the first degree if he "recklessly" causes the death. Defendant did not request an instruction under Sec. 565.024.1(1). Instead, Defendant asked for an instruction for second degree involuntary manslaughter based on a person

causing a death with “criminal negligence.” Second degree involuntary manslaughter is not listed as a lesser degree offense under Sec. 565.025.2(2). Hence, the court was correct in not instructing on it. To be clear, the lesson to be derived from this holding is that, in instructing down from the highest crime charged, there are two sources that must be checked. The first source is all lesser included offenses are to be given if requested by either party or the court per Sec. 556.046. Here, the court properly refused to give an instruction on second degree involuntary manslaughter because it is not a lesser included offense of felony murder. The second source for instructing down are particular statutes specific to the highest crime charged, in this case Sec. 565.025.2(2). That statute specifies that voluntary manslaughter under Sec. 565.023.1(1) and first degree involuntary manslaughter under Sec. 565.024.1(1) are to be given in offenses of second degree murder, including felony murder. This is analogous to the treatment courts have given the statutory mandate that felony murder be given in first degree murder cases. In those cases in and this one, the legislature has mandated instructions for certain offenses when appropriate but that does not make those offenses lesser included offenses. Defendant argues that MAI-CR3d 314.00 Notes on Use 4(C)2 provides that when felony murder is the highest homicide submitted, an instruction on second degree involuntary manslaughter “will be given” if justified by the evidence and requested by one of the parties or on the court’s own motion. However, the Notes on Use is wrong. To the extent that the Notes on Use requires the court to submit a second degree involuntary manslaughter instruction in a felony murder case it conflicts with Sec. 565.025.2(2) and should not be followed.

### **Jury Issues – Batson – Striking of Jurors – Juror Misconduct**

**McGill v. Superior Court, 2011 WL 2120179 (Cal. App. 2011):**

**Holding:** Where a perjury charge against Defendant for testifying falsely before a grand jury was heard by the same grand jury that heard the underlying case where the perjury occurred, the perjury charge was subject to dismissal.

### **Prosecutorial Misconduct**

**State v. Monday, 89 Crim. L. Rep. 548 (Wash. 6/9/11):**

**Holding:** Prosecutor injected racial bias into trial by pronouncing the word “police” as “po-leese” during questioning and by arguing that the reason the state’s witnesses weren’t more forthcoming was that “black folk” follow a code that frowns on cooperating with authorities.

## Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

### **State ex rel. Griffin v. Denney, No. SC91112 (Mo. banc 8/2/11):**

*Even though State prosecutors may not have known about a DOC incident report that was favorable to Defendant in a prison stabbing case, State is responsible for its disclosure under Brady and failure to disclose it prejudiced Defendant; habeas corpus relief is available and granted.*

**Facts:** In the 1980's, Defendant (Petitioner) was convicted of first degree murder due to a fatal stabbing that occurred at a DOC prison. The primary witnesses against Defendant were two fellow inmates of questionable credibility. No physical evidence connected Defendant to the murder. In 2005, Defendant filed a habeas petition alleging newly discovered evidence that the State failed to disclose a DOC report that prison guards had seized a sharpened screwdriver from another inmate immediately after the stabbing.

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

### **State v. Cannafax, No. SD30327 (Mo. App. S.D. 7/22/11):**

*Where Defendant's sexual offenses occurred during a time span from early 2006 to 2008, but it was unclear if they occurred after August 28, 2006, and the trial court's judgment made no findings about this, it is unclear whether the lifetime supervision requirements of Sec. 217.735 apply to Defendant, but the issue is not ripe until the Board of Probation and Parole attempts to apply them to him; at that time, he may bring a writ of mandamus to challenge their applicability.*

**Facts:** Defendant was convicted of sexual offenses alleged to have occurred between June 7, 2006 and November 2008. The trial court did not expressly find that the offenses occurred after August 28, 2006 and did not state in its judgment that Defendant was subject to lifetime supervision under Sec. 217.735, which provides that offenders are subject to lifetime supervision for certain sexual offenses "based on an act committed on or after August 28, 2006."

**Holding:** Defendant's claim on appeal is that he is improperly subject to lifetime supervision under Sec. 217.735 because there was not sufficient evidence to prove his offenses happened after August 28, 2006. However, since the trial court made no findings about this and made no mention of it in its judgment, it is unclear if Defendant

will be subjected to lifetime supervision when he completes his prison sentence. Thus, this issue is not ripe for review. However, if the Board of Probation and Parole seeks to apply Sec. 217.735 to him in the future, he may challenge that via a writ of mandamus.

**Jack v. State, No. SD30512 (Mo. App. S.D. 8/9/11):**

**Holding:** Denial of Rule 29.07(d) motion to withdraw guilty plea to correct manifest injustice is appealable and is governed by rules of civil procedure, even though it is filed in the criminal case; judgment becomes final 30 days after entry, and notice of appeal is due not later than 10 days thereafter.

**Sanford v. State, No. WD72291 (Mo. App. W.D. 7/26/11):**

**Holding:** Where motion court failed to appoint counsel for movant in 24.035 case who had indicated she was indigent, this was erroneous because Rule 24.035(e) mandates that counsel be appointed for indigent movants.

**Cornelious v. State, No. WD72866 (Mo. App. W.D. 9/27/11):**

**Holding:** Even though 29.15 movant filed multiple amended motions and the last motion was beyond the time limit for filing an amended motion, the Western District considers the claims in the last amended motion because the State failed to raise a timeliness objection in the motion court, so the timeliness issue is waived.

**Editor's note:** The Eastern District holds that timeliness is not waived despite failure to raise it in the motion court. *See Swofford v. State*, 323 S.W.3d 60 (Mo. App. E.D. 2010). As of October 2011, the Missouri Supreme Court is considering the issue.

**Vitrano v. U.S., 89 Crim. L. Rep. 545 (7<sup>th</sup> Cir. 6/21/11):**

**Holding:** A motion to amend a habeas petition under 28 USC 2255 was not a successive petition, but was actually a second petition filed after petitioner had abandoned the petition he wanted to amend.

**Ex parte Ward, 2011 WL 2164032 (Ala. 2011):**

**Holding:** Even though postconviction case was brought 17 years after trial, Movant's postconviction motion should not have been dismissed on grounds that trial counsel failed to exercise reasonable diligence, where Movant alleged that he did not know about the existence of certain scientific test results of the state Department of Forensic Sciences lab, and counsel had no reason to have suspected that any additional forensic test results existed or that any further investigation of the matter would have been anything more than a fishing expedition.

**People v. G.M., 2011 WL 1815413 (N.Y. City Crim. Ct. App. 2011):**

**Holding:** Even though Defendant was convicted of drug and other crimes in addition to prostitution, she was allowed to move to vacate all her convictions under a rule that allows vacation of convictions for sex trafficking victims for prostitution related offenses.

## Search and Seizure – Suppression Of Physical Evidence

### **State v. Emmett, 2011 WL 3610431 (Mo. App. S.D. 8/16/11):**

*Where (1) store clerk “assumed” Defendant had shoplifted; (2) Officer searched Defendant and her car and found drugs; (3) Defendant cross-examined witnesses at motion to suppress hearing; and (4) trial court suppressed the evidence, the State’s contention that the evidence was uncontested is wrong because Defendant cross-examined witnesses, and trial court was free to believe Defendant’s version of events and suppress evidence.*

**Facts:** Although a store clerk did not see Defendant take anything from convenience store, clerk “assumed” Defendant took something and called police. Officer asked Defendant to empty her pockets and found pills. Officer then read Defendant her *Miranda* rights, and obtained her consent to search her car. Officer saw through the car window a bottle of oil that looked like one that was missing from the store. Officer searched car and found drug residue and other drug evidence. Defendant filed a motion to suppress, claiming that her arrest was unlawful because made without probable cause and the evidence in the car must be suppressed as a fruit of the poisonous tree. The trial court suppressed the evidence. The State appealed.

**Holding:** The State claims that the evidence was found during a search incident to a lawful arrest. The State begins its argument by saying that “the essential facts are not in dispute” and then treats all its witnesses’ testimony as true. However, nothing reveals that the facts were not disputed. Defendant cross-examined witnesses and elicited testimony such as “I don’t recall” and admissions that the clerk “assumed” Defendant had shoplifted. Facts may be contested by simple argument or cross-examination. Here, Defendant contested the facts, so we must view the facts in the light most favorable to the trial court’s ruling. The trial court was free to believe or disbelieve the State’s evidence, and evidently was not persuaded that the State legally seized Defendant, legally searched her pockets or legally arrested her. Motion to suppress affirmed.

### **State v. Fisher, 2011 WL 1885952 (Ariz. 2011):**

**Holding:** Even though a gun used in a crime was unaccounted for, police could not conduct a protective sweep of Defendant’s apartment after all the occupants were outside, when police could not state any facts to show that they believed another person was still inside.

### **State v. Hummons, 89 Crim. L. Rep. 540 (Ariz. 6/10/11) & U.S. v. Gross, 89 Crim. L. Rep. 540 (6<sup>th</sup> Cir. 6/15/11):**

**Holding:** Even though police discovered a valid arrest warrant for Defendant after unconstitutionally stopping and detaining him, this does not necessarily purge the taint of the illegal stop from evidence subsequently seized.

### **State v. Parker, 2011 WL 1565356 (Or. 2011):**

**Holding:** Officer unreasonably “seized” passenger before passenger gave consent to search his person where Officer asked passenger if there were any warrants for his arrest, wrote down his name and date of birth, and went to police car to run a records check on passenger; a reasonable person would not have felt free to leave.

**People v. Carmona, 2011 WL 2090036 (Cal. App. 2011):**

**Holding:** Statute requiring a turn signal “in the event any other vehicle may be affected by the movement” and statute requiring any signal be given “during the last 100 feet traveled before turning” had to be read together, meaning that a driver must signal for a turn 100 feet ahead of time *only if* another vehicle might be affected. Thus, Officer lacked reasonable suspicion to conduct a traffic stop where driver failed to signal but this could not have affected another vehicle.

**State v. Almeida, 2011 WL 2207589 (N.M. Ct. App. 2011):**

**Holding:** Officer lacked reasonable suspicion to stop driver-Defendant after he made a left turn but not into the left-most lane, because this did not violate any statute regarding left turns, even though Officer thought it did.

## **Sentencing Issues**

**State v. McArthur, No. ED95094 (Mo. App. E.D. 7/5/11):**

**Holding:** Where Defendant charged with sodomy had a bifurcated trial, State may present in penalty phase testimony of a prior sexual assault victim of Defendant about that prior bad act.

**Editor’s Note:** An interesting dissenting opinion argues that State went too far in being allowed to present prior victim and then argue jury should impose maximum sentence to avenge prior victim’s assault, since that was not the subject matter of this particular case.

**State v. Wilson, No. ED95423 (Mo. App. E.D. 7/12/11):**

*Where trial court failed to find Defendant’s prior DWI convictions before the case was submitted to the jury but did so afterwards, this violated the timing requirements of 577.010 RSMo. Cum. Supp. 2008, and required that Defendant’s sentence as a chronic offender be vacated.*

**Facts:** Defendant was charged with DWI as a chronic offender under Sec. 577.010 RSMo. Cum. Supp. 2008. Before the case was submitted to the jury, the State introduced four exhibits showing four prior DWI convictions. However, the trial court did not make any finding about Defendant being a chronic offender until after the jury’s guilty verdict. Defendant was then sentenced to 12 years.

**Holding:** Sec. 577.023.7(3) RSMo. Cum. Supp. 2008 provided that in a jury trial, the facts pleaded for prior convictions shall be established and found prior to submission of the case to the jury. Here, the court violated the timing requirements of the statute by not doing this until after the jury’s verdict. This was plain error, and requires that Defendant’s sentence as a chronic offender be vacated. Case remanded for resentencing without any type of prior offender status.

**State v. Greer, No. ED95206 (Mo. App. E.D. 9/20/11):**

**Holding:** Where Defendant was sentenced to 15 years as a prior and persistent offender for endangering a corrections employee in violation of Sec. 565.085 RSMo. Cum. Supp.

2006, this was plain error because the offense is a Class D felony, but as a prior and persistent offender, the range of punishment is that for a C felony, which has a maximum of 7 years, Sec. 558.016.7(4) RSMo. Cum. Supp. 2006.

**State v. Harvey, No. ED95689 (Mo. App. E.D. 9/20/11):**

**Holding:** Where the trial court's orally pronounced sentence was for 15 years, but the written sentence and judgment was for 30 years, this was plain error because the oral pronouncement of sentence controls over the written one.

**State v. Cannafax, No. SD30327 (Mo. App. S.D. 7/22/11):**

*Where Defendant's sexual offenses occurred during a time span from early 2006 to 2008, but it was unclear if they occurred after August 28, 2006, and the trial court's judgment made no findings about this, it is unclear whether the lifetime supervision requirements of Sec. 217.735 apply to Defendant, but the issue is not ripe until the Board of Probation and Parole attempts to apply them to him; at that time, he may bring a writ of mandamus to challenge their applicability.*

**Facts:** Defendant was convicted of sexual offenses alleged to have occurred between June 7, 2006 and November 2008. The trial court did not expressly find that the offenses occurred after August 28, 2006 and did not state in its judgment that Defendant was subject to lifetime supervision under Sec. 217.735, which provides that offenders are subject to lifetime supervision for certain sexual offenses "based on an act committed on or after August 28, 2006."

**Holding:** Defendant's claim on appeal is that he is improperly subject to lifetime supervision under Sec. 217.735 because there was not sufficient evidence to prove his offenses happened after August 28, 2006. However, since the trial court made no findings about this and made no mention of it in its judgment, it is unclear if Defendant will be subjected to lifetime supervision when he completes his prison sentence. Thus, this issue is not ripe for review. However, if the Board of Probation and Parole seeks to apply Sec. 217.735 to him in the future, he may challenge that via a writ of mandamus.

**City of Joplin v. Klein, 2011 WL 2936401 (Mo. App. S.D. 7/21/11):**

*Even though City introduced ordinances making certain actions a municipal offense, where City failed to introduce the penalty portions of the ordinances, a court cannot judicially notice them and the charging information and proof were insufficient; furthermore, City is precluded from getting another opportunity to prove penalty.*

**Facts:** Defendant was convicted of violation of various city ordinances. At trial, City properly placed the ordinances creating violations before the trial court by filing certified copies of the ordinances with the clerk of the circuit court under Sec. 479.250. However, the penalties for violation of these ordinances were in separate ordinances that were not provided. Defendant appealed.

**Holding:** A court cannot take judicial notice of a city ordinance that is not properly introduced into evidence. Here, the information (citation) charging the offenses failed to list the ordinance providing a penalty, and the penalty ordinances were not admitted into evidence or otherwise properly before the court. Thus, the charging information does not comply with Rule 37.35(b)(4). *State v. Collins*, 328 S.W.3d 705 (Mo. banc 2011), held

that where the State failed to offer sufficient evidence to prove enhanced DWI status, the State does not get a second opportunity to do so. Applying *Collins*, City does not get a second opportunity to prove penalty here. Because City failed to allege the penalty ordinances in the charging information or prove them during trial, it is prevented from doing so at a re-sentencing. The only remedy is discharge of Defendant.

**Shaw v. State, No. SD30814 (Mo. App. S.D. 8/17/11):**

*Even though trial judge “thought” he imposed consecutive sentences, where the transcript said “concurrent” and State did not challenge the accuracy of the transcript pursuant the procedures of Rule 30.04(g), the appellate court must accept the accuracy of the transcript and the oral pronouncement of sentence controls.*

**Facts:** Defendant entered into a plea bargain whereby prosecutor would recommend consecutive sentences, but Defendant could argue for something less. However, the plea and sentencing transcript refer to the State’s offer as being for “concurrent” sentences and the transcript of the oral pronouncement of sentence said the sentences were “concurrent.” However, the written sentence and judgment said they were “consecutive.” Defendant filed a 24.035 motion alleging the oral pronouncement controlled. At the evidentiary hearing on the 24.035 motion, the trial judge said he “thought” he had said “consecutive,” and his notes reflected that. Also, the plea attorney and prosecutor testified they thought it was “consecutive.” The motion court denied relief based on this.

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

**State v. Lemons, No. SD30959 (Mo. App. S.D. 8/25/11):**

*(1) Where State submits Defendant’s “Driver’s Record” to prove prior DWI convictions, the Driver’s Record must specifically identify the convicting court; (2) State need no longer prove that Defendant had counsel or waived counsel in prior DWI convictions, but Defendant may prove that the prior convictions were unconstitutional.*

**Facts:** Defendant was charged with DWI as a “chronic offender” for having four prior DWI convictions. To prove the convictions, the State submitted Defendant’s Missouri “Driver’s Record” which showed that Defendant was convicted “on 4-02-1991 in Arkansas by circuit court.” Defendant claimed he never had such a conviction.

**Holding:** (1) The Driver Record was insufficient to prove the Arkansas conviction because it did not specifically identify the convicting court. Some minimal information is necessary to use a Driver Record to prove prior convictions to allow Defendant the opportunity to rebut the conviction. The requirement of court identification for violations of foreign law is included in the Driver License Compact, Sec. 302.600, Article III, so

that an aggrieved person would have only one county or city to contact in order to rebut the conviction. Here, the Driver's Record did not identify a specific Arkansas Circuit Court, but only the entire state of Arkansas. This was insufficient, and the Arkansas conviction should not have been counted as a prior DWI. Case remanded for resentencing as an "aggravated offender" (three priors). (2) On a separate issue, Defendant contends that the State didn't prove that his prior convictions were with counsel or counsel was waived. However, the DWI statute was amended in 2009 to no longer require proof that the defendant was represented by counsel or waived counsel. Sec. 577.023.1(4) RSMo. Cum. Supp. 2009. However, while the State need not prove this, a Defendant may still prove that the prior convictions were unconstitutional because he did not have counsel, but Defendant has not done that here.

**U.S. v. Spencer, 2011 WL 1900930 (2d Cir. 2011):**

**Holding:** Defendant did not violate probation condition that he notify probation office of a change in employment "10 days prior to" the change, where Defendant did not know 10 days in advance that he was to be terminated from his job.

**U.S. v. Burnett, 89 Crim. L. Rep. 475 (7<sup>th</sup> Cir. 6/6/11):**

**Holding:** 7<sup>th</sup> Circuit adopts broad interpretation of rule that prior convictions for which defendants' civil rights have been restored do not count as predicates for sentences under ACCA.

**U.S. v. Perry, 2011 WL 1900388 (8<sup>th</sup> Cir. 2011):**

**Holding:** Where proffer agreement was ambiguous in that one provision stated that Defendant's statements may not be used in the case-in-chief (suggesting they could be used elsewhere), but another provision stated the statements could not be used in any legal proceedings unless Defendant made an inconsistent statement, the agreement had to be construed against the Gov't and the statements could not be used in determining the Sentencing Guidelines range.

**State v. Fannon, 2011 WL 1900285 (Iowa 2011):**

**Holding:** Prosecutor's breach of plea agreement not to recommend consecutive sentences was not cured by the prosecutor's withdrawal of his remarks, for purposes of determining if Defendant's counsel was ineffective in failing to object to the breach or request appropriate relief.

**Cleveland Hts. v. Lewis, 2011 WL 2275817 (Ohio 2011):**

**Holding:** Completion of a sentence will not render an appeal moot where Defendant did not acquiesce in the sentence or abandon the right to appeal.

**People v. Roberts, 2011 WL 1992028 (Cal. App. 2011):**

**Holding:** Statements of record by Defendant, his counsel and the victim after a court accepted his guilty plea were not statements in the "record of conviction" and thus were not admissible to prove the assault involved great bodily harm so as to be a strike under Three Strikes Law.

**People v. Fernandez, 2011 WL 2039732 (N.Y. App. 2011):**

**Holding:** Sentence of 9 years for manslaughter was unduly harsh where Defendant had been terrorized by victim and Defendant did not intend to kill victim but approached him to ask for an apology to be treated with respect and dignity.

### **Statute of Limitations**

**State v. Donelson, No. ED95132 (Mo. App. E.D. 7/5/11):**

*Where in 2009, Defendant was charged with two counts of murder and two counts of armed criminal action, for offenses which occurred in 2000 and 2005 respectively, the ACA charges were barred by the three-year statute of limitations for ACA.*

**Holding:** Under Sec. 556.036 RSMo Cum. Supp. 2009, the prosecution of the felony of ACA is limited to three years because armed criminal action is an unclassified code felony and cannot be designated an A felony, which has no statute of limitations. Convictions for ACA vacated.

### **Statutes – Interpretation – Vagueness**

**State v. Davis, No. SC91368 (Mo. banc 8/30/11):**

*Supreme Court – on procedural grounds -- upholds trial court's ruling that Sec. 566.150 (which creates the crime of sex offenders being in certain parks), is retrospective as applied to offenders who committed their sex offenses before the effective date of the law; Supreme Court holds that the State failed to preserve claim that ban on retrospective laws applies only to civil laws, and not criminal laws.*

**Facts:** Defendant was convicted of sex offense in 1983. Under SORNA, he has to register as a sex offender in Missouri. Sec. 566.150 makes it a Class D felony for a registered sex offender to knowingly be present or loiter within 500 feet of a public park that contains playground equipment or a public swimming pool. Sec. 566.150 became effective in August 2009. In 2010, Defendant was charged with violating Sec. 566.150. He filed a motion to dismiss, claiming that Sec. 566.150 violated the Mo. Constitution's ban on retrospective laws as applied to him because his sex conviction was before the law's effective date. The trial court granted the motion to dismiss. The State appealed.

**Holding:** The State claims that the prohibition on retrospective laws in Art. I, Sec. 13 applies only to civil statutes, and that Sec. 566.150 is a criminal statute. However, the State never presented this issue to the trial court, and cannot raise it for the first time on appeal. That issue is not preserved for appeal, and is not reviewed. Dismissal affirmed.

**In re: D.B., 2011 WL 2274624 (Ohio 2011):**

**Holding:** Statutory rape provision as applied to a Defendant under 13 who had sex with another child under 13 was unconstitutionally vague and also violated Equal Protection Clause that all persons be treated alike, since each child here was in the protected class of children under 13.

## **Sufficiency Of Evidence**

### **State v. Davis, No. SC91368 (Mo. banc 8/30/11):**

*Supreme Court – on procedural grounds -- upholds trial court’s ruling that Sec. 566.150 (which creates the crime of sex offenders being in certain parks), is retrospective as applied to offenders who committed their sex offenses before the effective date of the law; Supreme Court holds that the State failed to preserve claim that ban on retrospective laws applies only to civil laws, and not criminal laws.*

**Facts:** Defendant was convicted of sex offense in 1983. Under SORNA, he has to register as a sex offender in Missouri. Sec. 566.150 makes it a Class D felony for a registered sex offender to knowingly be present or loiter within 500 feet of a public park that contains playground equipment or a public swimming pool. Sec. 566.150 became effective in August 2009. In 2010, Defendant was charged with violating Sec. 566.150. He filed a motion to dismiss, claiming that Sec. 566.150 violated the Mo. Constitution’s ban on retrospective laws as applied to him because his sex conviction was before the law’s effective date. The trial court granted the motion to dismiss. The State appealed.

**Holding:** The State claims that the prohibition on retrospective laws in Art. I, Sec. 13 applies only to civil statutes, and that Sec. 566.150 is a criminal statute. However, the State never presented this issue to the trial court, and cannot raise it for the first time on appeal. That issue is not preserved for appeal, and is not reviewed. Dismissal affirmed.

### **City of Joplin v. Marston, 2011 WL 2931075 (Mo. App. S.D. 7/21/11):**

*Where City failed to introduce city ordinance under which Defendant was convicted into evidence, the evidence is insufficient to convict because courts cannot take judicial notice of city ordinances, and double jeopardy precludes retrial.*

**Facts:** Defendant was convicted at a trial de novo of violation of various city ordinances, including driving under the influence of drugs. The City at trial failed to introduce the ordinances into evidence. Defendant appealed.

**Holding:** Municipal prosecutions require proof of the ordinances upon which conviction rests. Courts cannot take judicial notice of municipal ordinances that are not properly introduced into evidence. There are three ways to introduce municipal ordinances: (1) introducing a certified copy under Sec. 490.240; (2) bringing the printed volume of ordinances to court and proving the ordinance through the book, Sec. 490.240; or (3) under Sec. 479.250, filing a certified copy with the court provided it is available for inspection by the parties. None of these were done here. Hence, the record is devoid of proof of the ordinance violation. Principles of double jeopardy preclude a retrial where the evidence is found to be legally insufficient. Reversed and remanded for entry of judgment of acquittal.

### **City of Joplin v. Klein, 2011 WL 2936401 (Mo. App. S.D. 7/21/11):**

*Even though City introduced ordinances making certain actions a municipal offense, where City failed to introduce the penalty portions of the ordinances, a court cannot judicially notice them and the charging information and proof were insufficient; furthermore, City is precluded from getting another opportunity to prove penalty.*

**Facts:** Defendant was convicted of violation of various city ordinances. At trial, City properly placed the ordinances creating violations before the trial court by filing certified copies of the ordinances with the clerk of the circuit court under Sec. 479.250. However, the penalties for violation of these ordinances were in separate ordinances that were not provided. Defendant appealed.

**Holding:** A court cannot take judicial notice of a city ordinance that is not properly introduced into evidence. Here, the information (citation) charging the offenses failed to list the ordinance providing a penalty, and the penalty ordinances were not admitted into evidence or otherwise properly before the court. Thus, the charging information does not comply with Rule 37.35(b)(4). *State v. Collins*, 328 S.W.3d 705 (Mo. banc 2011), held that where the State failed to offer sufficient evidence to prove enhanced DWI status, the State does not get a second opportunity to do so. Applying *Collins*, City does not get a second opportunity to prove penalty here. Because City failed to allege the penalty ordinances in the charging information or prove them during trial, it is prevented from doing so at a re-sentencing. The only remedy is discharge of Defendant.

**State v. Hatfield, No. WD72468 (Mo. App. W.D. 8/30/11):**

*Even though Officer found intoxicated Defendant in a driveway by a wrecked car, evidence was insufficient to convict of DWI because there was no showing that Defendant had driven the car while intoxicated, as opposed to become intoxicated later.*

**Facts:** Officer was called to a home at 11:00 a.m. for a motor vehicle accident, and found a wrecked car parked in the home's driveway. Defendant was next to it and was intoxicated. Officer asked what happened, and Defendant said, "I lost it making the turn." Officer arrested Defendant for DWI. Defendant refused to provide a breath, blood or urine sample. Defendant was convicted of DWI at trial.

**Holding:** The evidence is insufficient to sustain a conviction for DWI because although the evidence showed that Defendant was intoxicated when standing by the car, there was insufficient evidence to prove that Defendant actually drove the car *while* intoxicated. Prior cases have made clear that where a Defendant is found outside the car, there must be some evidence linking in time the Defendant's intoxication and operation of the motor vehicle. Here, there was no evidence as to the time Defendant drove the car, or how much time elapsed between the accident and the arrest. There was no evidence that the car was running, whether the keys were in the car, the temperature of the car's motor, or other factors that would show that the car had recently been driven. The State argues that Defendant's refusal to take a BAC test establishes consciousness of guilt for DWI. However, this reasoning has previously been rejected in another case where the court held that such a denial could not be regarded as highly probative of DWI where there is a lapse of time between the defendant's driving and refusal, and the defendant's apparent access to alcohol in the interim. DWI conviction reversed.

**State v. Ostdiek, No. WD72397 (Mo. App. W.D. 8/30/11):**

*Officer's testimony that Defendant's car "just appeared" to be going faster than Officer's car was insufficient to convict of speeding.*

**Facts:** Defendant was charged with speeding. There was no radar reading showing Defendant's actual speed. Officer testified Defendant "just appeared" to be going faster

than Officer's car. Officer's testimony never gave an opinion as to Defendant's speed or even approximate speed.

**Holding:** The evidence was insufficient to prove beyond a reasonable doubt that Defendant was speeding. Officer did not testify how fast Officer was driving, and never gave an opinion as to Defendant's speed. While opinion testimony as to speed can sometimes support a speeding conviction, the evidence here is insufficient. Speeding conviction reversed.

**State v. Smith, No. WD71277 (Mo. App. W.D. 9/30/11):**

*(1) Where Defendant was charged with placing a toy "on" victim's genitals, but jury was instructed on whether Defendant placed toy "in" the genitals and there was no evidence to support placing it "in" the genitals, the evidence was not sufficient to prove first-degree statutory sodomy but was sufficient to prove first-degree child molestation; and (2) even though there was evidence that Defendant penetrated victim's anus, where the indictment and jury instruction only instructed on placing a hand "on" victim's anus, the evidence was insufficient to convict of first-degree statutory sodomy because the jury didn't find this through an instruction, but was sufficient to prove first-degree child molestation.*

**Facts:** Defendant was convicted of two counts of first-degree statutory sodomy for placing a toy "in" child victim's genitals, and for penetrating victim's anus.

**Holding:** The evidence for both convictions is insufficient. Sec. 566.010(1) requires that for first-degree statutory sodomy there be penetration of the female sex organ or anus. Regarding the first conviction, the indictment alleged that Defendant placed a toy "on" victim's genitals. However, the jury instruction allowed the jury to find that the toy was placed "in" the genitals. There was no evidence that the toy was placed "in" the genitals. Defendant is, however, guilty of first-degree child molestation because that involves any touching of another person's genitals. Regarding the second conviction, Defendant was charged with placing his hand "on" victim's anus, and the jury instruction instructed that Defendant placed his hand "on" the anus. The State's evidence, however, showed penetration. Despite this, the appellate court cannot uphold a conviction for first-degree statutory sodomy because the jury instruction did not hypothesize penetration of the anus. Thus, the jury was never asked to find and did not find that penetration occurred. Hence, the sodomy conviction cannot stand. However, the evidence does show first-degree child molestation. Convictions for first-degree statutory sodomy reversed, and convictions for first-degree child molestation entered and remanding for re-sentencing.

**U.S. v. Friske, 2011 WL 1878776 (11<sup>th</sup> Cir. 2011):**

**Holding:** Where there was no evidence that Defendant knew of forfeiture proceeding, he could not be convicted of obstruction of an official proceeding by attempting to dispose of and hide the assets involved in the forfeiture proceeding.

**In re: D.B., 2011 WL 2274624 (Ohio 2011):**

**Holding:** Statutory rape provision as applied to a Defendant under 13 who had sex with another child under 13 was unconstitutionally vague and also violated Equal Protection Clause that all persons be treated alike, since each child here was in the protected class of children under 13.

**People v. Cordell, 2011 WL 2138083 (Cal. App. 2011):**

**Holding:** Where statute prohibited the sale, transfer or conveyance of a bank access card, Defendant could not be convicted under this statute for merely “using” the victim’s card, because that wasn’t a sale, transfer or conveyance.

**Transcript – Right To**

**Shaw v. State, No. SD30814 (Mo. App. S.D. 8/17/11):**

*Even though trial judge “thought” he imposed consecutive sentences, where the transcript said “concurrent” and State did not challenge the accuracy of the transcript pursuant the procedures of Rule 30.04(g), the appellate court must accept the accuracy of the transcript and the oral pronouncement of sentence controls.*

**Facts:** Defendant entered into a plea bargain whereby prosecutor would recommend consecutive sentences, but Defendant could argue for something less. However, the plea and sentencing transcript refer to the State’s offer as being for “concurrent” sentences and the transcript of the oral pronouncement of sentence said the sentences were “concurrent.” However, the written sentence and judgment said they were “consecutive.” Defendant filed a 24.035 motion alleging the oral pronouncement controlled. At the evidentiary hearing on the 24.035 motion, the trial judge said he “thought” he had said “consecutive,” and his notes reflected that. Also, the plea attorney and prosecutor testified they thought it was “consecutive.” The motion court denied relief based on this.

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

**State v. Turnipseed, 2011 WL 1991752 (Wash. Ct. App. 2011):**

**Holding:** Defendant’s 6<sup>th</sup> Amendment right to confrontation was violated by a partially distorted and inaudible video of defense counsel’s earlier cross-examination of an expert.

## Trial Procedure

### **City of Joplin v. Marston, 2011 WL 2931075 (Mo. App. S.D. 7/21/11):**

*Where City failed to introduce city ordinance under which Defendant was convicted into evidence, the evidence is insufficient to convict because courts cannot take judicial notice of city ordinances, and double jeopardy precludes retrial.*

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**Holding:** Municipal prosecutions require proof of the ordinances upon which conviction rests. Courts cannot take judicial notice of municipal ordinances that are not properly introduced into evidence. There are three ways to introduce municipal ordinances: (1) introducing a certified copy under Sec. 490.240; (2) bringing the printed volume of ordinances to court and proving the ordinance through the book, Sec. 490.240; or (3) under Sec. 479.250, filing a certified copy with the court provided it is available for inspection by the parties. None of these were done here. Hence, the record is devoid of proof of the ordinance violation. Principles of double jeopardy preclude a retrial where the evidence is found to be legally insufficient. Reversed and remanded for entry of judgment of acquittal.

### **City of Joplin v. Klein, 2011 WL 2936401 (Mo. App. S.D. 7/21/11):**

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## Waiver of Appeal & PCR

**Burgess v. State, No. SC91571 (Mo. banc 7/19/11):**

**Holding:** Where motion court dismissed postconviction motion without findings of fact and conclusions of law, case is remanded for entry of findings.

**Editor's Note:** This case is noteworthy not because of the holding, but because the case posed the question of whether a movant can waive his postconviction rights as part of a plea bargain. The Supreme Court did not decide this issue because of the remand. However, in a footnote, the Supreme Court discussed Formal Opinion 126 (which states that it is not being permissible for defense counsel to advise a client regarding waiver of ineffective assistance of counsel by defense counsel): "The binding effect of a formal opinion is limited to disciplinary proceedings that occur after the formal opinion is issued and, even then, is subject to review by this Court when petitioned by any member of the bar who is substantially and individually aggrieved by the opinion. Formal Opinion 126 expressly stated that analysis of whether a waiver of postconviction rights would violate the Constitution or other laws was beyond the scope of the opinion." There is currently pending another case at the Supreme Court which also raises the issue of the validity of waiver of postconviction rights as part of a plea bargain, so the Supreme Court will likely rule on the merits of that issue later.