2011-12 IOWA CRIMINAL CASE LAW UPDATE

outline prepared by
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NOTE: All personal opinions expressed in this outline are of the author, and in no way represent the views of the Federal Public Defender or any other person.

I. Constitutional Law

A. Fourth Amendment

1. Expectations of Privacy

a. "Search" defined – Attachment of GPS Monitoring Device

United States v. Jones, _____ U.S. _____, 132 S.Ct. 945, 181 L.Ed.2d 911(2012)
The attachment to a vehicle of a GPS monitoring device followed by the collection of positioning data is a "search" for Fourth Amendment purposes.

– The Court was unanimous as to the result, but split 5-4 on the theory underlying theory.

Always endeavoring to ascertain the original intent of the drafters of constitutional language, Justice Scalia based his opinion not only on what is a reasonable expectation of privacy as discussed in Justice Harlan's concurrence in *Katz v. United Stsates*, 389 U.S. 347 (1967),but also upon common law principles involving tortious trespass. Justice Alito, on the other hand, argued that trespass is no longer required after *Katz*. The question is not the person's property interest as much as whether the person has a legitimate expectation of privacy.

b. Driveway Leading to Residence

State v. Lowe, _____ N.W.2d _____ (Iowa 2012)
A person does not have an expectation of privacy in the driveway leading to his or her residence, so police are free to make observations through the window of the residence while they are standing on the driveway.

2. Warrant Searches

a. Warrants Based in Part on Invalid Searches

State v. Watts, 801 N.W.2d 845 (Iowa 2011)
Where police obtain a warrant to search an apartment based in part upon information discovered in an invalid warrantless search, the warrant is valid and new evidence discovered during the warranted search is not excluded where the warrant application shows that prior to the initial search a law enforcement officer detected a strong odor of marijuana emanating from the apartment, that based upon the officer's experience and training the circumstances suggested that evidence of a drug crime would be found in the apartment, and where law enforcement would have sought the warrant even absent the evidence discovered in the illegal search.

b. *United States v. Leon* – reasonable reliance on warrant

Messerschmidt v. Millender, _____ U.S. _____, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012)
A warrant to search defendant's residence for other weapons and gang paraphernalia is not so obviously lacking in probable cause that a rational police officer would not rely upon it in good faith where the complaining witness alleged that the defendant assaulted her with a sawed-off shotgun, and where reasonable police officers might believe that the defendant possessed other guns and used his gang affiliation to intimidate the victim.

– This case was a 42 U.S.C. § 1983 action against the police officers alleging an unreasonable search. The Ninth Circuit (of course) denied the officers' request for qualified immunity. Chief Justice Roberts found that the officers were entitled to immunity.

c. Display of Warrant Prior to Search

State v. Breuer, 808 N.W.2d 195 (Iowa 2012)
While it is a better practice to display a search warrant at the outset of the search, it is not constitutionally required that officers provide the subject of the warrant with a copy.

– There is something of a split in jurisdictions as to whether display of the warrant is required, with the majority of jurisdictions falling in line with Justice Appel's unanimous opinion in *Breuer*. There is some suggestion that officers must leave a copy of the warrant at the conclusion of the search. Both in jurisdictions requiring the warrant be produced at the outset and those requiring production at the conclusion of the search, however, the requirement appears to be rooted in the rules more than in the Constitution, and a violation does not invalidate the search.

In *Breuer*, law enforcement obtained a warrant to obtain body samples after the defendant declined to provide them under implied consent following a motor vehicle accident. It is fairly apparent that Justice Appel's reasoning applies to all warranted searches in which there is no statutory or rule-based requirement that a warrant be produced at the outset of a search.

3. Warrantless Searches

a. Seizure of the Person

State v. Lowe, _____ N.W.2d _____ (Iowa 2012)
Despite the fact that officers are wearing uniforms with badges, a person is not seized when she allows officers into her house and voluntarily answers their questions, especially where, at least until a search warrant is obtained, officers honor her request that other areas of the house not be searched.

State v. DeWitt, _____ N.W.2d _____ (Iowa 2012)
Where police have reasonable suspicion that the defendant has been involved in a drug transaction, and where police reasonably believe that the defendant may flee if encountered in a crowded store, it is reasonable for officers to grab the defendant by the arm even in the absence of reasonable belief that the defendant may be armed.

– Mr. DeWitt asked for a *per se* rule that police must have reasonable suspicion that a defendant is armed before physically grabbing the defendant during a *Terry* stop. The Court was unwilling to do so. A little bit more troubling, in Mr. DeWitt's case, perhaps, was the officers' subsequent act of wrestling him to the ground after he attempted to break free. Under the circumstances of his case, the Court found that the officers' fear that he might be armed and represent a danger to others in the store justified their actions.

b. Residential Searches – Exigent Circumstances – Search After Arrest of Occupant

State v. Watts, 801 N.W.2d 845 (Iowa 2011)
Although police had observed the odor of marijuana emanating from an apartment, where there was no objective evidence that after the defendant answered the door to the apartment and was placed in handcuffs and taken away, there was someone else in the apartment to destroy evidence, and where there was no objective evidence that someone was destroying evidence, police lacked exigent circumstances to enter the apartment to conduct a warrantless search.

– It might be different if the police smelled evidence of methamphetamine production, as this can create a serious danger. As pointed out above, however, after searching the residence and finding some indicia of methamphetamine use, police obtained a warrant and searched the apartment. The search yielded the bulk of the evidence against Mr. Watts. Because the warrant, with information obtained from the initial entry excised, still contained probable cause for the search, evidence from the warrant search was not excluded.

c. Consent

(1) Standing to Argue

State v. Lowe, _____ N.W.2d _____ (Iowa 2012)
An individual who is staying at the residence of another person for six months has standing to challenge the validity of a consent to search the residence given by the resident.

State v. Lowe, _____ N.W.2d _____ (Iowa 2012)
While there is generally no standing to challenge the seizure of other persons, a defendant has standing to challenge the seizure of a person that is exploited to obtain consent to search a premise in which the defendant has an expectation of privacy.

(2) Voluntariness

State v. Lowe, _____ N.W.2d _____ (Iowa 2012)
Where police conduct a "knock and talk" on a residence, in which the resident voluntarily allows them to enter, where she suffers from no mental incapacitation, where she demonstrates, by her refusal to allow police to search other areas of the house, that she realizes that she has a right to refuse consent to search, where police tell her that her cooperation is necessary to aid a friend who earlier had been at the house who was being treated for a drug overdose, and where the interaction was of a brief duration, the totality of circumstances support a conclusion that consent was voluntary.

– There were circumstances that weighed against voluntariness. Officers did need to request consent several times before it was given. The resident was told that officers "didn't give a shit" about charging her. Although the latter, especially, was characterized by the Court as "troubling," it was not sufficient to weigh the balance towards involuntariness.

State v. Pals, 805 N.W.2d 767 (Iowa 2011)
In view of the totality of circumstances, a defendant's consent to search his automobile was not voluntarily given under article I, section 8 of the Iowa Constitution where (1) the defendant, stopped on suspicion of committing the misdemeanor offense of letting his dogs run loose, was initially subjected to a pat-down search, (2) the defendant was then detained in the patrol car for a period of time, (3) the defendant was never advised that he was free to leave and that he was not required to consent to the pat-down search, and (4) the defendant was not advised by law enforcement that the original basis for the stop had concluded prior to his being asked for consent.

– Although *Pals* is being viewed by some as a major development in Iowa constitutional law, the Court makes few proclamations of law, and the fact-based decision is arguably supportable by federal constitutional decisions such as

Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In a comprehensive review of the history and controversies surrounding the law enforcement practice of eliciting consent to search vehicles at the conclusion of unrelated traffic stops, Justice Appel flirts with, but declines to pull the trigger on, resolving numerous questions independently of federal Fourth Amendment analysis. Perhaps, for example, law enforcement should be required to inform the defendant that he or she is free to leave the scene, and need not consent to a search. Perhaps, law enforcement should be barred from asking for consent when the defendant is stopped on reasonable suspicion of having committed a misdemeanor in the past (this didn't apply because *Pals* was suspected of committing an ongoing misdemeanor).

Questions like this may be worth raising in the future, based upon the language in Justice Appel's majority opinion, but they remain questions. In his dissent, Justice Waterman sees no reason to break with federal precedent interpreting the parallel federal provision, and argued that consent was not invalid in this case.

(3) Third-Party Consent

State v. Lowe, _____ N.W.2d _____ (Iowa 2012)
Where the occupant of a residence in which the defendant is staying consents to a law enforcement search of areas in the residence over which the defendant does not have exclusive possession, and where the defendant does not explicitly refuse consent to search the area, the third party consent is binding on the defendant.

– The Court declined Mr. Lowe's invitation to hold, under article I, section 8 of the Iowa Constitution, that police have an obligation to obtain consent from all physically present co-tenants. Law enforcement must honor a co-tenant's refusal of consent, but need not solicit it.

d. Non-Law-Enforecement Seizures

(1) Public Safety

Ryburn v. Huff, _____ U.S. _____, 132 S.Ct. 987, 181 L.Ed.2d 966 (2012)
Where police receive information that a student wrote a letter threatening to "shoot up" his school, causing parents to keep their children at home, where the student was absent from school for two days, where no one answered the door when police came to the house and no one answered the telephone when they attempted to call, but then the student's mother answered her cell phone telling police she was inside the house, where she refused to discuss the reports inside the house, and where the mother turned around and ran inside the house when officers asked if there were any guns inside the house, officers had a reasonable belief that their was an imminent threat to their safety justifying a warrantless entry into the house.

– This issue did not arise in a criminal proceeding, but rather a civil action under 42 U.S.C. § 1983. The state court found that the officers had qualified immunity from suit. The Ninth Circuit found that they did not, which is probably the most accurate predictor as to how this case was likely to come out in the Supreme Court.

(2) Community Caretaking Exception

State v.Kurth, _____ N.W.2d _____ (Iowa 2012)
Law enforcement officers lack a bona fide community caretaking activity when they seize a vehicle by parking behind it in a manner that the vehicle is not able to leave, because they observed that the vehicle had been damaged while striking a downed traffic sign laying in the road, where there was no other reason to stop the vehicle..

– Justice Mansfield's opinion in *Kurth* is a helpful review of the historical background and the current application of the community caretaking exception to the warrant requirement. Quoting from *State v. Crawford*, 659 N.W.2d 537 (Iowa 2003), Justice Mansfield observed that "the community caretaking exception encompasses three separate doctrines: (1) the emergency aid doctrine, (2) the automobile impoundment/inventory doctrine, and (3) the 'public servant' exception."

The three-step test used by the Courts in applying the exception also appears in *Crawford*:

> (1) was there a seizure within the meaning of the Fourth Amendment?; (2) if so, was the police conduct bona fide community caretaker activity?' and (3) if so, did the public need and interest outweigh the intrusion upon the privacy of the citizen?

The parties agreed that there was a seizure of Kurth's vehicle. The second prong was the point at which law enforcement failed to provide sufficient justification. Certainly officers could approach Kurth and point out the damage to his car. But there was no bona fide justification for seizing the vehicle in the absence of any other facts. Since the seizure failed on the second prong, it was not necessary to conduct the balancing of the third.

In his concurring opinion, Justice Appel noted that the case was decided based upon the Fourth Amendment, and there was no need to determine whether the analysis would be different under the Iowa Constitution. He suggested that there may be some risk in adopting a community caretaking exception which relies too heavily on a vague reasonableness standard. One suggested remedy is to have a community caretaking policy in which evidence unrelated to the basis for the seizure is suppressed.

e. Strip Searches in Correctional Institutions

Florence v. Board of Chosen Freeholders of County of Burlington, _____ U.S. _____, 132 S.Ct. 1510, _____ L.Ed.2d _____ (2012)
It is not unreasonable for administrators of a correctional institution to require that all inmates admitted to general population be required to submit to strip searches in which jail personnel do not touch the inmates.

– In a concurring opinion, Justice Alito suggested that there may be circumstances, for example recent arrestees placed in holding facilities awaiting their initial appearances, in which strip searches may not be reasonable absent some reasonable suspicion that they are carrying contraband. Justice Kennedy agreed in a division of the 5-4 opinion to which Justice Thomas did not join. The *Florence* decision thus does not recognize any exceptions.

Justice Breyer wrote the dissent, referring to a number of studies that reveal that highly-intrusive strip searches have yielded very little contraband. In most of the cases in which contraband was found, the searches would have been justified by reasonable suspicion.

4. Exclusionary Rule – Reliance Upon Established But Overruled Law

Davis v. United States, _____ U.S. _____, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)
Even where the defendant raises a Fourth Amendment claim in a timely fashion before his conviction becomes final, the grounds for which are established by a development in the law occurring after the search or seizure, exclusion of evidence is not available as a remedy where officers relied in good faith upon established case law that existed at the time of the search.

– When I first saw that the Court had done this, what struck me was how unfair it seemed that the defendant in *Arizona v. Gant* (2009) could benefit from a Supreme Court ruling that officers may not conduct a search incident to arrest of an automobile where its occupants had been removed from the vehicle and secured in a way that they had no access to it, while Willie Davis, who raised the identical issue based upon the *Gant* analysis, and raised it in a timely fashion, could not. Joined only by Justice Ginsburg, Justice Breyer raised the same question in his dissent.

Several people characterized the Court's decision this term in *Kentucky v. King* as the death knell to the Fourth Amendment. *Davis* is an infinitely larger blow.

The conservative wing of the Court has been chomping at the bit for decades to do away with exclusion as a remedy (actually, it's the only practical remedy) for violations of the Constitution. *Davis* is a giant step in that direction. Granted, exclusion of evidence is a creation of the judiciary. It appears nowhere in the text of the Constitution. In more enlightened times, however, the courts recognized it as implicit. In the majority opinion in *Davis,* Justice Alito turns up his nose at what he characterizes as such "[e]xpansive dicta" written during "a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine."

The only purpose of exclusion, Justice Alito writes, is to deter police conduct, and not to confer upon the accused a right to suppression. Police are unfairly punished, he essentially argues, when they act in conformity with what, at the time of their actions, is established law. From my perspective, the flaw in Justice Alito's entire view is the notion that, by enforcing the Bill of Rights, we are "punishing" police officers. Police officers don't serve jail time when evidence is suppressed following a ruling explaining the Fourth Amendment. They continue to be paid. Law enforcement officers have no personal proprietary interest in the cases they initiate.

The same can not be said about the defendant.

The major impact of *Davis* is that it expands to warrantless searches and seizures the good-faith reliance doctrine of *United States v. Leon*, 468 U.S. 897 (1984) that, until now, applied only to warrant searches. As we know, the Iowa Supreme Court, at least historically, has eschewed applying the *Leon* analysis in analyzing cases under the Iowa Constitution and Code. Recent changes in personnel on the Supreme Court may generate, for some time, question concerning the vitality of these past decisions. For the time being, however, practitioners in state court should continue to cite the state Constitution and Code wherever there is a parallel provision.

B. Fifth Amendment – Self-Incrimination

1. Correctional Treatment Programs

State v. Iowa District Court; Harkins v. State, 801 N.W.2d 513 (Iowa 2011)
A requirement that a defendant convicted of sexual abuse participate in the Department of Corrections Sexual Abuse Treatment Program, the successful completion of which involves the defendant admitting to the behavior that resulted in the conviction, does not violate the Fifth Amendment protection against self-incrimination, despite the fact that the defendant who fails to comply loses good-time credits, because the purpose of the program is to further rehabilitation and not to elicit inculpatory testimony.

– Perhaps the most noteworthy aspect of the *Harkins* opinion is the split in justices who supported the majority and the dissent. Several weeks ago, a local attorney pointed out to me that a case was decided that day on a 4-3 split, with the three new justices voting together in the majority joined by Chief Justice Cady. *Harkins* was decided with the same split.

Both the majority opinion by Justice Mansfield and Justice Appel's dissent are a pleasure to read. The slip opinion is 57 pages long, and someone teaching a law school class on the Fifth Amendment could probably spend a semester analyzing it. The focus is upon the United States Supreme Court plurality opinion in *McKune v. Lile*, 536 U.S. 24 (2002) in which four justices of the Supreme Court essentially take a position consistent with Justice Mansfield. Both sides look for support to Justice O'Connor's concurrence.

Both sides agree that Harkins, who proceeded *pro se*, did not argue on state constitutional grounds. While pro se defendants are not supposed to be given special treatment, Justice Appel suggests that the Court could have considered whether there may be additional protection under the state constitution. What is interesting about this, however, is that there is no express provision

concerning self-incrimination in the state constitution. The Court has considered the right implicit in due process under Article 1, section 9.

2. *Miranda*

a. Custody Defined – Age of the Defendant

J.D.B. v. North Carolina, _____ U.S. _____, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)
The youthful age of the defendant is a factor to be considered in determining whether the defendant is "in custody" for the purpose of applying the *Miranda* warning requirement before conducting custodial interrogation.

– As much as I hate to admit it, Justice Alito's four-Justice dissent is somewhat persuasive. Factors such as the defendant's age, intelligence, background, etc., are relevant in the totality of circumstances inquiry into whether a confession is voluntary. Justice Sotomayor responds that the point of *Miranda* is that the totality of circumstances analysis sometimes is not enough. What constitutes custody for a seven year old or, as in J.D.B's case, a 13-year-old, is different from that of an adult.

State v. Pearson, 804 N.W.2d 260 (Iowa 2011)
A seventeen-year-old robbery suspect, who initially asserted his Fifth Amendment right to counsel when confronted by police, is not in custody, for *Miranda* purposes, when he is taken to a windowless room of the "home-like" residential facility in which he was already residing, but not locked in the room, is visited by a DHS caseworker assigned to him for many years, who asks him if he did what he is alleged to have done, and the suspect then confesses, and where the caseworker only tells police about the conversation several days later, and only after she is ordered to do so by her superiors.

– *Pearson* follows by a few months the United States Supreme Court decision in *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) in which the Court announced that the defendant's young age is a factor in determining whether he or she is in custody. After an exhaustive balancing of the circumstances, Justice Waterman finds that Pearson was not in custody. J.D.B. was 13 when he was questioned, while Pearson was a few months shy of his 18th birthday. The Court in *J.D.B.* recognized that the importance of age as a factor diminishes as the defendant grows older. The social worker in *Pearson* was familiar to him. Her purpose was to assist him, and she was somewhat surprised and hesitant when asked to participate in the criminal investigation. Her question to Pearson certainly was interrogation, but the issue is whether Pearson was in custody. Under the circumstances, he was not.

b. Providing *Miranda* Warnings to Validate Unwarned Confession

Bobby v. Dixon, _____ U.S. _____, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011)
The holding of *Oregon v. Elstad*, 470 U.S. 298 (1985), which prohibited the practice of eliciting a confession in violation of the Fifth Amendment and then giving the defendant the *Miranda* warnings to obtain the same confession, does not apply where the defendant did not admit the charged offense during the initial confession, but then did admit it after receiving the *Miranda* warnings.

c. Reinitiation of Questioning after Assertion of *Miranda*

State v. Lowe, _____ N.W.2d _____ (Iowa 2012)
The discovery of various elements of a possible methamphetamine lab, with no evidence that the lab was active in the present or in the recent past, does not justify reinitiation of questioning of the defendant after the defendant asserted his right to counsel under *Miranda*.

– Justice Zager stopped short of finding that the public safety exception might ever justify reinitiation of questioning after a *Miranda* invocation. If there is such an exception, he found, it does not apply here.

3. Promissory Leniency

a. Test

State v. Madsen, _____ N.W. 2d _____ (Iowa 2012)
In determining whether a confession should be excluded on grounds of promissory leniency, the court uses the common law evidentiary test, under which a "confession can never be received in evidence where the prisoner has been influenced by any threat or promise," and not the general constitutional totality of circumstances test, under which the court views all the circumstances to determine whether, in view of the promissory leniency combined with the other circumstances, the defendant's will was overborne.

– The totality of circumstances test is utilized in federal court, and Justice Waterman recognized that there are comparative advantages to the federal approach. The evidentiary approach may result in exclusion of some evidence, specifically confessions, that is highly probative, in circumstances in which the will of the defendant is not necessarily overborne. The State asked the Court to abandon the evidentiary standard in favor of the constitutional one.

Where the evidentiary test is met, the confession is to be excluded without further analysis. Where it is not met, the court must still employ the totality of circumstances approach to assure that the defendant's confession was voluntary. The state holds that burden.

The issue was raised in *Madsen* as ineffective assistance of counsel. Counsel

objected to the introduction of statements made after the defendant was told that he should cooperate to avoid having the circumstances of his offense publicized in the local media and to put the matter behind him. The implication was that, if Mr. Madsen cooperated, the problem would go away. The district court denied the motion to suppress using the constitutional test. Counsel was ineffective, therefore, in allowing the district court to resolve the matter using the wrong test.

Mr. Madsen had been convicted of two counts of sexual abuse in the second degree and one count of lascivious acts. He was able to establish *Strickland v. Washington* prejudice only with respect to one of the sexual abuse convictions, as the other two convictions were not based in any substantial part upon statements he made after the improper promises were made.

b. Application

State v. Polk, _____ N.W.2d _____ (Iowa 2012)
Where a defendant makes an inculpatory statement after being told several times by law enforcement that he will not see his children for a long time if he does not cooperate, the statement is involuntary as it is induced by an improper promise of leniency.

– Law enforcement put the full-court press on Mr. Polk to elicit a confession from him, and he complained about several aspects of it. He was already in jail when he was brought down and questioned about the shooting incident for which he ultimately was convicted. He attempted several times to end questioning and walk away, but law enforcement repeatedly re-initiated questioning.. Mr. Polk's competence to waive *Miranda* was subject to serious question. He has a very low I.Q. and has been found to be incompetent to stand trial on at least one previous occasion. Because the Court reversed on the promissory leniency question, it was not necessary to consider the others.

4. Recording Confessions

State v. Madsen, _____ N.W.2d _____ (Iowa 2012)
While the Court strongly recommends that law enforcement interviews, in and out of custody, be recorded, the failure to do so does not render interviews inadmissible.

C. Sixth Amendment

1. Right to Counsel – Ineffective Assistance

a. Breach of Duty

(1) Motion to Dismiss

Ennenga v. State, _____ N.W.2d _____ (Iowa 2012)
Counsel was ineffective in allowing the defendant to enter a plea of guilty to one count of a trial information and not moving to dismiss the information where, despite the fact that the trial information had been approved by the district court and presented to the defendant, and the defendant entered a plea based upon it within the 45-day limitation period of Iowa R.Crim.P. 2.33, the information was not "found" because it inadvertently was not filed with the clerk during that period.

– If counsel fails to lodge an objection that would result in dismissal, counsel breaches an essential duty. Ennenga was prejudiced in a *Strickland* sense, but the fact that he pleaded guilty to, and received a prison sentence for, a charge that would have been dismissed. As Chief Justice Cady questions in his three-justice dissent, does defense counsel really have a professional duty to check the clerk's file to see if a trial information inadvertently was not filed?

(2) Involuntary Confessions – Proper Standard

State v. Madsen, _____ N.W.2d _____ (Iowa 2012)
Counsel is ineffective in litigating a motion to suppress a confession as elicited by promissory leniency where the judge denies the motion applying the constitutional totality of circumstances test, where the proper standard is the common law evidentiary standard.

--Mr. Madsen had been convicted of two counts of sexual abuse in the second degree and one count of lascivious acts. He was able to establish *Strickland v. Washington* prejudice only with respect to one of the sexual abuse convictions, as the other two convictions were not based in any substantial part upon statements he made after the improper promises were made.

(3) Plea Negotiations

Lafler v. Cooper, _____ U.S. _____, 132 S.Ct. 1376, _____ L.Ed.2d _____(2012)
Where defendant is offered a beneficial plea agreement, which the defendant is inclined to accept, but rejects the agreement based upon the dubious advice of counsel that the defendant will not be convicted at trial of the most serious charged offense, and where the defendant then proceeds to trial, is convicted and receives a sentence 3 ½ times as long as the sentence offered in the agreement, counsel has failed to perform an essential duty and the defendant is prejudiced in the *Strickland v. Washington* sense.

– The question in *Cooper* was whether the provisions of *Strickland* extend to guilty plea negotiations. There is no constitutional right to a plea agreement and, arguably, the Sixth Amendment protects the right to a fair *trial*. But the Sixth Amendment has been found to extend to all stages of trial. And, just like counsel on appeal, another right not constitutionally-mandated, if defendant is involved with counsel in plea negotiations the defendant has a right to effective assistance.

The parties stipulated that Cooper's attorney's performance was deficient. The only question was whether the *Strickland* analysis applied. A 5-4 majority, led by Justice Kennedy, found that it does. Justice Scalia fired back with a characteristically acerbic dissent, suggesting that the American plea bargaining process produces injustice by pressuring prosecutors to overcharge and allowing guilty defendants to negotiate less punishment than they deserve.

Missouri v. Frye, _____ U.S. _____, 132 S.Ct. 1399,_____ L.Ed.2d _____ (2012)
Defense counsel renders ineffective assistance of counsel in failing to communicate to the defendant, prior to the express deadline for acceptance, a proposed plea agreement under which the defendant would have been eligible for a sentence substantially less than what the he ultimately received.

– Decided on the same day as *Lafler* with the same split of justices, *Frye* involved the same underlying issue – whether the right to effective counsel extends to the plea negotiation stage of trial. Over another angry dissent by Justice Scalia, Justice Kennedy found that it does. To qualify for relief under the relevant *Strickland* analysis, however, it is not enough to demonstrate that counsel was ineffective. The defendant must show (1) the defendant would have taken the agreement, (2) the

prosecution would not back out of the agreement, and (3) the court would have accepted the agreement. The case was remanded for these findings.

(4) Motion for Judgment of Acquittal

State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)
Where, in a prosecution for unlawful possession of a prescription drug, trial counsel moves for judgment of acquittal, but does not specifically argue that evidence is insufficient to establish that the items seized were, in fact, prescription drugs, counsel breaches an essential duty.

– Counsel is expected to move for acquittal in terms that are sufficient to raise the grounds upon which the motion would be successful. There is no valid strategic reason for not doing so. Thus, there is no reason for the Court to preserve defendant's ineffective assistance claim for postconviction review. Because the charge against the defendant would have been dismissed had the motion been made sufficiently, Brubaker was prejudiced by the breach.

(5) Jury Questions

State v. Buchanan, 800 N.W.2d 743 (IowaApp.2011)
It is proper for the district court to permit jurors to ask questions of witnesses where (1) the court accepts the jury's questions in writing, (2) the court determines which questions are permissible, (3) the parties have the opportunity to object prior to the questions being asked, (4) the court poses the questions to the witness, and (5) the parties are given an opportunity to further examine the witness, so if these procedures are followed trial counsel is not ineffective in failing to object.

b. Prejudice

(1) Structural Error

Lado v. State, 804 N.W.2d 248 (Iowa 2011)
Ineffective assistance of counsel may be structural error, for which no showing of prejudice is necessary for reversal, where (1) counsel is denied completely, either actually or constructively, (2) where counsel does not subject the government's case to meaningful adversarial testing, or (3) where a presumption of prejudice is justified by surrounding circumstances, so the failure of counsel to prosecute a client's postconviction relief petition, that results in its dismissal, constitutes structural error for which no showing of prejudice is required.

– Justice Zager drew the test for structural error from *State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008). By taking no action and letting Mr. Lado's postconviction claim die, counsel failed to subject the prosecution's case to meaningful testing.

(2) General

State v. Neitzel, 801 N.W.2d 612 (IowaApp.2011)
Defendant is not entitled to a new trial on the ground that his attorney was ineffective in not objecting to a state's witness testifying from her notes and not having independent recollection of the incident, where the defendant is unable to establish any prejudice.

– The Court of Appeals also rejected Neitzel's claims that counsel was ineffective in failing to move for new trial on the ground that the weight of the evidence did not support conviction and on the ground that trial counsel failed to investigate the case, to cross-examine witnesses and to prepare for trial and that counsel did not arrange for depositions until two months prior to trial. The Court's review of the evidence determined that the weight of the evidence supported conviction. And Neitzel failed to specify how he was prejudiced by any of his attorney's actions (or inaction).

2. Confrontation

a. Depositions – Defendant's Presence

State v. Rainsong, 807 N.W.2d 283 (Iowa 2011)
The Confrontation Clause would be violated by permitting the introduction at trial against the defendant of depositions taken in the absence of the defendant.

b. Forensic Laboratory Report

Bullcoming v. New Mexico, _____ U.S. _____, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)
The Confrontation Clause requires that a forensic laboratory report prepared for evidentiary purposes be admitted through the testimony of a witness who participated in its preparation, and not merely an expert who can vouch for the procedures used in its preparation and its reliability.

– *Bullcoming* extends upon *Melendez-Diaz v. United States* (2009), under which a forensic laboratory report must be offered through live testimony of a witness who may be cross-examined. Under *Bullcoming*, the witness must play a role in the preparation of the report. It is not necessary to call the individual who actually conducted the examination, when that person's supervisor or some other laboratory personnel is available. It is also not necessary to call every person involved in its preparation. The proponent decides who to call and how much evidence is necessary. Justice Ginsburg's opinion in *Bullcoming* also leaves open the question of the introduction of laboratory reports that are not prepared necessarily for

evidentiary purposes. A report prepared for treatment purposes, for example, is not testimony, and the Confrontation Clause may not apply.

Justice Kennedy wrote a stinging dissent in *Melendez-Diaz*, predicting that the decision would have an onerous impact upon the criminal justice system. Justice Ginsburg (in a section of the *Bullcoming* opinion not joined by a majority of the Court) presents statistics demonstrating that these effects have not occurred.

D. Eighth Amendment

1. Life Sentence for Repeat Sex Offenders

State v. Oliver, _____ N.W.2d _____ (Iowa 2012)
As there is no national consensus against the imposition of life imprisonment without parole as a sentence for repeated sexual offenses against minors, and where the penalty furthers legitimate penological goals in relation to the offense, the Eighth Amendment does not categorically bar the use of this penalty for this offense.

– The categorical test articulated in *Graham v. Florida*, 130 S.Ct. 2011 (2010) is, according to Justice Zager, the current framework for analyzing what was previously labeled a facial challenge to a sentencing statute on Eighth Amendment grounds. The reviewing court (1) examines the practices of other jurisdictions to see if there is "an objective indicia of national consensus" favoring a particular practice, and then (2) makes an independent determination as to whether the practices further the penological goals of retribution, deterrence, incapacitation and rehabilitation.

After applying the categorical approach, the Court may then determine whether the sentence is grossly disproportional as applied to the particular defendant. *Graham*, according to Justice Zager, did retain the analysis of *Solem v. Helm*, 463 U.S. 277 (1983), under which the court (1) determines whether the defendant's sentence gives rise to an inference of gross disproportionality, (2) the court conducts an intrajurisdictional review of penalties for offenses of similar gravity, and (3) the court conducts an interjurisdictional review of penalties for the same offense or for similar offenses.

Mr. Oliver did not prevail under any of these tests.

2. Prison Conditions – Remedies – *Bivens* Damages – Alternative Remedies

Minneci v. Pollard, _____ U.S. _____, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012)
A suit by federal inmates for damages under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) for inadequate provision of medical care in a privately-run prison facility is not appropriate where an alternative remedy exists under state tort claim provisions.

–*Bivens* recognizes a suit in federal court for monetary damages for violations of constitutional protections.[1] A suit under *Bivens* may only exist where there are no existing alternative remedies that provide adequate protection. *Wilkie v. Robbins*, 551 U.S. 537 (2007).

E. Tenth Amendment – Standing

Bond v. United States, _____ U.S. _____, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011)
An individual charged with violation of a federal law has standing to argue under the Tenth Amendment that Congress exceeded its enumerated powers in passing that law.

– The Tenth Amendment preserves the concept of federalism, protecting the sovereignty of the states from encroachment by the centralized federal government. Such encroachments occasionally may harm an individual more than they do the states, so individuals who suffer actual injury from them have standing to challenge them. This is not unprecedented. Injured parties also may challenge statutes as violative of the separation of powers doctrine, *INS v. Chadha*, 462 U.S. 919 (1983), and have been held to possess standing to challenge the President's exercise of a line-item veto. *Clinton v. City of New York*, 524 U.S. 417 (1998).

F. Fourteenth Amendment

1. Due Process

a. *Brady* Violations

(1) General

Desimone v. State, 803 N.W.2d 97 (Iowa 2011)
Where the state calls a witness to testify that, upon leaving work, the witness observed the alleged sex abuse victim running away from the defendant's apartment in a manner consistent with the testimony of the victim, the state violates Due Process under *Brady v. Maryland* in failing to disclose to the defendant the time records of the witness that would establish that the witness left work after the victim had already reported the assault to police.

– Justice Wiggins' opinion in *Desimone* is a primer on the application of *Brady* in

[1]Bivens claimed that his Fourth Amendment interests were violated by federal narcotics agents.

Iowa. The prosecutor received the witness' time records shortly before trial. The state argued that Desimone's attorney failed to exercise due diligence in that the defense could have subpoenaed the time records. Justice Wiggins responded that defense counsel does not have a duty to investigate every government witness to determine whether the prosecution intends to present false testimony.

(2) Materiality

Smith v. Cain, _____ U.S. _____, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012)
Statements undisclosed to a defendant in a capital murder case, made by the sole eyewitness and contradicting the witness' identification of the defendant at trail, are material and require a new trial under *Brady v. Maryland* where the remainder of the evidence is not sufficient restore confidence in the guilty verdict.

– The test under *Brady* is not whether the suppressed evidence would have resulted in acquittal, it is whether there is reasonable probability that the result of the trial would have been different, and whether suppression of the evidence undermines confidence in the outcome of the proceeding. The State of Louisiana (which has become the garden state for *Brady* claims) advanced various explanations why the witness could not identify a suspect at the time of the incident, but was able to do so later (even unequivocally in a photo lineup). These explanations were possibilities, Chief Justice Roberts responded, but were not probabilities, suggesting that the reasonable probability test might run both ways.

In response to Chief Justice Roberts' four-page 8-1 majority opinion, Justice Thomas authored a 21-page dissent arguing, quite persuasively, that the evidence against Juan Smith was actually so overwhelming that the suppressed evidence did not undermine confidence in the verdict.

Aguilera v. State, 807 N.W.2d 249 (Iowa 2011)
Undisclosed DCI files that contain witness statements inconsistent with the witnesses' trial and deposition testimony and with other statements made by the witnesses are material when, viewed collectively, there is a reasonable probability that disclosure would have resulted in defense counsel employing different strategy at trial and that the result of trial would have been different.

– Justice Zager's opinion in *Aguilera* is highly fact-specific. Jose Aguilera shot and

killed Jesus Garcia in 1996. He argued that the shooting was either accidental or in self-defense. The state charged him with murder in the first degree. Two eye witnesses testified against him. The testimony of one was consistent with a theory of accidental shooting, the testimony of the second was not. The undisclosed DCI reports contained an early statement by that witness that was more supportive of Aguilera, along with statements by others that could have been used to impeach that witness' testimony.

Justice Zager noted that it is not enough that defense counsel know of the existence of police reports. If Counsel is not made aware that the reports are exculpatory they are suppressed for the purposes of *Brady*. As the Court previously held in *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), disclosure of the actual reports, and not just oral disclosure of their existence, is required under *Brady*.

b. Jury Selection – *Batson* Claims – Court's Authority to Raise Sua Sponte

State v. Mootz, 808 N.W.2d 207 (Iowa 2012)
The district court has the authority to raise a *Batson* claim *sua sponte* and to ask the party striking a minority juror to articulate racially-neutral grounds for the strike, once it makes a finding of a *prima facie* case of purposeful discrimination.

– *Batson* articulates a right held by the public not to be excluded from jury service on racially-motivated grounds. Because of the immense hurdles a member of the public encounters in vindicating this right, the courts have the authority to raise the question themselves when they observe perceived violations. Before raising the issue, the district court must find a prima facie case of racial discrimination in the exercise of peremptory challenges and must articulate these findings.

In *Mootz*, a case involving an assault upon a Hispanic police officer, the district court declared before jury selection commenced that, of the two Hispanic panelists, one could be excluded and one could not. Mootz struck both. The district court erred in failing to make a prima facie finding of purposeful discrimination before proceeding to the second step of the process, inquiring into whether the defendant had racially-neutral reasons for the strike. At

this point the State objected to the strike, arguing, "I don't see any relevant reason for him being stricken." Again, this was not the issue.

The third step in the process is the determination, in view of the striking party's articulation of its reasons for the strike, of whether the strike was racially-motivated. Mootz articulated a number of reasons for striking the juror, including the fact that the juror had been arrested previously and that the juror had worked at a bar (the assault for which Mootz was charged occurred in a bar). There is a strong presumption of validity of the articulated reasons for a peremptory challenge, and Justice Zager found that the strike was justified in this case, and that the district court erred in denying the challenge.

The right to peremptory challenges is statutory, and not constitutional, in Iowa. The improper denial of a peremptory challenge is automatically prejudicial, the Court held, and Mr. Mootz received a new trial.

c. Eyewitness Identification Testimony – Non-Police Action

Perry v. New Hampshire, _____ U.S. _____, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012)
The Due Process requirement that the district court make findings prior to the admission of eyewitness identification testimony as to whether (1) the identification process was impermissibly suggestive, and (2) the process resulted in a very substantial likelihood of irreparable misidentification applies only to identifications arranged by police, and not to spontaneous identifications that are not police-arranged.

– Due Process generally requires only that the Court conduct the review, and there is little in the case law to compel a particular finding. In her lone dissent, Justice Sotomayor argues that the Due Process concern has to do with the inherent unreliability of eyewitness identification, and it should not even matter whether the identification was arranged intentionally by police.

d. Right to Counsel in Civil Contempt Proceedings

Turner v. Rogers, _____U.S. _____, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011)
The Due Process Clause does not provide a right to counsel in civil contempt proceedings for failure to pay child support where the defendant faces up to a year in custody, where the proceedings are not necessarily complex. where the other party is the custodial parent and not the government, which is often represented by counsel, and where certain procedural protections are in place to protect the rights of the non-custodial parent, including (1) notice that the non-custodial parent's ability to pay is the central issue of fact, (2) use of a uniform form to gather financial information about the non-custodial parent, (3) the ability to respond at a hearing to matters relating to the non-custodial parent's financial status, and (4) the requirement that the court make a finding that the non-custodial parent has the ability to pay.

– There was no dispute but that there is no Sixth Amendment right to counsel in civil cases. In other contexts, i.e., civil juvenile delinquency proceedings, proceedings involving the transfer of prison inmates to mental facilities, Due Process does require representation by counsel. In others, such as revocation of probation, no such right exists. Justice Breyer's majority opinion appears to suggest that there are circumstances, such as a complex case, a longer potential period of incarceration, or a case in which the opponent is represented, in which Due Process would require counsel.

Here, Mr. Turner received none of the procedural safeguards Justice Breyer enumerated as alternatives to appointed counsel, so his case was remanded (although Mr. Turner had finished his one-year sentence at this point). Joined by the usual suspects, Justice Thomas dissented from this part of the opinion, on the ground that the concept of procedural protections had not been raised at any level below.

e. Potential Legislation Providing Basis for Challenge

Leal Garcia v. Texas, _____ U.S. _____, 131 S.Ct. 2866, 180 L.Ed.2d 872 (2011)
Due Process Clause does not prevent a State from carrying out an execution where legislation that has not been passed by Congress could have the effect of providing the defendant with a collateral attack on his conviction.

– Mr. Leal Garcia committed a very heinous capitol offense, and faced the death penalty. In violation of the Vienna Convention on Consular Relations, he was never provided the opportunity at the time of his arrest to consult with the Mexican consulate. In 2004 the International Court of Justice ruled that a notification violation violated the Vienna Convention. In 2008, however, the Court held in *Medellin v. Texas* that the 2004 ruling and

the Vienna Convention were not enforceable federal law.

Prior to Mr. Leal Garcia's execution, Senator Patrick Leahy introduced legislation requiring that the Convention be followed, at least with respect to defendants charged at the time Mr. Leal Garcia was arrested. Passage of the legislation would have resulted in Mr. Leal Garcia's case being remanded for further proceedings, specifically a hearing to determine if he was prejudiced by the Vienna Convention violation.

Mr. Leal Garcia and the President argued that Due Process merits a stay of execution to allow Congress to consider the new legislation. Due Process does not require this, Justice Per Curiam ruled in a 5-4 decision, so let's go ahead and kill the guy. Mr. Leal Garcia died by lethal injection that evening, after the President of the United States and the government of Mexico both attempted to call Texas Governor Rick Perry requesting a reprieve.

2. Equal Protection

Judicial Branch v. Iowa District Court, 800 N.W.2d 569 (Iowa 2011)
Differential treatment under the Iowa Code between defendants who are acquitted or whose charges are dismissed, for whom Iowa Code § 692.17 is interpreted not to require removal of criminal history data, and those who receive deferred judgments, for whom a confidential docket is maintained under Iowa Code § 907.4 that is not available to the public, is supported by a rational basis so, assuming that the two groups are similarly situated, it does not violate Equal Protection.

– Defendants who are acquitted are not a suspect class, and have no fundamental right to removal of criminal history data, so the disparity is reviewed using rational basis analysis.

II. Substantive Offenses

A. Accomplice Liability – Joint Criminal Conduct

State v. Rodriguez, 804 N.W.2d 844 (Iowa 2011)
Defendant who steals gasoline and jumps into the vehicle driven by another as the vehicle escapes, recklessly and at high speeds, striking and killing a motorcycle rider, is guilty of reckless vehicular homicide under a theory of joint criminal conduct, as the defendant is acting in concert with the driver in the theft of the gasoline, the driver commits the vehicular homicide, the vehicular homicide is in furtherance of the gasoline theft, and the homicide is reasonably foreseeable to the defendant.

– These are the four elements of joint criminal conduct. The defendant must commit an initial offense with the principle. The principle must commit the unrelated offense. The unrelated offense must be committed in furtherance of the initial offense. And the unrelated offense must be reasonably foreseeable to the defendant.

In this case, there was sufficient evidence that Rodriguez committed reckless vehicular homicide, under the joint criminal conduct theory, and counsel was not ineffective in permitting the defendant to plead guilty via an *Alford* plea.

B. Controlled Substances

1. Possession With Intent to Deliver – Sufficiency

State v. DeWitt, _____ N.W.2d ____ (Iowa 2012)
Despite the facts that the defendant was not in a vehicle at the time drugs were found inside it, that a number of other individuals had been riding in the vehicle, that the defendant's fingerprints were not on the drugs, and that the drugs were not in an area in the vehicle in which the defendant had been riding, evidence was sufficient for a rational jury to find beyond reasonable doubt that the defendant was in possession of the drugs when he was the most recent, and the most frequent, driver of the vehicle, that he was engaged in "suspicious activity," that he resisted arrest when police approached him, and where police had received information that the defendant was about to engage in a drug transaction.

2. Marijuana Delivery – Accommodation Offense – Serious Misdemeanor

State v. Iowa District Court for Black Hawk County, _____ N.W.2d _____ (Iowa 2012)
Under the plain language of the second paragraph of Iowa Code § 124.401(5), a defendant convicted of an accommodation offense delivery of marijuana after a previous conviction of possession of marijuana is sentenced on a serious misdemeanor, rather than under the habitual offender provision that would make the offense an aggravated misdemeanor.

– The State argued that this holding conflicts with the holding in *State v. Rankin*, 666 N.W.2d 608 (Iowa 2003) in which a defendant previously convicted of an accommodation offense was sentenced to an aggravated misdemeanor following his subsequent conviction of possession of marijuana. As unfair as it may sound to Mr. Rankin, Justice Hecht explains, it's a different situation. The second paragraph of § 124.401(5) provides that a defendant who commits an accommodation offense and with a single conviction of possession is guilty of a serious misdemeanor. The converse does not apply.

3. Unlawful Possession of a Prescription Drug – Sufficiency

State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)
Especially where there are many types of pills, some of which are legal, non-prescription medications, that resemble pills found in the possession of the defendant, there is insufficient evidence for a rational jury to find the defendant guilty of the unlawful possession of a prescription drug based solely upon the testimony of a Division of Criminal Investigation Criminalist that the pills are "consistent in appearance with a pharmaceutical preparation containing [C]lonazepam," a Schedule IV controlled substance.

– Counsel was ineffective in moving for judgment of acquittal on this specific ground. Justice Wiggins' opinion in *Brubaker* cites to other cases articulating tests to be used in establishing that a

particular pill, etc., is a prescription drug.

4. Federal Cocaine Felonies – "Cocaine Base" defined

DePierre v. United States, _____ U.S. _____, 131 S.Ct. 2225, 180 L.Ed.2d 114 (2011)
The definition of "cocaine base," giving rise to 21 U.S.C. 841(b) mandatory minimums equal to those that apply to one hundred times the quantity of powder cocaine, includes not only crack cocaine, but also includes any form of basic cocaine, including cocaine paste and freebase.

– The reason this is an issue is because, in defining "cocaine base" for the purpose of the application of the United States Sentencing Guidelines, the Sentencing Commission defined the term as "'crack'. . . the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." DePierre argued that the same definition should apply to the statute that sets the minimum and maximum sentences. The Guideline limitation does not appear in the statute, however, and Justice Sotomayer held that the statutory definition of cocaine base includes all of its forms.

While conceding that the statute is poorly drafted, Justice Sotomayor declined to apply the rule of lenity because it was not, in the mind of the unanimous court, ambiguous.

C. Homicide

1. Attempted Murder – Jury Instructions

State v. Hunt, 801 N.W.2d 366 (IowaApp.2011)
In a prosecution for attempted murder, the district court does not err in giving an instruction, recommended by the Supreme Court in *State v. Young*, 686 N.W.2d 182 (Iowa 2004) explaining that the phrase in the marshaling instruction that the defendant expected his actions "would cause or result in the death" of the victim "refers to Defendant's expectation of the consequences of the act. The phrase does not refer to the probability that Defendant's act would be successful."

– Mr. Hunt argued that the explanation instruction is confusing. Generally, an instruction that merely repeats the law, in this case the holding of *Young*, is not error.

2. Reckless Vehicular Manslaughter – Penalties – Law Enforcement Initiative Surcharge

State v. Rodriguez, 804 N.W.2d 844 (Iowa 2011)
Because the language of Iowa Code § 911.3, establishing a $125 law enforcement initiative surcharge for certain enumerated offenses, does not include reckless vehicular manslaughter as an enumerated offense, there is no authority to impose the surcharge after conviction of that charge.

3. Homicide By Motor Vehicle – Iowa Code § 707.6A(1) – Causation

State v. Adams, 810 N.W.2d 365 (Iowa 2012)
To convict a defendant of homicide by motor vehicle under Iowa Code § 707.6A(1) the State must prove that the proximate cause of the victim's death was the defendant's intoxicated driving, and it is not enough to prove that the defendant was intoxicated and was driving the vehicle.

– The issue was not raised at the district court level, so Adams was required to raise it as ineffective assistance of counsel. Justice Hecht concluded that the record was insufficient to determine whether trial counsel had a strategic reasons for failing to move for acquittal and ask for a jury instruction correctly stating the causation principle, so the issue was preserved for postconviction proceedings. Justice Hecht pointed out that the trial defense was that Adams was not intoxicated, so maybe trial counsel was justified in not arguing causation

Personally, I can't envision any strategic reason for not moving for a judgment of acquittal to which the defendant would be entitled to as a matter of law. I don't see why an attorney wouldn't ask for the jury instruction. Even if the defense was that Adams wasn't intoxicated, it is not dramatically inconsistent to tell the jury that, if you do find intoxication, you must find that the intoxicated driving was the cause of death.

It is significant that the language of § 707.6A(1) requires that the defendant cause the death of another *by* operating a vehicle while intoxicated and not *while* operating while intoxicated.

Another baffling (at least to me) aspect of *Adams* is Justice Waterman's concurrence. Justice Waterman takes the position that § 707.6A(1) was drafted to make defendants responsible for deaths that occur when they drive while intoxicated, without placing any burden upon the State to prove that the intoxication caused death. He does leave the door open to a possible defense of an intervening cause, but he appears to read the majority as interpreting the statute consistently with his interpretation. I don't think the two positions are consistent.

D. Motor Vehicle Offenses – Operating While Intoxicated

1. Implied Consent – Incorrect Advisory

State v. Overbay, _____ N.W.2d _____ (Iowa 2012)
A motorist's consent to a blood alcohol test is not rendered invalid by the fact that the requesting officer advised the motorist that refusal to submit to a blood test would result in suspension of driving privileges, without also advising the driver that, if the driver refused to consent to a blood test, the officer must then offer a urine or breath test before the motorist's response is considered a final refusal.

2. Implied Consent – Refusal to Submit to Testing – Subsequent Consent

Welch v. Iowa Department of Transportation, 801 N.W.2d 590 (Iowa 2011)
Defendant's initial refusal to submit to chemical testing is binding, and the defendant may not avoid the license revocation provision of Iowa Code § 321J.9(1)(a) by changing his mind and agreeing to a test, even after a short period of time has passed.

– Justice Mansfield followed the identical holding of the Court in *Krueger v. Fulton*, 169 N.W.2d 875 (Iowa 1969) in reaching this decision.

E. Sexual Offenses

1. Specific Offenses

a. Sexual Abuse – Sufficiency

(1) Sex Act

State v. Meyers, 799 N.W.2d 132 (Iowa 2011)
Letters between the defendant, while in custody, and the victim of an alleged sex abuse, the testimony of witnesses who observed the defendant and the victim behaving romantically at a party, the defendant's admissions to a social worker and the defendant's prior convictions of sex offenses involving the same victim, all corroborate the defendant's admissions and render the evidence sufficient to convict the defendant of sexual abuse.

(2) Against the Will

State v. Meyers, 799 N.W.2d 132 (Iowa 2011)
If the circumstances and the relationship between the defendant and the alleged victim of sexual abuse amount to psychological force or renders the victim incapable of giving consent, there is sufficient evidence for a finder of fact to conclude that a sexual act between them was against the will of the victim.

– The district court acquitted the defendant of the alternative of sexual abuse under which the victim suffers from a disease or defect rendering the defendant incapable of giving consent. This does not preclude the state from pursuing another scenario, including one involving psychological force, under which the act was against the will

of the victim.

b. Lascivious Acts – Sufficiency

State v. Meyers, 799 N.W.2d 132 (Iowa 2011)
Where the defendant, as the victim's step-father, was essentially the victim's father figure throughout most of her life, where the state offered as evidence a letter describing the victim's body, where the defendant admitted to sexual activity with the victim, and where several witnesses testified that there was a sexual relationship between the defendant and the victim, sufficient evidence existed to support defendant's conviction of lascivious acts by a person in a position of authority under Iowa Code § 709.14.

c. Indecent Exposure – Sufficiency

State v. Blair, 798 N.W.2d 322 (IowaApp.2011)
While a conviction of indecent exposure requires proof that the defendant intended that someone view his behavior, it is not required that the state prove the defendant intended to expose himself to a particular individual so, while it may be argued that because the shades in the complaining witness' house were closed he would not have intended to expose his masturbatory activities to her, he still intended to expose them to someone when he performed them in a location where others would be expected to be present to see them.

– Testimony of the 11-year-old complaining witness that Mr. Blair's penis was out over his pants and that he was petting it like a dog was substantial evidence supporting a finding that the exposure was sexually motivated.

2. Iowa Code § 903A Special Sentence – Credit on Sentence

Kolzow v. State, _____ N.W.2d _____ (Iowa 2012)
While a defendant is entitled to a reduction on the ten-year Iowa Code § 903B special sentence for earned time, the Department of Corrections is not required to apply an earned-time credit to a revocation sentence under that act.

Kolzow v. State, _____ N.W.2d _____ (Iowa 2012)
Defendant is entitled to credit on a revocation sentence under the special sentence provisions of Iowa Code § 903B for time served awaiting the revocation hearing.

– Section 903B provides for sentences of up to two years on a first violation and five years on subsequent violations of an Iowa Code § 903B special sentence. Not giving the defendant credit for time spent in custody awaiting the revocation hearing would have the effect of increasing the revocation sentence above the statutory maximum.

3. Sexually Violent Predator Commitment – Procedures

In re the detention of Johnson, 805 N.W.2d 750 (Iowa 2011)
Once a person committed under the Sexually Violent Predator commitment provision of Iowa Code Chapter 229A makes the Iowa Code § 229A.8(5)(e) showing that there is probable cause that he should no longer be committed under the statute, and where the court fails to hold a final hearing within sixty days of the determination that a hearing should be held, the remedy is not release from commitment, but rather a civil proceeding for mandamus.

– Once the probable cause showing is made, the statute provides that "the court shall set a final hearing within sixty days." The State argued that this requirement is satisfied by the mere act of setting the hearing within the limitation period, and it is not required that the hearing actually be held. The intent of the legislature, Justice Zager wrote, was that the hearing actually commence during the limitation period. The nagging question was remedy.

In re detention of Fowler, 784 N.W.2d 184 (Iowa 2010) dealt with the Iowa Code § 229A.7(3) requirement that the actual commitment hearing be held within 90 days of commencement of the proceeding. The committed person has a liberty interest in having the commitment hearing held during the limitation period, the Court found, and the failure to do so merited dismissal of the commitment action.

The situation in *Johnson* is different. The person has already been committed, and received all the process due prior to the deprivation of liberty that results from the initial commitment. § 229A.8(5)(e) affects persons who have already been committed, so the same interest does not apply. The legislative intent clearly is that committed individuals not be released until it is found that they are no longer a danger.

4. Sex Offender Registration – 18 U.S.C. § 2250(a) (Sex Offender Registration and Notification Act) – Applicability to Previously-Convicted Sexual Offenders

*Reynolds v. United States*_____ U.S. _____, 132 S.Ct. 975 , 181 L.Ed.2d 935 (2012)
Because the Sex Offender Registration and Notification Act expressly provides that the "Attorney General shall have the authority to specify the applicability of the requirements. . . to sex offenders convicted before the enactment of" the Act, previously-convicted sexual offenders who traveled in interstate commerce and failed to register under the Act after the Act was enacted but before the Attorney General specified that the requirements applied to that particular class of offenders were not covered by its provisions.

F. Weapons Offenses

1. Felon in Possession – Prior Conviction – Deferred Judgment

State v. Tong, 805 N.W.2d 599(Iowa 2011)
The statute prohibiting felons from possessing firearms exists to protect the public, so a prior deferred judgment for which the defendant has not yet completed probation and for which charges have not yet been dismissed is a "conviction" for which the defendant is prohibited under Iowa Code § 724.26 from possessing firearms.

2. Going Armed with Intent – Instructions

State v. Pearson, 804 N.W.2d 260 (Iowa 2011)
The marshaling instruction in a prosecution for going armed with intent must include an element of movement.

– Evidence was sufficient in *Pearson* for a rational jury to find movement, in that the defendant moved across the kitchen before hitting the victim on the head with a frying pan. Nevertheless, the instruction must be given.

G. Witness Tampering (18 U.S.C. § 1512(a)(1)(C) – Communication to a Federal Officer – Standard

Fowler v. United States, _____ U.S. _____, 131 S.Ct. 2045, 179 L.Ed.2d 1099 (2011)
To convict a defendant of witness tampering under 18 U.S.C. § 1512(a)(1)(C), the government must establish a *reasonable likelihood* that one of the persons to whom the victim would have communicated information about the defendant's criminal behavior would have been a federal law enforcement officer.

– The statute requires proof that (1) the defendant killed the victim, (2) to prevent a person from communicating, (3) to a federal law enforcement officer, (4) information about a federal crime. It explicitly provides that there is no *mens rea* requirement regarding the fact that the victim or the ultimate recipient of the information is a law enforcement officer. Writing for the majority, Justice Breyer determines, however, that to establish the *actus reus* there must be some showing that the information sought to be concealed would have gone to a federal officer. In his dissent, Justice Alito argues that the fact that the information concerns a federal crime is enough for a jury to infer that the defendant's actions would prevent the information from going to a federal officer. At the other end of the spectrum, Justice Scalia takes the position that it should be proven beyond reasonable doubt that the information would have gone to a federal officer.

III. Pre-trial Issues

A. Initiation of Charges – Federal Grand Jury – Witness Immunity

Rehberg v. Paulk, _____ U.S. _____, 132 S.Ct. 1497, _____ L.Ed.2d _____ (2012)
Witnesses in grand jury proceedings, even law enforcement witnesses, have the same absolute immunity from suit under 42 U.S.C. § 1983 that is enjoyed by other witnesses.

– Justice Alito's opinion does an excellent job of laying out the policy reasons and the historical basis for immunity enjoyed by various participants in the system. If anything, there is a greater need for immunity for law enforcement witnesses because of the potential that the threat of suit may chill their willingness to perform their duties.

Rehberg, the petitioner, attempted to draw the distinction that investigator Paulk was the "complaining witness." That may have some significance, Justice Alito explained, in the filing of charges, etc., but there is no meaningful distinction when it comes to testifying before the grand jury.

B. Jurisdiction – Subject Matter Jurisdiction – Associate District Court – Habitual Offenders

State v. Bartley, 797 N.W.2d 608 (IowaApp.2011)
The habitual offender provision of Iowa Code § 902.8 merely enhances the sentence for a class "D" or class "C" felony, so an habitual offender who commits a class "D" felony is still charged with a class "D" felony, and the district associate court has subject matter jurisdiction over the case under Iowa Code § 602.6306(2).

C. Iowa Code § 804.20 – Right to Contact Family Member or Attorney – "Alone and In Private"

State v. Walker, 804 N.W.2d 284 (Iowa 2011)
Absent a particularized showing of a security risk or legitimate time constraints, the Iowa Code § 804.20 right of an arrestee to consult with his or her attorney "alone and in private" is violated by a jail procedure requiring counsel to meet with the client through a glass partition, monitored by audio and video surveillance.

– Justice Waterman cites to several federal decisions requiring contact visits between a defendant and his or her attorney. As a general matter, because an attorney is an officer of the court he or she should present no security risk.

As with other violations of § 804.20 discussed in past Supreme Court decisions, no showing of prejudice is required and the products of the violation, in this case an O.W.I. chemical test, must be suppressed.

D. Freezing Defendant's Assets

State v. Krogmann, 804 N.W.2d 518 (Iowa 2011)
The Iowa Supreme Court does not approve of the prosecutorial practice of freezing a defendant's assets for the purpose of preserving resources for restitution.

– In *State ex rel. Pillars v. Maniccia*, 3434 N.W.2d 834 (Iowa 1984), the Court held that the district court does not have the authority to enter a civil injunction prohibiting a criminal defendant from disposing of assets that may be needed for restitution. The distinction in *Krogman* was that the district court entered the order freezing the assets as part of the actual criminal case. Justice Mansfield suggests that this is a distinction without a difference. Additionally, the state does have the Iowa Code § 910.10 remedy of obtaining a lien to collect restitution that the defendant "is likely to be ordered to pay."

These observations fell short of a holding, however, because Krogmann failed to preserve error. The effect of this failure was that he was unable to use his personal assets for his criminal defense.

E. Appointment of Counsel – Contract – Limitation to Appellate Practice

Phelps v. State Public Defender, 794 N.W.2d 826 (IowaApp 2010)
Although a defense attorney signs a contract on which he checks a box relating to criminal legal services, and does not check the box specifically relating to appellate services, the State Public Defender may not deny the claim where an attorney signing such a contract is appointed to represent a defendant on appeal, as the acceptance of representation is for all criminal matters.

– Attorneys who sign the appellate limit their representation to appellate matters. Attorneys who sign the general box are not limited.

F. Discovery

1. Disclosure of Witnesses – Iowa R. Cr.P. 2.13(4) Remedies – Exclusion

State v. Richards, 809 N.W.2d 80 (Iowa 2012)
Defendant's substantial rights were not injuriously affected by the district court's exclusion of an expert witness disclosed to the state eight days before a trial that had been continued for nearly a year, where the state's case that the defendant strangled his wife was "powerful" and the testimony of the excluded physical therapist that the defendant lacked hand grip strength would not necessarily establish that he was unable to strangle her.

– In his concurrence to Justice Mansfield's opinion, Justice Appel indicated that he generally is "highly skeptical of the exclusion of relevant expert testimony offered by the defense when the expert was designated one day late unless all the alternatives had been established." In this case, however, the expert testimony "was extraordinarily weak" and "the evidence of the defendant's guilt was overwhelming."

2. Depositions – Taking Without Defendant's Permission

State v. Rainsong, 807 N.W.2d 283 (Iowa 2011)
Iowa R.Crim.P. 2.13(1) provides that the defendant in a criminal case *may* depose witnesses listed by the state in the indictment or information, not that the defendant must depose them, and where the state conducts a deposition in the defendant's absence after the defendant elects not to depose a witness, what is produced is not a valid deposition.

– One witness against Mr. Rainsong suffered from ill health and was not able to travel to Iowa from Oregon to participate in a deposition. The condition of his health was so bad that a telephone deposition, originally proposed by Mr. Rainsong, was also impractical. The state offered to fly all the parties to Oregon, but Mr. Rainsong declined. Ultimately, the state took the witness' deposition without Rainsong present under Iowa R. Crim.P. 2.13(2) which deals with preservation of the testimony of a witness unavailable to testify for trial. The deposition was not admitted however, because the state failed to obtain the court approval required under Rule 2.13(2) to proceed in this manner.

Justice Wiggins stressed in *Rainsong* that the Court interprets discovery rules liberally to promote discovery of relevant evidence. At the same time, however, the Court will not extend discovery procedures beyond what are provided for in the rules.

G. Dismissal

1. Speedy Indictment

Ennenga v. State, _____ N.W.2d _____ (Iowa 2012)
Despite the fact that a trial information has been approved by the district court and presented to the defendant, and the defendant has entered a plea based upon it within the 45-day limitation period of Iowa R.Crim.P. 2.33, the information was not "found" if it inadvertently was not filed with the clerk during that period, and counsel was ineffective in allowing the defendant to enter a plea of guilty to one count of the information and not filing a motion to dismiss.

– Justice Zager found no good cause for the delay. All of the statutory history and case law to which he cited indicate that an information (and an indictment) is "found" when it is filed. If it is not filed within 45 days it must be dismissed. If counsel fails to lodge an objection that would result in dismissal, counsel breaches an essential duty. Ennenga was prejudiced in a *Strickland* sense by the fact that he pleaded guilty to, and received a prison sentence for, a charge that would have been dismissed.

In his three-justice dissent, Justice Cady would find that an information is "found" when it is

approved by the judge and presented to the defendant, even if inadvertently it is not filed. All the purposes of the speedy trial rules were met here. The defendant had notice of the charge, and the case proceeded as if the information was timely. Does defense counsel really have a professional duty to check the clerk's file to see if the information inadvertently was not filed?

It's a good win for Attorney Gary Dickey and for Roger Ennenga, a rather bad jailhouse lawyer with a long criminal history, who stumbled into a windfall in this case. One wonders if Mr. Ennenga's trial information wasn't one in a stack of cases presented to a judge on a particular day back in 2005 that never made it to the clerk to be file-stamped, and if Gary Dickey was the only one to catch the error.

2. Speedy Trial – Excludable Time – Federal.

United States v. Tinklenberg, _____ U.S. _____, 131 S.Ct. 2007, 179 L.Ed.2d 1080 (2011)
All time from the time a pre-trial motion is filed through hearing on the motion or other disposition is excludable under 18 U.S.C. § 3161(h)(1)(D) in calculating the 70-day speedy trial limitation, and it does not matter that the period during which the motion was considered did or did not impact upon the scheduled trial date.

– The Sixth Circuit found that time expended in considering motions was excludable only if it pushed back the trial date. Every other jurisdiction has arrived at a different result. Justice Breyer reviewed the case law and reversed the Sixth Circuit. Justice Scalia concurred in the result, insisting that the terms of the statute are clear, so judicial interpretation was not necessary.

United States v. Tinklenberg, _____ U.S. _____, 131 S.Ct. 2007, 179 L.Ed.2d 1080 (2011)
Rule 45(a), which at the time provided that weekend days and holidays are excluded from any speedy trial limitation under the rules, local rules or any court order, does not apply to the 10-day limitation for transporting the defendant for examination or hospitalization under 18 U.S.C. § 3161(h)(1)(F), because the provision is statutory and not part of a rule, local rule or court order.

H. Pretrial Motions – Motions for Adjudication of Law Points

State v. Iowa District Court for Black Hawk County, _____ N.W.2d _____ (Iowa 2012)
Although there is no express provision in the Iowa Rules of Criminal Procedure for motions for adjudication of law points, and such motions no longer exist in civil procedure in Iowa, Iowa Rule of Criminal Procedure 2.11(2), which covers general pretrial motions, is read by the Court to authorize motions for adjudication of law points.

– The Court previously made this pronouncement in *State v. Meadows*, 696 N.W.2d 593 (Iowa 2005).

I. Competence to Stand Trial

1. Presumption of Competence

State v. Hunt, 801 N.W.2d 366 (IowaApp. 2011)
The defendant is presumed competent to stand trial so, where the testimony of expert witnesses for the government and for the defendant are in equipoise, the defendant is competent.

2. Standard

State v. Neitzel, 801 N.W.2d 612 (IowaApp.2011)
Despite findings by a psychologist hired by the defendant that he possesses deficient memory and reporting skills, the defendant is competent to stand trial where there is no showing that the defendant lacked the capacity to appreciate the charge against him, to understand the proceedings and to assist effectively in his defense.

3. Competency to waive *Miranda* – State's right to independent examination

State v. Rodriguez, 807 N.W.2d 35 (Iowa 2011)
Although the rules of criminal procedure do not provide that the state is entitled to an independent examination of a defendant who claims that he or she was mentally incompetent to waive the Fifth Amendment protections of *Miranda*, the district court has the authority, as part of its responsibility to provide a fair trial for all parties, to order the defendant to submit to an independent examination, but the examiner is authorized only to testify as to an opinion concerning the defendant's competence and not about any incriminating statements or evidence arising from the evaluation.

J. Material Witness Detention – Length of Detention

In the Matter of Marshall; State v. Marshall, 805 N.W.2d 145 (Iowa 2011)
Because the plain language of Iowa Code § 804.11 permits law enforcement with probable cause to believe that a person is a material witness to a felony to arrest that witness if "such person might be unavailable for service of a subpoena," law enforcement may hold the person only long enough to serve the witness with a subpoena.

– Comparison of the Iowa statute with that of other jurisdictions, including the United States federal statute, is not entirely instructive, because of the unique wording of § 804.11. Justice Appel declined to rule on Mr. Marshall's constitutional challenges, because the case was decidable on a non-constitutional ground using a number of rules of statutory construction, including the rules that material witness statutes are narrowly construed, that the court attempts to apply the "fair meaning of the statute" without extending its reach beyond its express terms, and the Court attempts to avoid absurd results.

Joined by two other Justices, the Chief Justice dissented. The determination that the witness might be unavailable for service of a subpoena is the starting point, he argued. Further detention is not precluded if there is concern that the witness will not honor the subpoena.

IV. Trial Issues

A. Jury Selection

1. Improper Questioning

State v. Hunt, 801 N.W.2d 366 (IowaApp.2011)
The district court does not abuse its discretion in declining to grant mistrial during jury selection where the prosecutor presents a hypothetical question to the jury in which a hypothetical child tells another child, "I'm going to kill you," which was language used by the defendant in the case at trial, especially where the hypothetical illustrated that a person may make such a statement without actually harboring an intent to kill.

2. Peremptory Challenges – Erroneous Denial – Prejudice

State v. Mootz, 808 N.W.2d 207 (Iowa 2012)
The erroneous denial of a peremptory challenge is automatically reversible, and no showing of prejudice is necessary.

– There is no constitutional right to a peremptory challenge. Parties are guaranteed a specific number of challenges under IowaR.Crim.P. 2.18(9). The state attempted to apply the standard of *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1994) that eliminated the presumption of prejudice where the court erroneously denied a challenge for cause, and the defendant was forced to exercise peremptory challenges. Under *Neuendorf*, the defendant is only prejudiced where, after all peremptory challenges are exercised, a biased juror remained on the panel.

Justice Zager distinguished *Neuendorf*. It is constitutionally-based while the denial of peremptory challenges involves a rule. Where a peremptory challenge is denied, the striking party is forced to keep a juror he or she feels is not right for the case. Under the *Neuendorf* scenario, if a party is unable to strike a juror for cause, he or she can exercise a peremptory strike. If the number of erroneous denials of challenges for cause exceeds the number of available peremptory challenges, the party is prejudiced under *Neuendorf*.

B. Evidence and Witnesses

1. Confessions – corroboration -- Iowa R. Crim.P. 2.21(4)

State v. Meyers, 799 N.W.2d 132 (Iowa 2011)
Letters between the defendant, while in custody, and the victim of an alleged sex abuse, the testimony of witnesses who observed the defendant and the victim behaving romantically at a party, the defendant's admissions to a social worker and the defendant's prior convictions of sex offenses involving the same victim, all corroborate the defendant's admissions and render the evidence sufficient to convict the defendant of sexual abuse.

– Admissions made by the defendant are functionally the same as a confession for the purpose of the application of Rule 2.21(4).

2. Relevance

a. Prejudicial Evidence – Iowa R.Evid. 5.402 and 5.403

State v. Hunt, 801 N.W.2d 366 (IowaApp.2011)
The district court does not abuse its discretion in permitting the state to introduce multiple sets of gruesome photographs of the victim in a prosecution for attempted murder and willful injury where (1) the nature of such charges is inherently gruesome so photographs would necessarily be gruesome, and (2) the gruesome nature of the offense was already obvious in testimony of witnesses at the trial.

b. Iowa R. Evid. 5.404(b) – Prior Bad Acts

State v. Richards, 809 N.W.2d 80 (Iowa 2012)
Statements made two days before the victim's death that the defendant intended to kill her are relevant in a prosecution for murder.

State v. Richards, 809 N.W.2d 80 (Iowa 2012)
Evidence of defendant's recent alcoholism is relevant in a prosecution for the murder of his wife in view of evidence that his use of alcohol was a source of conflict between them.

State v. Richards, 809 N.W.2d 80 (Iowa 2012)
Evidence that defendant physically abused his wife is relevant and probative in a prosecution for murder where the wife was the victim, where the defendant denies that he is the person who caused her death.

3. Impeachment – Iowa R. Evid. 5.609

a. Crimes of Dishonesty or False Statement

State v. Harrington, 800 N.W.2d 46 (Iowa 2011)
Convictions for theft and for burglary with the intent to commit a theft are crimes of dishonesty or false statement for the purpose of the application of the impeachment rule of Iowa R.Evid. 5.609(a)(2).

b. Balancing Prejudice and Probative Value

State v. Harrington, 800 N.W.2d 46 (Iowa 2011)
The district court must admit evidence of prior convictions involving dishonesty or false statements during the testimony of the defendant, and does not engage in the prejudice/probative value weighing of Iowa R.Evid. 5.609(a)(2).

– This is the way the rule is written. The general rule of Iowa R.Evid. 5.609(a)(1) is that evidence of any offense carrying a penalty of more than a year is admissible for impeachment except that, if the witness is the defendant, the court must determine "that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." The specific rule of Rule 5.609(a)(2) is that "[e]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." There is no exception to Rule 5.609(a)(2) involving the defendant as a witness. Mr. Harrington, whose illustrious career as a burglar extends back to my early Appellate Defender days, based his argument on *State v. Axiotis*, 569 N.W.2d 813 (Iowa 1997) in which the Court appeared to hold that the balancing test must be conducted in every case. To the extent that *Axiotis* requires a balancing where the prior conviction is one of dishonesty or false statement, Justice Zager ruled in his first written Supreme Court opinion, *Axiotis* is overruled.

State v. Redmond, 803 N.W.2d 112 (Iowa 2011)
The district court abused its discretion in permitting the state to impeach a defendant charged with indecent exposure with a prior conviction of first-degree harassment where the probative value of the prior conviction did not outweigh its prejudicial effect.

–Justice Zager's opinion in *Redmond* is a thoughtful discussion of the parameters of Iowa Rule of Evidence 5.609(a)(1) which, following the federal rule, now permits impeachment using prior convictions not involving dishonesty. The rule does not permit wholesale admission of prior convictions and, where the witness is the defendant, the balancing test must be taken seriously. The *Redmond* opinion provides detailed guidance on how to measure probative value[2] and prejudice[3] in applying the balance.

[2]Justice Zager cited the "five common circumstances employed in federal court" as being "(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the degree of similarity between the past crime and the charged crime, (4)

While it is a better practice for the district court to make on-the-record findings concerning the admissibility of a Rule 5.609(a)(1) prior conviction, the district court's failure to do so was not reversible.

c. Preservation

State v. Derby, 800 N.W.2d 52 (Iowa 2011)
In order to preserve error on a claim that impeachment evidence was not proper under Iowa R.Evid. 5.609, it is not sufficient that the defendant raised the claim in a motion in limine, as the defendant must actually testify at trial and be impeached using the questionable evidence.

– The first written opinion by my law school classmate, Justice Thomas Waterman, goes against us. The Court held in *State v. Brown*, 569 N.W.2d 113 (Iowa 1997) that the defendant must actually testify and be impeached at trial to preserve Rule 5.609 error. Mr. Derby saw some hope in the 2001 decision in *State v. Daly*, 623 N.W.2d 799 (Iowa 2001), in which the Iowa Court declined to follow the United States Supreme Court holding in *Ohler v. United States*, 529 U.S. 753 (2000) that a defendant waives Rule 609 error if he or she testifies at trial and preemptively admits to the prior conviction. The *Daly* court found that the ruling in limine is sufficient, and the defendant need not re-object at trial. Mr. Derby believed that it should follow that, once he obtained a pre-trial ruling, he need not subject himself to prejudicial cross-examination at trial to be able to appeal. Justice Waterman refused to extend *Daly* that far. It would be too speculative, he wrote, to assume that the admission of prior convictions would prejudice the defendant sufficiently to warrant a new trial.

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the importance of the defendant's testimony, [and] (5) the centrality of the credibility issue."

[3]The two main risks of admitting prior-crimes testimony are (1) that the jury may draw from the prior offense a conclusion that the defendant has the propensity to commit the charged offense, and (2) that the jury may conclude that the defendant is a bad person, and may wish to punish the defendant for this.

4. Hearsay

a. Iowa R.Evid. 5.801(c) – Hearsay Defined

(1) Proof of the Truth of the Matter Asserted – Explanation for Police Investigation

State v. Elliott, 806 N.W.2d 660 (Iowa 2011)
While the admission of testimony that the focus of the examination changed after witnesses gave inconsistent statements may be non-hearsay, testimony concerning the details of what the declarants told law enforcement may be hearsay.

– The district court must determine whether the evidence is offered truly to explain the conduct of the investigation or to prove the matter asserted. The reviewing court makes "an objective finding based on the facts and circumstances developed by the record as to what is the *real* purpose of the testimony."

The evidence in question were the declarations of a young boy who witnessed the defendant in the company of an infant who subsequently died of head injuries. The three witnesses who did testify were the child's mother and two other adults who initially told police that the child was with the mother and not the defendant, a walk-away from Fort Des Moines. Each was a potential source of the child's injuries. When the young boy told police the child was with Elliott, the other three changed their stories.

The state also attempted to justify admission as an Iowa R.Evid. 5.612 writing to refresh memory, an Iowa R.Evid. 5.801(d)(1)(A) prior inconsistent statement, and an Iowa R.Evid. 5.803(5) memorandum or record concerning a matter about which the witness one had recollection. Each of these exceptions apply, however, only where the declarant testifies.

(2) Prejudice – Cumulative Evidence

State v. Elliott, 806 N.W.2d 660 (Iowa 2011)
Even where inadmissible hearsay may be cumulative to other testimony and live witnesses, its admission is prejudicial where even the state admits that the other witnesses lack credibility and attempts to bolster the credibility of the declarant, especially where the outcome of the trial was determined largely by the credibility of the witnesses.

b. Exceptions

(1) Iowa R. Evid. 5.803(2) (Excited Utterances)

State v. Richards, 809 N.W.2d 80 (Iowa 2012)
In a prosecution for murder where the victim was the defendant's wife, the wife's statement to her daughter that the defendant had put a cane to her neck was admissible as an excited utterance where the victim "was upset and crying" when she made the statement, and her "neck was red."

(2) Iowa R. Evid. 5.803(3) (Existing Mental, Emotional, or Physical Condition)

State v. Richards, 809 N.W.2d 80 (Iowa 2012)
In a prosecution for murder where the victim was the defendant's wife, the wife's statements to her daughter that she feared the defendant and wanted to find somewhere else to live are admissible as statements of the witness' existing mental, emotional or physical condition that are admissible under Iowa R.Evid. 5.803(3).

(3) Iowa R.Evid. 5.803(4) (Statements for Purposes of Medical Diagnosis)

State v. Neitzel, 801 N.W.2d 612 (IowaApp. 2011)
Statements of a 7-year-old victim of alleged sexual abuse to a nurse and a social worker, who she believed she was visiting "for her 'ouchie,'" that describe sexual activity between herself and her 16-year-old babysitter, the defendant, were made for the purpose of receiving medical diagnosis and treatment and are thus excepted from the application of the hearsay rule.

– Judge Vogel also determined that the child's report had circumstantial guarantees of trustworthiness that justify their admission under the residual clause of Iowa R.Evid. 5.807. Apparently, Neitzel did not raise a Confrontation Clause argument under *Crawford v. Washington.* Most likely, the Court would have deemed the victim's statements non-testimonial, for the reasons set out in the hearsay analysis.

C. Conduct of Trial

1. Cross-Examination – District Court Discretion

State v. Buchanan, 800 N.W.2d 743 (IowaApp.2011)
The district court does not abuse its discretion in denying defendant's request to cross-examine a law enforcement witness about a subsequent incident in which the officer shot and killed a suspect during a struggle, along with the fact that the officer received counseling for stress and was at least temporarily assigned to investigate property crimes, where these facts had little relevance to the current prosecution and the danger of unfair prejudice outweighed any potential probative value.

– While the Court of Appeals found the defendant's bill of exceptions to be sufficient to present facts necessary to resolve the question, the Court expressed disapproval that the district court denied the defendant the opportunity to make an offer of proof. While excessive offers of proof may be disruptive,

"refusal to permit the making of an offer of proof is usually error." It may not be *reversible* error, however, if the appellate court is able to determine from the record made what its contents would be.

2. Jury Questions

State v. Buchanan, 800 N.W.2d 743 (IowaApp.2011)
It is proper for the district court to permit jurors to ask questions of witnesses where (1) the court accepts the jury's questions in writing, (2) the court determines which questions are permissible, (3) the parties have the opportunity to object prior to the questions being asked, (4) the court poses the questions to the witness, and (5) the parties are given an opportunity to further examine the witness, so if these procedures are followed trial counsel is not ineffective in failing to object.

– The Iowa Supreme Court approved the practice of juror questions in *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980). But *Rudolph* was a civil case, and *Buchanan* is the first extension to criminal trials. Judge Danilson noted that *Rudolph* cited five other jurisdictions in which juror questions are allowed in criminal cases.

3. Motion for Mistrial – Mention of Defendant's Prior Convictions

State v. Hunt, 801 N.W.2d 366 (IowaApp.2011)
The district court does not abuse its discretion in denying mistrial where a prosecution witness briefly mentioned the defendant's OWI convictions where (1) the defense had discussed in some detail the defendant's struggles with alcohol and drug abuse and (2) the reference was not a persistent effort to inject inadmissible information into the trial that demonstrably denied the defendant a fair trial.

4. Prosecutorial Misconduct – Denial of Fair Trial

State v. Krogmann, 804 N.W.2d 518 (Iowa 2011)
The prosecutor's improper question to the defendant, "Have you shot anyone today?" in addressing the defendant's defense that his assault on the victim was a product of bipolar disorder did not entitle the defendant to a new trial where the court sustained the defendant's objection, the question was withdrawn, and the defendant did not ask for a mistrial, where the question, though improper, related to a legitimate trial issue, and where the evidence against the defendant was substantial.

D. Motion for Judgment of Acquittal – Sufficiency

State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)
In a prosecution for unlawful possession of a prescription drug, trial counsel's general motion for judgment of acquittal was insufficient to preserve the specific argument that the evidence was insufficient to establish that the pills found in the defendant's possession were, in fact, a prescription drug.

E. Jury Deliberations – Jury Misconduct – Proof – Juror Affidavits

State v. Blair, 798 N.W.2d 322 (IowaApp.2011)
The fact that the jury improperly considered the defendant's failure to testify at trial came from jurors' observations during trial, and not from an extrajudicial source, so affidavits attesting to this fact are not admissible under Iowa R.Crim.P. 5.606(b).

F. Post-trial Motions – Motion for New Trial – Weight of the Evidence

State v. Root, 801 N.W.2d 29 (IowaApp.2011)
In ruling on an Iowa R.Crim.P. 2.24(2)(b)(6) motion for new trial, the court determines whether the jury verdict is against the weight of the evidence and not whether there was sufficient evidence to submit the case to the jury, so a district court determination that the verdict was "supported by competent evidence" is ambiguous as to which standard is being utilized, and the ruling is vacated and remanded to assure that the district court applies the correct standard.

V. Sentencing

A Particular Sentences

1. Deferred Judgment

a. Revocation – Remedies

State v. Keutla, 798 N.W.2d 731 (Iowa 2011)
Where the defendant serving a term of probation on a deferred judgment violates the conditions of release, the district court has the authority under Iowa Code § 908.11(4) either to continue the defendant on probation but impose a jail term for contempt of court or to revoke the deferred judgment and impose a sentence on the original conviction, but does not have the statutory authority to do both.

– Section 908.11(4) sets out four options from which the court must choose where the defendant violates the conditions of a deferred judgment. The district court must select one. In Ms. Keutla's case, the district court selected two, which is not permitted under the statute.

b. Effect

State v. Tong, 805 N.W.2d 599(Iowa 2011)
The statute prohibiting felons from possessing firearms exists to protect the public, so a prior deferred judgment for which the defendant has not yet completed probation and for which charges have not yet been dismissed is a "conviction" for which the defendant is prohibited under Iowa Code § 724.26 from possessing firearms.

– Whether a prior deferred judgment is a "conviction," Justice Mansfield explains, depends upon whether it is being used to protect the public or to enhance punishment. It is for the former, but it is not for the latter. On the very same day, the Court addressed in *Daughenbaugh v. State*, 805 N.W.2d 591(Iowa 2011), the question of whether a prior deferred judgment is a

conviction that may be challenged in a postconviction relief proceeding. It is not.

Mr. Tong had not yet completed probation and not yet had his original burglary charge dismissed when he was charged under § 724.26. Would it make a difference if he had? In a special concurrence, Justice Wiggins reads the majority opinion as a clear statement that no person who pleads guilty expecting a deferred judgment may ever possess a firearm in Iowa. That conclusion is less clear to me. Certainly, the reference by Justice Mansfield to the § 724.26 firearm prohibition for persons adjudicated delinquent as juveniles, as being a suggestion that behavior underlying a deferred judgment should be enough, is a signal that Justice Wiggins is correct. On the other hand, Justice Mansfield notes in a footnote the provision of Iowa Code § 724.27 that § 726.26 does not apply where the defendant's conviction has been expunged. This is a question that will have to be answered in the future.

2. Consecutive Sentences – Federal

Setser v. United States, _____ U.S. _____, 132 S.Ct. 1463, _____ L.Ed.2d _____ (2012)
The federal sentencing court has the authority to order a sentencing in a pending case to run consecutively to a sentence that has not yet been imposed.

– The Code and the Guidelines discuss the Court's authority to run a current sentence consecutive to or concurrent with a prior or contemporaneous sentence in another case. They are silent with respect to sentences that have not yet been imposed. Justice Scalia recognizes that the final say is going to be in the hands to the judge who sentences the defendant in the later case. That judge may or may not accede to the wishes of the original sentencing judge.

Justice Breyer authored a three-justice dissent. There is no statutory authority for what the majority finds, he argues. The Bureau of Prisons, and not the sentencing judge, has the functional authority to decide whether the original sentence is consecutive to or concurrent with the subsequent sentence by exercising its designation power. The Bureau may designate the defendant to a state correctional facility, effectively making the sentence concurrent.

3. Restitution – Costs of Extradition

State v. Watson, 795 N.W.2d 94 (IowaApp. 2011)
Because there is no language in the Iowa Code authorizing the collection as restitution of the costs of extraditing the defendant into Iowa, the district court errs in requiring the defendant to repay, as restitution, extradition expenses.

4. Fines – Law Enforcement Initiative Surcharge

State v. Rodriguez, 804 N.W.2d 844 (Iowa 2011)
Because the language of Iowa Code § 911.3, establishing a $125 law enforcement initiative surcharge for certain enumerated offenses, does not include reckless vehicular manslaughter as an enumerated offense, there is no authority to impose the surcharge after conviction of that charge.

B. Time Credited to Sentence – Home Supervision with Electronic Monitoring

Anderson v. State, 801 N.W.2d 1 (Iowa 2011)
Because Iowa Code § 907.3(3) expressly provides that a defendant who has his or her probation revoked receives credit for time under the supervision of the Department of Correctional Services, the defendant is entitled to credit for time served in home supervision with electronic monitoring under the direction of the D.P.S.

– Justice Waterman characterized as "counter-intuitive" a holding that a defendant should get prison credit for time served living at home. Virtually every other jurisdiction goes the other way. The difference in Iowa, Justice Waterman explains, is the unequivocal language of the statute that is dissimilar from that of most other states.

Four of the five Iowa Code § 901B.1 levels of sanctions involve supervision by the DCS, so this decision could operate as a windfall for defendants seeking credit towards their sentences.

C. Resentencing – Presumption of Vindictiveness

State v. Harrington, 800 N.W.2d 46 (Iowa 2011)
Although, in resentencing a defendant on remand following an appellate reversal, the district court applies sentencing enhancements not applied in the original sentence, the presumption of judicial vindictiveness of *North Carolina v. Pearce*, 395 U.S. 711 (1969) does not apply where the defendant's aggregate sentence is lower than the original sentence.

– The defendant is still free to argue actual vindictiveness, if it is supported by the evidence. The focus on the aggregate sentence follows the majority of jurisdictions that have considered the issue. Harrington pointed out that many of these are federal jurisdictions, in which the defendant receives a single sentence for all counts. In his unanimous opinion, Justice Hecht elected nevertheless to follow the majority. The rule of *Pearce*, that a higher sentence on remand generated a presumption of vindictiveness, has softened over the years, and the presumption does not apply where there is not a reasonable likelihood of vindictiveness.

D. Federal Sentencing

1. Enhancements for Prior Offenses – Armed Career Criminal Status (18 U.S.C. § 924(e))

a. Prior "Serious Drug Offense"

McNeill v. United States, _____ U.S. _____, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011)
To qualify as a "serious drug offense" prior offense giving rise to Armed Career Criminal status under 18 U.S.C. § 924(e)(2)(A)(ii), the offense must have carried a maximum term of imprisonment of ten years or more at the time it was committed, and the fact that the jurisdiction in which it was committed subsequently reduced the maximum penalty below ten years does not affect its status as a qualifying prior conviction.

b. Prior Crime of Violence

Sykes v. United States, _____ U.S. _____, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011)
The offense of fleeing from a police officer using a motor vehicle inherently "presents a serious potential risk of physical injury to another," and is thus a violent felony for the purpose of establishing Armed Career Criminal status.

– A prior offense is a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(I), or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The "otherwise involves" inquiry is the operative question here. The Court has approached the question in various ways over the past few years. In other cases, the Court has suggested that a prior offense meets the test if it involves "purposeful, violent, and aggressive" behavior. This analysis has been questioned because this language appears nowhere in the statute. Justice Thomas acknowledged the criticism, but did not necessarily overrule prior cases in which the language appeared. To the extent that it still has validity, the language applies more to strict liability offenses. The test that Justice Thomas did utilize was a comparison to the enumerated offenses (burglary, arson, etc.) to determine whether the offense under consideration presents as much or a greater risk of injury than they do. Justice Thomas used statistical evidence to establish that eluding causes more injuries to bystanders and police than burglary and arson.

Justice Scalia dissented, repeating the argument he has made in the past that the § 924(e) definitional section is fatally vague and that Congress needs to rewrite the statute. In her dissent, Justice Kagan took the position that mere eluding with a vehicle does not inherently

create risk of injury. Other alternatives in the Indiana State Code under which Mr. Sykes was charged previously contain elements that would place the offense within the § 924(e) definition.

2. Reasons for Sentence – Improper Reasons – Rehabilitation – Federal

Tapia v. United States, _____ U.S. _____, 131 S.Ct. 2382, 180 L.Ed.2d 357 (2011)
Pursuant to language in 18 U.S.C. § 3582(a) that, imposing a term of imprisonment, the court must recognize "that imprisonment is not an appropriate means of promoting correction and rehabilitation," it is improper for the court to either impose prison or increase the length of a prison sentence for the purpose of promoting rehabilitation.

– The Federal Sentencing Act was a reaction to the sentencing scheme that had existed previously under which defendants received indeterminate sentences, presumably were subject to correctional treatment, and then were released when they were determined to have been rehabilitated. The perception of Congress was that the rehabilitation model had failed, and the Court sees provisions such as § 3582(a) as Congress' efforts to purge rehabilitation completely as a ground for imposing prison. The Court gives very brief, and from my perspective unsatisfying, lip service to 18 U.S.C. § 3553(a)(2)(D), that requires the sentencing court to consider "the need for the sentence imposed. . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Tapia* renders this language superfluous to some degree, unless it simply refers to non-incarceration sentences.

Justice Kagan notes that the Court is silent on whether *Tapia* applies to sentences *reduced* to further rehabilitation. Also, the Court makes it clear that there is nothing improper with the sentencing courts making recommendations for treatment and encouraging the defendants' rehabilitation, provided they do not base their sentencing decisions on these factors.

3. Resentencing – Federal – Retroactive Change in Sentencing Guidelines

Freeman v. United States, _____ U.S. _____, 131 S.Ct. 2685, 180 L.Ed.2d 519 (2011)
18 U.S.C. § 3582(c)(2), that permits a defendant to file for a sentencing reduction based upon a favorable amendment in the United States Sentencing Guidelines that is made retroactive, may be available to a defendant who was sentenced pursuant to a Federal R.Crim.P. 11(c)(1)(C) agreement to a specific term of incarceration, where the sentencing court's acceptance of the agreement was based upon the fact that the agreed-upon sentence was keyed to the applicable guideline range.

– Justice Kennedy's opinion in *Freeman* was a plurality opinion. Justice Sotomayor concurred, but limited her agreement to plea agreements such as Freeman's that are expressly based upon the applicable

sentencing guideline range.

VI. Appeal and Collateral Review

A. Direct Appeal

1. Preservation of Error

a. Constitutional Issues – State v. Federal

State v. DeWitt, _____ N.W.2d _____ (Iowa 2012)
Where an appeallant raises a constitutional issue without specifying whether he or she is relying upon the state constitution, the federal constitution or both, the appellate court may review the issue under both constitutions.

– Where, however, the appellant specifically refers to the federal provision, and provides no reason why the state court should adopt a different analysis, the Court will review the issue only on federal grounds.

State v. Harrington, 800 N.W.2d 46 (Iowa 2011)
Where there are parallel provisions in the State and federal constitutions, and the defendant does not specify which of the two constitutions he or she is relying upon, the Court considers that the issue had been preserved under both.

b. Motions in Limine

State v. Derby, 800 N.W.2d 52 (Iowa 2011)
In order to preserve error on a claim that impeachment evidence was not proper under Iowa R.Evid. 5.609, it is not sufficient that the defendant raise the claim in a motion in limine, as the defendant must actually testify at trial and be impeached using the questionable evidence.

c. Sufficiency of Objection

State v. Krogmann, 804 N.W.2d 518 (Iowa 2011)
Defendant fails to preserve for appeal his objection to the order of the district court freezing his assets for restitution where the defendant first learns of the state's request after it is granted by the court, and does not request a hearing or seek dissolution of the order.

– Had he requested one, Mr. Krogmann would have been entitled to a hearing, and the court would have considered a motion to dissolve the order. It wasn't enough that he articulated his arguments in his motion for discretionary review because, even though an informational copy was provided to the district court, the discretionary review motion is addressed to the appellate court. His post-trial motion for new trial also was not a proper vehicle for making his objection..

2. Standards of Review

a. Restitution

State v. Watson, 795 N.W.2d 94 (IowaApp. 2011)
Where the defendant challenges, not the district court's collection of restitution, but rather whether the district court has the authority to collect restitution, the challenge is reviewed for legal error.

b. Ineffective Postconviction Counsel

Lado v. State, 804 N.W.2d 248 (Iowa 2011)
While the right of counsel in postconviction proceedings is derived from statute, and not the constitution, claims of ineffective assistance of postconviction counsel are nevertheless subject to *de novo* review.

B. Postconviction Relief

1. Availability

a. Ineffective Assistance of Counsel

State v. Utter, 803 N.W.2d 647 (Iowa 2011)
Because defense counsel breaches an essential duty in failing to move to dismiss charges against the defendant where the trial information was filed beyond the 45-day limitation of Iowa R. Crim.P. 2.33(2)(a), and the defendant was clearly prejudiced in that the motion would have been granted and the prosecution would have been dismissed, and where there is no possibility that counsel may have declined to file the motion as part of an agreement by the state not to file other charges, the court may vacate the conviction on ineffective assistance grounds on direct appeal, and need not preserve the issue for postconviction relief.

b. Law of the Case

State v. Ragland, _____ N.W.2d _____ (Iowa 2012)
It is an exception to the principle that issues previously decided, correctly or wrongly, become the law of the case arises where the law is subsequently explained in a manner that appears to be beneficial to the applicant.

– Jeffrey Ragland moved to correct what he argued was his illegal 1986 life sentence for felony murder in the first degree. He raised two grounds. First, he raised the *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) issue that the predicate felony was willful injury, and felony murder requires an independent felony. Second, he was a juvenile when the offense was committed, and the subsequent decision in *Veal v. State*, 779 N.W.2d 63 (Iowa 2010) held that a sentence of life without parole for a crime committed as a juvenile was cruel and unusual punishment.

Mr. Ragland had raised both issues before. He had not raised the Eighth Amendment issue after *Veal*, however, so the Court reversed the summary denial of relief and remanded the

case for consideration in light of *Veal.* He had raised the independent felony argument after *Heemstra*, and *Heemstra* was determined to be prospective only in *Goosman v. State*, 764 N.W.2d 539 (Iowa 2009). So the door is closed on that issue.

c. Deferred Judgments

Daughenbaugh v. State, 805 N.W.2d 591(Iowa 2011)
Defendant who is granted a deferred judgment, successfully completes probation and has his or her case dismissed does not have a final conviction, and may not challenge the conviction leading to the deferred judgment in a postconviction relief proceeding.

– Even a deferred judgment has some collateral consequences, especially in the federal system. Mr Daughenbaugh was a pharmacist who found out that he could not participate in Medicare, Medicaid or any other federal program after receiving a deferred judgment for stealing prescription drugs. He attempted, unsuccessfully, to have the deferred judgment vacated on ineffective assistance grounds.

Different jurisdictions take various positions on the status of deferred judgments, generally based upon particular statutory language. They are well-summarized in the majority opinion in *Daughenbaugh*. Justice Appel elected to define "conviction" in the strict legal sense (which in Iowa requires judgment and sentence) as opposed to what would be dictated by general popular understanding.

2. Procedures – Preservation of Error – Ineffective Assistance

State v. Utter, 803 N.W.2d 647 (Iowa 2011)
Because defense counsel breaches an essential duty in failing to move to dismiss charges against the defendant where the trial information was filed beyond the 45-day limitation of Iowa R. Crim.P. 2.33(2)(a), and the defendant was clearly prejudiced in that the motion would have been granted and the prosecution would have been dismissed, and where there is no possibility that counsel may have declined to file the motion as part of an agreement by the state not to file other charges, the court may vacate the conviction on ineffective assistance grounds on direct appeal, and need not preserve the issue for postconviction relief.

C. Federal Habeas Corpus

1. Preservation of Error – Ineffective Assistance – Collateral Review

Martinez v. Ryan, _____ U.S. _____, 132 S.Ct. 1309, _____ L.Ed.2d _____ (2012)
While ineffective assistance of postconviction counsel is not a ground for habeas relief, where state procedures require that claims of ineffective assistance of trial counsel be raised for the first time during collateral postconviction review, counsel's deficient failure to properly preserve error during initial collateral review may constitute cause, allowing the claim to be raised for the first time in federal habeas corpus proceedings.

– Unpreserved claims may be raised in habeas if the petitioner demonstrates cause for not raising them at the state level, as well as prejudice. Ineffective postconviction counsel is not a ground for relief. Ineffective trial counsel is. If counsel during the initial collateral review is deficient in not preserving a valid claim of ineffective trial counsel, the petitioner may raise the ground of ineffective trial counsel for the first time in habeas.

2. Extent of Review

a. Federal Review of State Factual Findings.

Cavazos v. Smith, _____ U.S. _____, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011)
Although the federal court reviewing state homicide trial proceedings in Habeas is persuaded that, following a battle of expert witnesses, the state did not prove beyond reasonable doubt that the victim died from Shaken Baby Syndrome as opposed to Sudden Infant Death Syndrome, the federal court may not substitute its judgment for that of the state court where any reasonable trier of fact could conclude that the elements of the offense had been proven.

– The Ninth Circuit was adamant about this one. This is the third time the Ninth has attempted to vacate Ms. Smith's conviction of child abuse causing death, and the third time the Supreme Court has sent the case back down. Justice Ginsburg wondered in her three-justice dissent why the Court bothered to take the case, as there is no new issue raised and the function of the Supreme Court is not necessarily as a court of error preservation.

Ms. Smith was sleeping next to her grandson. When they woke up, the grandson was having some difficulty, and died a few days later. Despite the absence of a large amount of intracranial bleeding, bloodshot eyes and other indicia of abuse, three government expert witnesses testified that the boy died of shaken baby syndrome. Two defense witnesses disputed this. There was no corroborating evidence that, for example, the boy was crying excessively

or that anyone saw the grandmother treat the boy in a rough manner. One government witness testified that the grandmother questioned, in so many words, "Did I do that?" when the injuries were discovered. According to all accounts, Ms. Smith was nothing other than a loving grandmother. She had served ten years of her fifteen year minimum sentence.

This case doesn't give us much in the way of law, but there is a lot of helpful guidance from Justice Ginsburg in her dissent for attorneys defending shaken baby cases. There is a lot of ammunition available now that was not developed in 1996, which Ms. Smith was first charged.

b. Review of State Findings on Questions of Law

Hardy v. Cross, _____ U.S. _____, 132 S.Ct. 490, 181 L.Ed.2d 468 (2011)
In finding that, prior to retrial following a hung jury, the State made sufficient efforts to obtain the presence of a key witness who testified and was subject to cross examination at the first trial, justifying a finding that the witness was unavailable and permitting the reading to the jury of the witness' testimony during retrial, the state court did not unreasonably apply established federal law.

Bobby v. Dixon, _____ U.S. _____, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011)
The state court does not decide a federal issue in violation of clearly established federal law in finding that law enforcement did not violate *Miranda* by reinitiating interrogation after the defendant asserted his *Miranda* rights at a time the defendant was not in custody, because a defendant may not assert the *Miranda* rights anticipatorily, and a *Miranda* invocation may only be made while the defendant is in custody.

Bobby v. Dixon, _____ U.S. _____, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011)
The state court does not decide a federal issue in violation of clearly established federal law in finding that the Fifth Amendment is not violated when law enforcement makes false claims to the defendant that his codefendant has cooperated in order to elicit cooperation from the defendant.

Bobby v. Dixon, _____ U.S. _____, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011)
The state court does not decide a federal issue in violation of clearly established federal law in finding that a confession was involuntary under *Oregon v. Elstad*, 470 U.S. 298 (1985), which prohibited the practice of eliciting a confession in violation of the Fifth Amendment and then giving the defendant the *Miranda* warnings to obtain the same confession, where the defendant did not admit the charged offense in the initial confession, but then did admit it after receiving the *Miranda* warnings.

Greene v. Fisher, _____ U.S. _____, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011)
For the purpose in determining whether the state court finding that the introduction of a co-defendant's statement in which the defendant was implicated using substituted words like "blank" or "some guy" violated the Confrontation Clause, the United States Supreme Court holding in *Gray v. Maryland*, 523 U.S. 185 (1998) was not "clearly Established Federal Law" where *Gray* was decided after Mr. Greene was convicted, but before the conclusion of his appeal.

– Under *Teague v. Lane*, 489 U.S. 288 (1989), a petitioner may benefit from decisions announcing new constitutional rules of procedure that are released any time before the petitioner's conviction becomes final. According to Justice Scalia, the plain reading of the Antiterrorism and Effective Death Penalty Act of 1996, however, requires the federal law to be clearly established at the time the state court adjudicates the merits of the claim. *Teague* and the AEDPA address standards to be applied in Habeas Corpus Proceedings. What Green should have done, Justice Scalia notes, was to file a petition for Certiorari raising the issue that was, at that time, pending before the Supreme Court. The AEDPA does not apply to direct review by the Supreme Court.

3. Procedures

a. Limitations

(1) Final Judgment in State Court

Gonzalez v. Thaler, _____ U.S. _____, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012)
For the purpose of calculating the one-year limitation period on the filing of Habeas Corpus, where the petitioner did not seek the final level of review at the state level, the petitioner's conviction was a final judgment on the final date that the petitioner could have requested review, and not on the date that mandate issued..

(2) Waiver by Government

Wood v. Milyard, _____ U.S. _____, _____ S.Ct. _____, _____ L.Ed.2d _____ (2012)
While the federal appellate court has the discretion, but not the duty, to raise *sua sponte* a statute of limitations defense to a Habeas Corpus petition that was forfeited by the government at the district court level (where the state simply neglected to advance the defense), it is an abuse of discretion for the court to raise the defense *sua sponte* when it has was waived by the state below.

– The appellate court should raise a forfeited claim only rarely. Joined by Justice Scalia in his concurrence, Justice Thomas argued that the court of appeals never has the discretion to consider a limitations issue that was not raised below.

b. Certificate of Appealability – Contents – Jurisdictional Nature

Gonzalez v. Thaler, _____ U.S. _____, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012)
The 28 U.S.C. § 2253(c)(3) requirement that the certificate of appealability to appeal a district court's final ruling in a habeas proceeding "shall indicate which specific issue" satisfies the required 28 U.S.C. § 2253(c)(3) "substantial showing of the denial of a constitutional right" is mandatory, but not jurisdictional, and the district court's failure to do so does not bar the appellate court from deciding the merits of a case where a specific issue is not articulated in the COA.

– A rule is jurisdictional only when it is clearly designated as a threshold limitation on its scope.

c. Procedural Default – Cause – Abandonment by Counsel

Maples v. Thomas, _____ U.S. _____, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012)
While, on postconviction review, ineffective assistance generally is not cause overcoming default on a filing deadline for a notice of appeal, the abandonment by counsel of a petitioner's Habeas Corpus proceeding during its pendency, along with counsel's failure to notify the petitioner that counsel will no longer be representing the petitioner and counsel's failure to move with the court to withdraw, provide cause for the failure to file a timely notice of appeal.

– There is no constitutional right to counsel in postconviction proceedings and thus, it follows, no right to effective assistance of counsel. So ineffective assistance is not cause for failure to preserve error in postconviction proceedings. The theory is that an attorney whose representation is not constitutionally-mandated acts as the agent for the petitioner and the attorney's acts or inaction are imputed to the petitioner. Where an attorney takes no action at all on a case, however, to the extent that the attorney essentially has abandoned the case, the Court held in *Holland v. Florida* (2010), the attorney is no longer the petitioner's agent, and the procedural default may be overcome.

d. Replacement of Counsel – Standard

Martel v. Clair, _____U.S. _____, 132 S.Ct. 1276, 182 L.Ed.2d 135 (2012)
The standard the district court should apply in ruling upon requests for replacement of counsel in habeas challenges to capital sentences, like all habeas cases, is whether replacement is in the "interest of justice."

– Justice Kagan declined the State of California's invitation to utilize a stricter standard that would permit replacement only where the defendant has, in effect, suffered a denial of counsel, where appointed counsel does not possess statutory qualifications to handle the case, where counsel has a conflict of interest, or where counsel has completely abandoned the case. Noting

that, at the district court level, the state had acquiesced in the use of the "interest of justice" standard, Justice Kagan observed that it would be questionable to apply a stricter standard to habeas actions in capital cases than in non-capital cases.

Although Mr. Clair prevailed on the correct standard to be applied, the Court reversed the finding of the Ninth Circuit that the district court abused its discretion in not replacing counsel in his case, because after Mr. Clair initially requested replacement he and his attorneys appeared to have resolved their differences and Mr. Clair renewed his request only on the eve of the release of the district court's ruling on his habeas petition.

Justice Kagan did take the district court to task for not making a more arduous inquiry into Mr. Clair's reasons for wanting new counsel. The court should always do so.

D. Appeal to Supreme Court – Mootness

Turner v. Rogers, _____U.S. _____, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011)
Non-custodial parent's challenge to the procedures that resulted in his incarceration for 12 months for failure to pay child support in a hearing in which he was not provided counsel was not moot, despite the fact that he had finished serving his time long before the case reached the Supreme Court, because the issue of the denial of counsel was capable of repetition and evasive of review.

– In Mr. Turner's case alone, he had already been incarcerated once for failure to pay child support, and it was reasonably likely that the issue would arise again in his case. Being that the largest sentence he was likely to receive was 12 months, it was virtually impossible that he would still be incarcerated by the time his challenge reached the Supreme Court.

United States v. Juvenile Male, _____ U.S. _____, 131 S.Ct. 2860, 180 L.Ed.2d 811 (2011)
The question of whether a juvenile is required, under the Sexual Offender Reporting and Notification Act, to register as a sex offender as a result of a delinquency determination that occurred prior to the effective date of the Act becomes moot when the juvenile turns 21 years old and the state court certifies that the requirement that the individual continue to register as an adult is not based upon the juvenile reporting requirement.

VII. Miscellaneous Issues

A. Electronic Records – Removal After Acquittal or Dismissal

Judicial Branch v. Iowa District Court, 800 N.W.2d 569 (Iowa 2011)
Although Iowa Code § 692.17(1) provides that "[c]riminal history data in a computer data storage system shall not include arrest or disposition data or custody or adjudication data after the person has been acquitted or the charges dismissed," docket information stored on the Iowa Court Information System need not be removed after acquittal or dismissal because (1) the docket constitutes source documents excepted from removal under Iowa Code § 692.17(2)(a), (2) the public is entitled to view public records of "any public body or agency" under Iowa Code § 692.18(1), (3) criminal history data is considered public records under Iowa Code § 22.7(9), and (4) the clerk of court is required to maintain the docket under Iowa Code § 602.8104.

– In deciding this case, Justice Mansfield recognizes that there is a conflict in the statutory provisions. The apparent legislative intent was to retain the documents. The subject of the documents in this case, referred to as J.W., pointed out that the criminal history data of defendants who received deferred judgments is removed from the data made available to the public by ICIS. Such data, Justice Mansfield explained, goes into a separate confidential file that is only available to law enforcement and court personnel.

Assuming that defendants who are acquitted and those who receive deferred judgments are similarly situated, a rational basis exists for their disparate treatment, so Justice Mansfield rejected J.W.'s Equal Protection argument.

Department of Public Safety v. Iowa District Court, 801 N.W.2d 544 (Iowa 2011)
The sole mechanism for attempting to remove data from agency records of the Department of Public Safety is through the administrative procedure provisions of Iowa Code § 692.5 and judicial review, and not through proceedings in equity in district court.

– Section 692.5 expressly limits the right of action in this manner.

B. Prisons – Remedies

1. State Tort Claims Act – Immunity – Discretionary Function

Walker v. State, 801 N.W.2d 548 (Iowa 2011)
The State is not immune from suit under the discretionary function exception to Iowa Code § 669.14 where a prison guard was exercising a discretionary function in the timing of an incident report concerning an inmate assault, but did not base his discretionary decision upon the public policy underlying the grant of that discretion.

– Kevin Walker sued the state after he was assaulted seriously by another inmate at the Clarinda Correctional Facility. He asserted that the assault upon him could have been averted had a prison guard reported an earlier assault and threat in a timely manner. The district court denied the state's motion for

summary judgment. The discretionary function exception to the Tort Claims Act, where the state is being sued for the acts and omissions of its employees, requires proof that (1) the employee's action was an exercise of discretion, and (2) the employee's actions were based upon the policy underlying the grant of authority. Under the Federal Tort Claims Act, discretionary acts by government employees are presumed to be based upon the underlying policy considerations. Justice Wiggins declined to adopt the presumption under the Iowa act.

Writing for himself and Justice Waterman, Justice Mansfield dissented from this holding. Part of his analysis was the notion that "it's hard being a prison guard. We shouldn't punish them for exercising their discretion." The flaw in this analysis is that it's not the prison guard who gets punished. It's the state. At least in this case.

Justice Wiggins also determined that the intentional tort exception does not apply. It's the state being sued for its negligence in not protecting the victim from the aggressor's intentional tort. If the prison guard commits the assault, that might fall within the exception.

2. Civil Suits for Monetary Damages

Minneci v. Pollard, _____ U.S. _____, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012)
A suit by federal inmates for damages under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) for inadequate provision of medical care in a privately-run prison facility is not appropriate where an alternative remedy exists under state tort claim provisions.

– *Bivens* recognizes a suit in federal court for monetary damages for violations of constitutional protections.[4] A suit under *Bivens* may only exist where there are no existing alternative remedies that provide adequate protection. *Wilkie v. Robbins*, 551 U.S. 537 (2007).

[4]Bivens claimed that his Fourth Amendment interests were violated by federal narcotics agents.