# Case Law Update

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## UPCOMING EVENTS

APR 25 Thu 2019 — 9:00 am State Public Defender Commission... @ The Westin Kansas City at Crown Center - Penn Valley Conference Room

MAY 8 Wed 2019 — all-day Truman Day

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SARAH JOHNSON ON MO VIEWPOINTS

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# Sex Cases & Related Issues

**State v. Ferguson, 568 S.W.3d 533 (Mo. App. E.D. Feb. 26, 2019):**

*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.*

**State v. McWilliams, 564 S.W.3d 618 (Mo. App. W.D. Oct. 16, 2018):**

*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. Rogers, 529 S.W.3d 906 (Mo. App. E.D. Sept. 26, 2017):**

*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.*

**State ex rel. Gardner v. Wright,**
**562 S.W.3d 311**
**(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.*

**State v. Williams, 548 S.W.3d 275 (Mo. banc May 1, 2018):**

*(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 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;*

*(3) 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. Graham, 549 S.W.3d 533 (Mo. App. W.D. June 12, 2018):**

*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.*

**<u>Carr v. Missouri Attorney General Office</u>, 560 S.W.3d 61 (Mo. App. W.D. Sept. 18, 2018):**
*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.*

# Statutory Change re: Registration:

* Effective August 2018, Sec. 589.400 was revised to create a Tiered registration system, which allows more people to eventually not have to register.

* If your client is charged with failure to register, check to see if they may no longer have to register and can petition off registry under Sec. 589.401.

**State v. Beck, 557 S.W.3d 408 (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.

"Celis-Garcia" plain error relief won't go on forever!
Need to object to instructions.

**State v. Henry, 568 S.W.3d 464 (Mo. App. E.D. Jan. 29, 2019):**

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. Adams, 2018 WL 6313503 (Mo. App. W.D. Dec. 4, 2018):**

*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.*

**<u>Doe v. Belmar</u>, 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.*

* 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.”

* SORNA’s language is broad and indicates that Congress intended for courts to examine an offender’s underlying conduct.

* Court rejects Petitioner’s claim that court should use categorical approach (looking only at elements of offense of conviction) instead of non-categorical approach (looking at the actual underlying conduct).

# Sentencing, Revocation, & Related Issues

**State v. Richey,**
**2019 WL 1247089**
**(Mo. banc March 19, 2019):**

*(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.*

**State v. Banderman, 2019 WL 1434389 (Mo. App. S.D. April 1, 2019):**

*(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.*

*(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. Boston, No. ED107198 (Mo. App. E.D. April 23, 2019):**

*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, 559 S.W.3d 5 (Mo. App. E.D. Aug. 21, 2018):**

*Where (1) the trial court sentenced Defendant/Movant 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 Defendant/Movant 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.*

# Money & Criminal Justice – what next?

* Bond
* Pretrial release costs
* Post-trial costs


# Revoking Probation Too Late

**State ex rel. Boswell v. Harman, 550 S.W.3d 551 (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.*

**Trams v. State,555 S.W.3d 480 (Mo. App. E.D. Aug. 7, 2018):**

*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.*

**Miller v. State, 558 S.W.3d 15 (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.*


# 120-Day & Treatment Program Issues

**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.*

**State ex rel. Young v. Elliott, 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.*

**Newton v. Missouri Dept. of Corrections, No. WD81343 (Mo. App. W.D. April 16, 2019):**

*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.*

**State ex rel. Cullen v. Cardona, 568 S.W.3d 492 (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.*

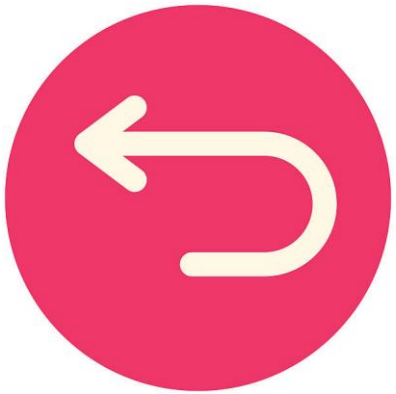
**<u>State v. Pierce</u>, 548 S.W.3d 900 (Mo. banc June 12, 2018):**


*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.*

**<u>State v. Perry</u>, 548 S.W.3d 292 (Mo. banc June 12, 2018):**

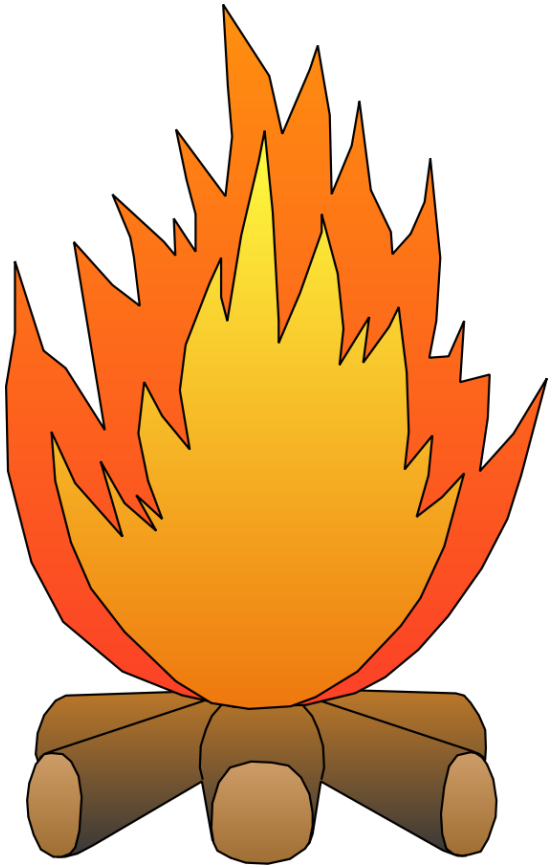

*Even though the sentencing judge misunderstood the range of punishment (because persistent offender status increases only the maximum penalty, not the minimum penalty), Defendant was not entitled to re-sentencing under plain error because Defendant could not show that the judge's sentence was based on the mistaken belief, since the court did not sentence him to the minimum time.*

**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):**
*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.*



**Fields v. Mo. Bd. of Prob. and Parole, 559 S.W.3d 12 (Mo. App. W.D. Aug. 28, 2018):**

*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.*



# Earned Compliance Credit Issues

**State ex rel. Coleman v. Horn, 2019 WL 1030744 (Mo. banc March 5, 2019):**

A "notice of citation" under the pre-2018 amendments to the ECC 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.

**State ex rel. Hillman v. Beger, 566 S.W.3d 600 (Mo. banc Feb. 13, 2019):**

*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.

**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 EEC's would not continue to accrue, because Sec. 559.105.1 requires that "restitution" be owed to a crime victim for victim's losses;*

*(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.*

**State ex rel. Culp v. Rolf, 568 S.W.3d 443 (Mo. App. W.D. Jan. 15, 2019):**

*Where (1) Defendant is eligible for 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.*

**State ex rel. Hawley v. Chapman, 567 S.W.3d 197 (Mo. App. W.D. Oct. 23, 2018):**

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.

* Pre-2018 statute allowed denial of ECC only "prior to the first month in which the person may earn" ECC.

* But 2018 amendment (217.703.5) states that if a hearing is held after notice of violation, then the court may rescind ECCs and find Defendant is ineligible to earn future ECCs.

**<u>Dunn v. Precythe</u>, 557 S.W.3d 454 (Mo. App. W.D. July 31, 2018):**

*(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.*


# Search & Seizure

**State v. Hughes, 563 S.W.3d 119 (Mo. banc Dec. 18, 2018):**

*(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;*

*(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.*

**State v. West, 548 S.W.3d 406 (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.*

**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.*

** Just as a search of a file cabinet allows for search of every document or folder for incriminating evidence, so too, can a warrant authorize search of every document or file on a phone for evidence of a specific crime.*

** Western District rejects contrary rule from other States that a warrant is not sufficiently particular if it does not limit the categories of data to be searched, e.g., photos, videos, texts.*

** Western District is not the last word on this – keep litigating for this better rule until the U.S. Supreme Court says otherwise.*

*(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).*

** Court notes that majority of States have ruled that compelling a defendant to reveal a passcode does implicate 5th Amendment privilege against self-incrimination because it shows defendant has possession and control over phone's contents.*

**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.*

* Sec. 577.020: 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: 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.”

* But these statutes must comply with constitutional requirements regarding exigent circumstances and blood draws.

* *Missouri v. McNeely* (2013) and subsequent cases require exigent circumstnaces for warrantless blood draw. Normal dissipation of alcohol in blood isn't enough to justify warrantless draw.


# Case Law Roulette…
# or Significant Cases that Don’t Fit Anywhere Else

**State v. Zuroweste, 2019 WL 1446943 (Mo. banc April 2, 2019):**

*(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.*

**State ex rel. Gardner v. Boyer, 561 S.W.3d 389 (Mo. banc Dec. 4, 2018):**

*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.*

* In applying "appearance of impropriety" test, court looks at fairness of trial from perspective of the *defendant*, not third-party witness.

**State ex rel. Peters-Baker v. Round, 561 S.W.3d 380 (Mo. banc Dec. 4, 2018):**

*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.*

** Court says screening not adequate, e.g., where prosecutor is "boss" of the Prosecutor's Office.*

**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.*

**State ex rel. Richardson v. May, 565 S.W.3d 191 (Mo. banc Jan. 15, 2019):**

*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.*

**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;*

*(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.*

**<u>Caruthers v. Wexler-Horn</u>, 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.

But…case was transferred to Supreme Court in December 2018.

**State v. Emerson, 2019 WL 1442356 (Mo. App. E.D. April 2, 2019):**


*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*

**State v. Dierks, 564 S.W.3d 354 (Mo. App. E.D. Nov. 20, 2018):**


*Motions for continuance for inability to locate a witness must comply with Rule 24.10, which requires a statement of (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.*

**<u>State v. Carter</u>, 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.*

**<u>Davis v. Wieland</u>, 2018 WL 2921894 (Mo. App. W.D. June 12, 2018):**


* *Attorney sanctioned for sending letter to opposing-party's expert which cited to a colleague of the expert in suggesting that expert's methodology was flawed.*

* *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 facts or opinion of other experts, but when an Attorney emphasizes his connection with an expert's colleagues or superiors, this is 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.*

**State v. Waters,**
**2019 WL 1649448**
**(Mo. App. S.D. April 17, 2019)**


*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.*

Bye Bye
Bazell …

…except on direct appeal, and even then, only after TRIAL.

# “The SIS Scenario”

If you have SIS scenario and court converts this to a conviction via SES or an actual prison sentence, you must do a direct appeal.

Cannot raise this in a regular PCR case under 24.035.

## Can't raise in 24.035 even if had SIS

**Hamilton v. State, 2019 WL 1339462 (Mo. App. E.D. March 26, 2019):**

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.

**State v. Russell, No. ED106570 (Mo. App. E.D. April 23, 2019):**

*Even though (1) Defendant pleaded guilty and received an SIS in 2013; (2) Bazell was decided in 2016; (3) Defendant objected to felony sentencing in 2017 and filed a direct appeal, Defendant cannot receive relief because the Supreme Court has held that 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 wasn't final until after Bazell.*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**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.*

*But case transferred to Supreme Court in April.*

* Sec. 566.151 on enticement requires the State to prove a Defendant's knowledge, awareness or belief that child was less than 15 years old.

* An attempt to commit an underlying offense presumes the same mental state.


# Sufficiency of Evidence

**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.*

* 575.150: Person resists arrest when they "prevent[] the officer from effecting the arrest."

* An "arrest" occurs when Officers obtain actual restraint of the person of the defendant, or his submission to custody.

* 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.

* Critical element in determining whether an arrest has been effected is when the Officer has control over the Defendant's movements.

* But…defendants can be charged with attempted escape from custody in these situations.

**State v. Smith, 551 S.W.3d 60 (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."*

**State v. Drabek, 551 S.W.3d 550 (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.*

**State v. Wilhite, 550 S.W.3d 141 (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.*

# Postconviction Revolution

**Martin v. State, 568 S.W.3d 78 (Mo. App. S.D. Feb. 21, 2019):**

*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.*

**Booker v. State, 552 S.W.3d 522 (Mo. banc June 12, 2018):**

*"Factual basis" is a distinct concept from a "knowing and voluntary plea."*

* Essential inquiry in 24.035 case is whether the guilty plea was knowing and voluntary.

* While a sufficient factual basis can be an important factor in the voluntariness determination, whether a plea is knowing and voluntary is determined by record as a whole.

# Statement in lieu = Anders?

**Stewart v. State, 2019 WL 1522905 (Mo. App. W.D. April 9, 2019):**

*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.* *But…*

**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.

*But more…*

**Latham v. State, 554 S.W.3d 397 (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.*

**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.*

**Lampkin v. State, 560 S.W.3d 67 (Mo. App. E.D. Sept. 18, 2018):**

*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.*

**Barber v. State, 2019 WL 925505 (Mo. App. E.D. Feb. 26, 2019):**
*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.*

*Court notes Southern District has approved a "timeliness motion" procedure, but only for verified motions, so that a court can credit counsel's statements, but this motion wasn't verified.*

**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.*

**<u>Washington-Bey v. State</u>,**
**2019 WL 659684**
**(Mo. App. W.D. Feb. 19, 2019):**

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.

**Naylor v. State, 2018 WL 6047971 (Mo. App. W.D. Nov. 20, 2018):**

*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.*

**State ex rel. Hawley v. Midkiff, 534 S.W.3d 604 (Mo. banc April 3, 2018):**

*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.*