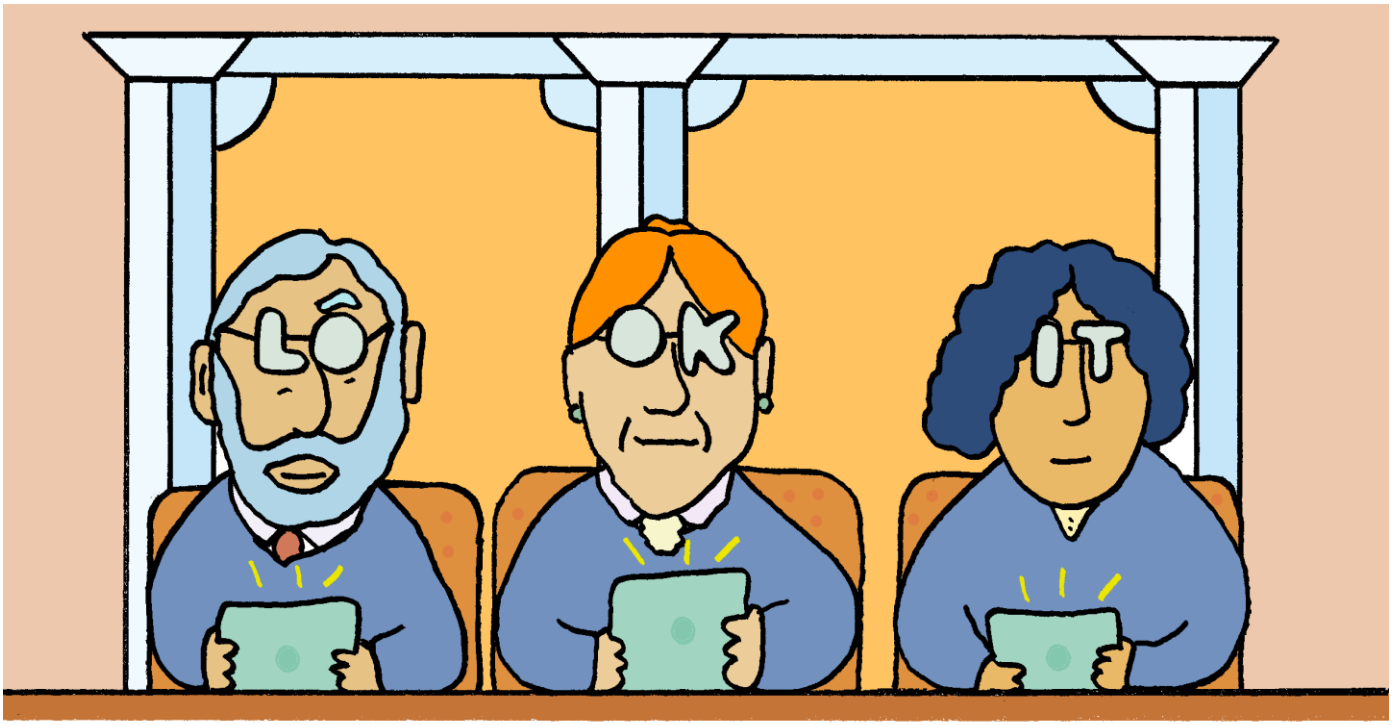
LOOKIT 2.0



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Introductory Notes

* Lookit 2.0 has been updated and reorganized for easier use. “Lookit Legal Topics” are covered in the first half of the document and the second half of the document contains the “Lookit Crimes Section” where new and relevant cases are organized by specific crimes. Please make sure to check **both** the general legal topic and the specific crime section when you research any issue.

* Please keep in mind that Lookit 2.0 does **not** include every published case on a topic so additional research may be required if you do not see what you need. The purpose of Lookit 2.0 is to provide the general case law on a specific topic or crime and a sampling of cases which address factual scenarios where those general legal principles have been applied. In many sections, a yellow box has been placed around the black letter law for that specific legal topic.

* Any published Court of Appeals case that has a petition for certiorari that has been “accepted” for review by the Colorado Supreme Court is noted in red in the case blurb with the specific issues that are currently on review. The notations will be updated as the Colorado Supreme Court issues its opinion in those cases.

* The pronouns used for any participants in a case are the same ones that were used by the court in its opinion.

* Lookit 2.0 can be accessed through the CDAC website and will be updated on the 1st of the month with any new published cases. While some older cases have been included in the Lookit 2.0 version, please use the original Lookit for cases that were published prior to 2000. The original version will remain on the CDAC website as Lookit 1.0.

* Lastly, if any errors are found or you believe a helpful published case is missing from the document, please send an email to Kathy Gillespie at the Colorado Attorney General’s Office (Kathy.gillespie@coag.gov) so that any errors or necessary additions can be addressed. Please title the email “Lookit 2.0 Correction Needed.”

A special thank you to Matt Holman, First Assistant Attorney General, for creating the original artwork!

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MISCELLANEOUS OFFENSES

I. LOOKIT LEGAL TOPICS

SEARCH & SEIZURE

FOUNDATIONAL REQUIREMENTS

Standing: Reasonable Expectation of Privacy

People v. Curtis, 959 P.2d 434 (Colo. 1998); People v. Nelson, 2012 COA 37. Standing is a prerequisite to challenge a search. Standing is demonstrated when, based on the totality of the circumstances, defendant shows a sufficient connection to the areas searched or the items seized. But defendant need not be present at the time of the intrusion to assert standing. An additional factor in determining standing is whether defendant has a possessory or propriety interest in the subject of the search.

People v. Jorlantin, 196 P.3d 258 (Colo. 2008). Absent evidence to the contrary, when defendant files a motion to suppress claiming his 4th Amendment rights were violated, the initial allegation suffices to establish that he was the victim/aggrieved party of the alleged invasion of privacy. The prosecution does not have the burden of going forward at the suppression hearing to prove defendant was the one arrested.

People v. Terrazas-Urquidi, 172 P.3d 453 (Colo. 2007). A person has standing to object a search only if the disputed search/seizure has occurred in a space in which defendant has a legitimate expectation of privacy. An expectation of privacy is legitimate only if: (1) defendant manifested a subjective expectation of privacy in the searched area, and (2) society is prepared to recognize that expectation as reasonable. There can be no reasonable expectation of privacy in a residential area that is expressly or impliedly held open to casual visitors. *Here:* police approached a shed occupied by defendant, which was located behind a residence, and knocked on the door. Because defendant impliedly held open the area outside the shed door to casual visitors, he lacked a legitimate expectation of privacy in this area and could not complain that the officers' presence violated his 4th Amendment rights.

People v. Galvadon, 103 P.3d 923 (Colo. 2005). General concepts of judicial standing are distinguishable from the concept of "standing" in 4th Amendment context; while the general concept of standing asks whether a person is asserting his own rights, not those of a third person, and whether the person has alleged injury in fact, the Fourth Amendment inquiry is a more complex inquiry to determine whether the disputed search and seizure has infringed an interest of the defendant which the 4th Amendment was designed to protect. In order to have a reasonable expectation of privacy, defendant must have an actual expectation that the area/activity subjected to government intrusion would remain free of such intrusion and that expectation must be one that "society is prepared to recognize as reasonable." *Here*: liquor store night manager of a liquor store had a reasonable expectation of privacy from government intrusion in the back room of the store, and the existence of an in-store surveillance camera in that room had no effect on that expectation.

Henderson v. People, 879 P.2d 383 (Colo. 1994). Touchstone of 4th amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy in the area/item searched or seized. This determination requires the court to ascertain whether an individual has exhibited a subjective expectation of privacy in the particular place or object in question and whether that subjective expectation is one society recognizes as reasonable. The existence of a legitimate expectation of privacy must be determined after examining all the facts and circumstances of each particular case.

People v. Carper, 876 P.2d 582 (Colo. 1994). A person does not have a reasonable expectation of privacy in property when he has abandoned his interest in the property.

People v. Davis, 2019 CO 24. In general, an individual does not retain an expectation of privacy in information voluntarily revealed to law enforcement even if it is revealed on the assumption that it will be used for a limited purpose. *Here:* defendant who voluntarily gave his cellphone passcode to officer – so that officer could retrieve a phone number for defendant's girlfriend – did not manifest a subjective expectation of privacy in the passcode. Even if he had a subjective expectation of privacy in the passcode, society would not deem it reasonable, given defendant's willingness to share that information with the officer under the circumstances regardless of any limitations he might be said to have implicitly placed upon the disclosure.

People v. Campbell, 2018 COA 5. As a condition of bond in another case, defendant had an ankle monitor that transmitted GPS location data; that data was obtained by law enforcement and linked him to the charged burglaries. Because defendant was aware that his bondsman had access to the GPS location data, he had no expectation of privacy that society would call reasonable.

People v. Mendez, 2017 COA 129. Use of video surveillance through a CI who was invited into drug suspect's apartment was not an unreasonable search. Suspect consented to CI being in apartment and thereby gave up any reasonable expectation of privacy in what CI could observe or visually record, CI was lawfully entitled to be in apartment, and video memorialized what CI was able to see.

People v. Phipps, 2016 COA 190. An individual does not have a reasonable expectation of privacy in the contents of his computer shared through the installation and use of file sharing software such as LimeWire, regardless of his subjective intent.

People v. DeGreat, 2015 COA 101. There is no reasonable expectation of privacy in phone calls placed from jail.

People v. Schutter, 249 P.3d 1123 (Colo. 2011). Defendant left his cell phone in a locked store restroom but left the store when the clerk said he was too busy to retrieve the phone. An hour later, after the clerk retrieved the phone, the clerk gave the phone to police. Officer read several of defendant's text messages, which proved to be incriminating. Police later included that information in search warrant affidavit. The trial court suppressed, finding that: (1) defendant had not abandoned the phone, and (2) police had exceeded the permissible scope of a search for identifying information by reading the text messages. CSC affirmed, holding that under these circumstances, the phone could not be fairly characterized as abandoned, lost, or mislaid such that police would have had any justification for searching it for identifying information.

Perez v. People, 231 P.3d 957 (Colo. 2010). 4th Amendment right to be free from unlawful searches/seizures is a personal right and can't be asserted vicariously; the only person who can assert the right is a person with a possessory/proprietary interest in the property/premises searched. A vehicle occupant who is arrested must have a possessory/proprietary interest in the vehicle in order to assert a 4th Amendment right; without such a possessory interest, an individual lacks standing to assert a violation. *Here*: defendant using car with the owner's permission at the time of his arrest had a possessory interest in the vehicle. Fact that defendant disclaimed possessory interest in the glove compartment was irrelevant to a determination of his standing to challenge the search of that compartment following his arrest on an outstanding warrant having no connection to the vehicle; defendant had possessory interest in the car and standing to protest the search of the car itself, and officers could not access the glove compartment without first gaining access to the car itself.

People v. Brown, 250 P.3d 718 (Colo. App. 2010). Defendant had no reasonable expectation of privacy in his brother's trailer home, where: as a standard parole condition, defendant's brother had consented to parole officers' searching his residence and any premises he controlled; defendant knew that (1) his brother was on parole; (2) the residence could be searched at any time; (3) the brother was required to have permission to live

with others; and (4) the brother did not have permission for defendant to live there; and (4) defendant was himself a fugitive from justice who had absconded after his probation revocation.

People v. Flockhart, 310 P.3d 66 (Colo. App. 2009), r'vd other grounds, 304 P.3d 227 (Colo. 2013). In order to challenge the legitimacy of a government search, defendant must first demonstrate a legitimate expectation of privacy in the area searched/property seized. *Here*: defendant lacked standing to challenge search of building adjacent to his residence; he did not own, rent, or occupy building, he had never been employee of business located in building, business owner used space for personal storage, and nothing recovered in search of area indicated ownership by defendant, while the back room was accessible through door in defendant's back yard, it was also accessible through door to street and through business portion of building, and there was evidence that defendant's use of back room consisted primarily of participating in card games, other card players had open access to back room, and business owner usually left doors to back room unlocked.

People v. Gutierrez, 222 P.3d 925 (Colo. 2009). A taxpayer has a reasonable expectation of privacy in his tax records and has standing to challenge a search of his accountant's office that resulted in the seizure of client's file. *Here:* acting pursuant to a warrant, police seized and searched all of the taxpayer files in an accountant's office; one of the clients challenged the search. Because there was no individualized probable cause as to this client's file, the search of the file was suppressed; good-faith exception to the exclusionary rule does not apply because the warrant was so lacking in probable cause that no reasonably well-trained officer could have relied on it.

People v. Samuels, 228 P.3d 229 (Colo. App. 2009). A probationer has a lesser expectation of privacy such that a probation officer may search a probationer's home without a warrant if the officer has a reasonable suspicion to believe that probationer violated a condition of his probation, and that evidence of that violation may be found there.

People v. Zamora, 220 P.3d 996 (Colo. App. 2009). Defendant had no objectively reasonable expectation of privacy in a phone conversation with a third party during a break in police interrogation, when he made the call on the interrogating officer's cell phone and in his presence, notwithstanding that defendant spoke Spanish during the call. By exposing his conversation to the detective, defendant undertook the risk he could be understood.

People v. Laurent, 194 P.3d 1053 (Colo. App. 2008). Defendant has no reasonable expectation of privacy in garbage he delivers to a garbage collector even if he keeps the garbage in his locked garage and only takes it to the curb when the trash collector arrives.

People v. Terrazas-Urquidi, 172 P.3d 453 (Colo. 2007). A person has standing to object only if the disputed search/seizure has occurred in a space where the person has a legitimate expectation of privacy. An expectation of privacy is legitimate only if: (1) the person manifested a subjective expectation of privacy in the searched area, and (2) society is prepared to recognize that expectation as reasonable. There can be no reasonable expectation of privacy in a residential area that is expressly or impliedly held open to casual visitors. *Here:* police approached a shed occupied by defendant, which was located behind a residence, and knocked on the door. Because defendant impliedly held the area outside the shed door open to casual visitors, he lacked a legitimate expectation of privacy in this area and could not complain that officers' presence there violated his 4th Amendment rights.

Moody v. People, 159 P.3d 611 (Colo. 2007). Appellate court may address standing sua sponte where there is a complete and factually developed lower court record; in some circumstances, remand for further factual findings might be appropriate. *Here:* COA erred in addressing standing sua sponte because the suppression hearing factual record was undeveloped regarding standing and could not be supplemented with reliable

testimony, given the passage of time.

People v. Lee, 93 P.3d 544 (Colo. App. 2003). Defendant has no reasonable expectation of privacy in telephone calls from jail, especially if he receives notice of the wiretapping. *Here:* a video, a handbook, and posted signs at the jail all gave defendant notice that this jail calls were monitored and recorded.

People v. Roth, 85 P.3d 571 (Colo. App. 2003). A fictitious drug checkpoint did not violate defendant's 4th Amendment rights because the stop of his car was based upon individualized suspicion of unlawful activity. Defendant's rights under Colorado Constitution were not violated because he failed to establish how the officers' ruse implicated a privacy interest.

People v. Salaz, 953 P.2d 1275 (Colo. 1998). Prisoner has no reasonable expectation of privacy in clothing that has been inventoried and held in jail's custody for safekeeping.

People v. Schafer, 946 P.2d 938 (Colo. 1997). Defendant had a reasonable expectation of privacy in his tent because: (1) in Colorado, a tent is a form of habitation and, (2) the tent was erected on private, unfenced, unimproved, and apparently unused land. One who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege in the absence of personal or posted notice.

Police Action

People v. Holmberg, 992 P.2d 705 (Colo. App. 1999). Private or non-law enforcement government actors come within the purview of the 4th Amendment only when their searches have no other purpose but to aid law enforcement, investigatory or administrative functions. If a person is an agent of the police for purposes of criminal investigations, evidence obtained from an unlawful, privately conducted search must be suppressed. This rule prevents police from circumventing constitutional requirements by directing a third party to perform a search that would be improper if conducted by the police. Conversely, private or non-law enforcement government actors come within the purview of the 4th Amendment only when their searches of individuals have no other purpose but to aid law enforcement investigatory or administrative functions. *Here:* a government employee's search of defendant before he went into a rock concert was not state action requiring probable cause; search was valid because the employee was not an agent of the police but was acting to further the concert promoter's private interests.

People v. Morse, 2023 COA 27. Applying the private search doctrine, when a private party acting lawfully and independently of the government discovers and views an electronic file on another person's device (or "cloud" account) and makes that file available to law enforcement, officers do not violate the Fourth Amendment by viewing that same electronic file without a warrant. *Here:* an independent private party discovered a video on defendant's computer depicting an apparent sexual assault. She showed the video to law enforcement and made a copy. Trial court correctly denied defendant's motion to suppress the video. COA does not consider whether the officers could lawfully view other files on the computer because no such evidence was admitted at trial. COA also concludes that evidence found on the computer would also have been admissible under the independent source doctrine, where officers later obtained a warrant for the computer.

People v. Dyer, 2019 COA 161. Department of Human Services caseworkers are governmental officials and subject to 4th Amendment's restrictions.

People v. Pilkington, 156 P.3d 477 (Colo. 2007). Evidence collected by an insurance investigator conducting a parallel investigation of a possible arson case was properly admitted under the 4th Amendment because the investigator was not acting as a law enforcement agent.

People v. Mason, 989 P.2d 757 (Colo. 1999). During a criminal investigation, the prosecution issued a SDT to compel production of defendant's bank/telephone records. Although Colorado recognizes that individuals have a reasonable expectation of privacy in these records, a search warrant is not required because a SDT invokes greater procedural safeguards than a warrant. CSC recognized that a SDT is no less than a constructive search that must be supported by probable cause.

PROBABLE CAUSE

People v. Cox, 2017 CO 8. Law enforcement has probable cause to conduct a search when the facts available to the officer would warrant a person of reasonable caution to believe that contraband or evidence of a crime is present. Probable cause does not require certainty or even that it be more likely than not that a search will reveal evidence. Rather, probable cause is a nontechnical standard and a commonsense concept. The probable cause determination requires a court to consider the totality of the circumstances to determine whether a fair probability exists that a search of a particular place will reveal contraband or evidence of a crime. The standard requires a court to do more than consider all of the individual circumstances of a case in isolation from the others. Rather, a court must consider the facts in combination. In assessing the totality of the circumstances, the possibility that an innocent explanation may underlie a particular circumstance may add a level of ambiguity to a fact's probative value in a probable cause determination, but it does not destroy the facts usefulness outright and require it to be disregarded.

People v. Juarez, 770 P.2d 1286 (Colo. 1989). Probable cause does not require direct observation of crime.

People v. McCoy, 870 P.2d 1231 (Colo. 1994). Probable cause does not require police to know that a particular crime has been committed.

People v. McCoy, 870 P.2d 1231 (Colo. 1994); People v. Rogers, 68 P.3d 486 (Colo. App. 2002). In determining whether probable cause is present, consideration must be given to an officer's training and experience in determining the significance of the officer's observations.

Generally

People v. Campbell, 2018 COA 5. Because officers had the right to arrest defendant for vehicular eluding, they had the right to use reasonable force in effectuating the arrest and conduct a search of his person incident to arrest. *Here:* based on officer's testimony that defendant's vehicle did not stop after the officer activated his lights/siren and appeared to be trying to get away from him, there was probable cause to arrest for vehicular eluding at the time he was contacted by the police.

People v. Fields, 2018 CO 2. Probable cause existed to arrest defendant at the point when he conceded he had a felony conviction and was not permitted to possess a firearm. His admission preceded the discovery of illegal drugs in his possession. *Here:* even if the officer reasonably believed that he felt a packet containing methamphetamine during the pat-down, he had already acquired probable cause to arrest based on POWPO and search him incident to arrest.

People v. Ball, 2017 CO 108. Once probable cause to arrest is acquired in the course of a lawful investigatory stop, further detention is no longer attributable to the investigatory stop and is justified as a lawful arrest, whether a formal arrest has yet been announced or not. *Here:* where defendant implicated herself in the possession of contraband during a lawful investigatory stop, her admission that she was in possession of contraband provided probable cause to believe she was committing a crime, and her further detention was not subject to the limitations of an investigatory stop but was justified as an arrest.

People v. Cox, 2017 CO 8. Although Amendment 64 of the Colorado Constitution allows possession of one ounce or less of marijuana, a substantial number of other marijuana-related activities remain unlawful under Colorado law. Given that state of affairs, the odor of marijuana is still suggestive of criminal activity; the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination. *Here:* there was probable cause to search the trunk of defendant's car following a traffic stop; trooper observed several factors that led him to believe that there might be evidence of illegal activity in the trunk: defendant had 2 cell phones on his car seat, exhibited unusual nervousness, and gave an inconsistent explanation regarding his travels, and officer's canine alerted to the odor of drugs in the trunk.

People v. Brown, 217 P.3d 1252 (Colo. 2009). Where defendant was found passed out in driver's seat of a car that had stopped across a sidewalk and against a fence, police had reasonable suspicion to contact him. These (and subsequent) observations, plus defendant's repeated combative gestures, gave police probable cause to arrest him for DUI and resisting arrest.

People v. Manier, 197 P.3d 254 (Colo. App. 2008). Detective asked to search defendant's person, defendant said yes, pulled a key on a black holder out of her pocket, and held it out in her hand for inspection. Another officer asked defendant about the key, which defendant identified as a car key. However, the officer recognized the key as a Ford truck key based on his personal experience owning Ford vehicles, and by that time, officers knew that the stolen truck they were investigating was a Ford, parked nearby with fictitious plates. Police properly seized the key and had probable cause to associate it with criminal activity because its incriminating nature was "immediately apparent."

People v. Villano, 181 P.3d 1225 (Colo. App. 2008). Probable cause to arrest where: undercover officer purchased methamphetamine from defendant's co-conspirator; police saw defendant's car at co-conspirator's house on the day of a drug sale; police contacted defendant as he drove his car away from co-conspirator's house; when co-conspirator was prompted to go to his supplier, police watched him drive to defendant's house; after arranging to buy methamphetamine and being told that the co-conspirator was waiting for his supplier to arrive, defendant and another man arrived at the co-conspirator's house and were arrested.

People v. Flowers, 128 P.3d 285 (Colo. App. 2005). Probable cause where: police observed defendant's car follow another car into a parking lot at the approximate time of an arranged drug deal; defendant parked his car next to the first car and waited while the first car's occupant made contact with the CI; after the CI gave the first car's occupant $200 for drugs, police heard that person say that he had to go "to the truck" to get the drugs; the first car's occupant then immediately got into defendant's car before getting in to his own car and delivering the drugs to the CI; both cars then left the parking lot at the same time.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). Officer had reasonable suspicion to stop defendant's vehicle when he recognized it from a police bulletin; probable cause arose when officer matched defendant and vehicle to the bulletin.

People v. Trusty, 53 P.3d 668 (Colo. App. 2001). When police were told that nobody was allowed in the apartment, and the occupants failed to answer a knock at the door, police had probable cause to enter and arrest occupants for trespass.

Informants (Confidential & Citizen)

People v. Trontell, 533 P.2d 1124 (Colo. 1975). An affidavit which relies on information supplied by a ***confidential informant*** must allege sufficient underlying facts from which the issuing magistrate can make an independent determination that illegal activity is being carried on in the place to be searched. In addition, the affidavit must set forth sufficient information so that the magistrate can determine independently that the informant is credible, or that his information is reliable. A ***citizen informant*** who is identified by name and address and was a witness to criminal activity will not be considered on the same basis as the ordinary confidential informant. When the affidavit specifies the identity of the citizen-informer who is a witness to criminal activity and there is included a statement of the underlying circumstances, the affidavit will be deemed sufficient without the requirement that further facts demonstrating the credibility of the informant and the reliability of his information be set forth.

People v. Hubbard, 519 P.2d 951 (Colo. 1974). The citizen-informer who was an eyewitness to the crime and is identified in the affidavit is presumed to be reliable, and there is no requirement that either his credibility or the reliability of his information be further demonstrated.

People v. Novitskiy, 2012 COA 213. Under the citizen-informant rule, the basis of an informant's knowledge may be inferred from the circumstances. *Here:* an assistant manager of a convenience store told police that defendant had just given him a counterfeit $20 bill. That information was sufficient to establish probable cause for his arrest and permitted police to conduct a search incident to arrest during which they discovered additional counterfeit bills. Officer could reasonably infer that, because of his occupation, the assistant manager possessed the knowledge and ability to recognize counterfeit currency.

People v. Hoffman, 2012 CO 66. For the reasons stated in Neuhaus v. People, 2012 CO 65, CSC holds that conditional pleas whereby defendant may plead guilty while reserving the right to appeal an unsuccessful motion to suppress evidence are not permitted under Colorado rule or statute. CSC declines to create by judicial decision an exception allowing conditional guilty pleas that reserve the right to appeal an unsuccessful pretrial motion to suppress evidence because a reservation of that right is better created by statute or court rule, if at all.

People v. Valencia, 257 P.3d 1203 (Colo. App. 2011). Under the citizen-informant rule, when an identified eyewitness to a crime gives information to police, that information is considered sufficiently reliable to support a probable cause determination. *Here:* victim's identification of defendant, including his first and last name, his month and day of birth, his age and that he was her ex-boyfriend, provided officers with probable cause to arrest defendant.

People v. Casteneda, 249 P.3d 1119 (Colo. 2011). Defendant's car was involved in a 3:00 a.m. hit and run accident on an interstate highway. Shortly after, police contacted defendant a few miles away on the side of the highway. Defendant claimed she had not been driving, and that the real driver – a six-foot tall woman named Jowanna -- had walked away from the scene. Police had probable cause to arrest defendant as the driver where: the car was registered to defendant's mother; the car was damaged and matched the description given by the victim; defendant had the odor of alcohol on her breath; defendant was the only woman present with the car; and the driver's seat was pulled too far forward to accommodate a six-foot tall person. Search incident to arrest upheld.

People v. Hoffman, 293 P.3d 1 (Colo. App. 2010), rev'd other grounds, 2012 CO 66. Affidavit was insufficient where: (1) the informant did not state that he bought drugs from defendant, witnessed any sales of drugs by defendant, or had been in defendant's presence during a sale; (2) the informant did not state that he had been inside defendant's trailer or had witnessed defendant handling large amounts of either methamphetamine or

cash; (3) there was no indication that he previously gave reliable information to the police or made a declaration against his penal interest; or (4) police did not corroborate factors that related to the specific information provided by the informant.

People v. Robinson, 226 P.3d 1145 (Colo. App. 2009). Probable cause for defendant's arrest where: informant's legal problems gave him a motivation to supply accurate information and an incentive to cooperate with the police; information upon which the officer acted was sufficiently detailed to indicate the informant had a basis of knowing who "nephew" (defendant) was and why he would appear on the scene (for the purpose of selling drugs); and individuals identified by the informant at the scene were found to match the earlier descriptions given by informant.

People v. Polander, 41 P.3d 698 (Colo. 2001). The law recognizes a difference between a CI and a citizen informant. The two prongs of the *Aguilar-Spinelli* test for probable cause to arrest based on information provided by a CI, which look to the informant's truthfulness and the informant's basis for knowledge, are intended simply as guides; each "prong" need not be satisfied in any technical sense in order for the information to be included in the evaluation of probably cause.

People v. Randolph, 4 P.3d 477 (Colo. 2000). Search warrant affidavit contained no details from which the magistrate could infer that the informant had a personal basis of knowledge. The informant was not an anonymous informant, but he had no apparent history of providing accurate information to the police. In addition, the allegation of smoking methamphetamine was stale because it had occurred only sometime within the past two months and no time frames were provided for the other allegations. Affidavit listed at least five separate buildings without connecting the alleged criminal activity to each of the buildings. Under these circumstances, the affidavit was conclusory, lacked particularity, and was insufficient to support probable cause for the issuance of a search warrant.

People v. Grazier, 992 P.2d 1149 (Colo. 2000). A citizen called 911 to report that she had observed a man entering her neighbor's window and then opening the door to let a second man into the apartment; she believed neither man lived in the apartment. Because officers saw no objective signs of any sort of burglary in progress to support the citizen's suspicion, police did not have probable cause for warrantless entry into apartment based on the 911 report.

People v. Meraz, 961 P.2d 481 (Colo. 1998). A highly detailed statement from a CI may allow a judge to conclude that the CI had access to reliable information about the activities. Police corroboration of some of the CI's information may support a probable cause finding, even when all the corroborated details relate to innocent, non-criminal activities. The statements of other witnesses may also corroborate a CI's account and elevate the degree of suspicion to probable cause.

People v. McCoy, 870 P.2d 1231 (Colo. 1994). Reliability of a CI can be supported by showing that the CI has supplied reliable information in the past. When the source of information is an identified citizen informant with first-hand knowledge of the incident reported, such information is sufficiently reliable to be used in determining the existence of probable cause. In such circumstances the prosecution is not required to establish either the credibility of the citizen or the reliability of the information.

Anonymous Tips

People v. Martinez, 200 P.3d 1053 (Colo. 2009). Anonymous tips from citizen informants can be sufficient to form reasonable suspicion because citizens are less likely to fabricate information in return for immunity or other compensation. Where there is inadequate information to determine whether an anonymous source is a citizen informant, but where the information provided indicates that the informant made first-hand, contemporaneous observations and likely is not affiliated with the criminal activity, anonymous tips can be sufficient to form reasonable suspicion. A truly anonymous tip is one where the caller fails to provide his/her name, has no known prior record of providing information, there is nothing to suggest that the caller was a citizen informant, and nothing in the tip indicates that the caller is an unaffiliated bystander contemporaneously witnessing criminal activity. Truly anonymous tips give the police no way to assess the caller's veracity or basis of knowledge, and, without more, do not amount to reasonable suspicion. However, a completely anonymous tip can establish reasonable suspicion if it contains specific details corroborated by police observation.

People v. Dacus, 2024 CO 51. In this DA interlocutory appeal, the CSC held that a Report Every Drunk Driver Immediately (REDDI) report was not an anonymous tip requiring corroboration to justify an investigatory stop, and even if it was, the officers had developed reasonable suspicion by the time they encountered defendant's vehicle. The CSC reversed the trial court's suppression order.

People in the Interest of C.C-S., 2021 COA 127. Under the reasonableness standard, a search and seizure of a student by school officials based on an anonymous tip received through Colorado's Safe2Tell hotline did not satisfy the 4th Amendment. COA determined that school officials improperly relied on information that was anonymous, stale, and uncorroborated, and did not provide reasonable suspicion that the juvenile had violated the law. The exclusionary rule applies to searches of students by school officials and applying it here, the trial court's adjudication of delinquency and remands the case for a new trial.

People v. Polander, 41 P.3d 698 (Colo. 2001). In assessing the reliability of information provided to the police, one factor is whether the caller has identified himself sufficiently to place himself at risk of reprisal for false reporting. *Here*: caller identified himself as a Burger King employee who had observed specific criminal conduct in the restaurant parking lot. Regardless of whether this degree of self-identification was enough to qualify the caller as a citizen-informant, it was an important indication of reliability.

People v. D.F., 933 P.2d 9 (Colo. 1997). Standing alone an anonymous tip lacks the indicia of reliability necessary to establish "reasonable suspicion." However, observations by officers that provide corroboration for the tip may lead to the requisite reasonable suspicion for an investigatory stop. *Here:* officers received an anonymous tip that there were three males in the Harvey Park area, one of whom was wearing a poncho and carrying a "possible BB rifle." Officers responded and saw three juveniles, one wearing a poncho and walking "stiff legged." This corroboration provided a sufficient basis for an investigatory stop. Officers are not required to view *criminal* conduct in order to corroborate a tip. They must simply observe articulable facts which, considered with rational inferences, reasonably justify an investigatory stop.

Fellow Officer Rule

People v. Threlkel, 2019 CO 18. While the fellow officer rule imputes information from officers who possess it to those who do not, the CSC has made clear that it does not require a linear chain of communication from one officer to the next. Instead, the rule pools the collective knowledge of officers working together as a cohesive unit in a coordinated investigation. Moreover, so long as the police remain engaged in such a coordinated investigation, the rule encompasses information that the police as a whole possess at the time of the relevant action,—i.e., at the time of the challenged search or seizure.

People v. Swietlicki, 2015 CO 67. Under the fellow officer rule, an officer who does not personally possess a sufficient basis to take action nevertheless may do so if he acts at the direction of or as a result of communications with another officer, and the police as a whole possess a sufficient basis to take the action. The fellow officer rule applies to plain view seizures. *Here:* deputy had probable cause to seize defendant's laptop because he was told by other officers involved in the investigation to seize the laptop, and the police collectively had ample information establishing probable cause to believe that the laptop contained child pornography. Court recognized that possessors of child pornography often hoard and rarely dispose of their materials.

Grassi v. People, 2014 CO 12. The fellow officer rule imputes information that the police possess as a whole to an individual officer who effects a search or arrest if: (1) that officer acts pursuant to a coordinated investigation and (2) the police possess the information at the time of the search or arrest. The rule does not require a linear chain of communication from one officer to the next; rather, it pools the collective knowledge of officers engaged in a coordinated investigation. The rule encompasses any information that the police gather between the initial assignment and the officer's action as part of a coordinated investigation.

People v. Barry, 2015 COA 4. The fellow officer rule operates to impute information that the police possess as a whole to an individual officer. Where law enforcement authorities are cooperating in an investigation, the knowledge of one is presumed shared by all. When the police expand the scope of their investigation to include other officers not currently on scene, the rule operates to integrate those outside officers and make them part of the coordinated investigation. The rule imputes shared information to an individual officer if two conditions are met: (1) the officer must act at the direction of or as a result of communications with another officer, thus ensuring that he acted pursuant to a coordinated investigation; and (2) the police as a whole must possess the information. So long as the police remain engaged in a coordinated investigation, the rule encompasses information that the police as a whole possess at the time of a search or arrest. The rule encompasses any information that the police gather between the initial assignment and the officer's ultimate search or arrest as part of a coordinated investigation.

People v. Jauch, 2013 COA 127. The fellow officer rule may be used to find probable cause to seize evidence under the plain view exception. *Here:* because the lead investigator had a reasonable belief that the turquoise shirt was linked to the crime under investigation, an officer acting under his direction had probable cause to seize the item.

People v. Arias, 159 P.3d 134 (Colo. 2007). Under fellow officer rule, an officer who does not personally possess a sufficient basis to make an arrest may nevertheless do so if he acts at the direction or as a result of communication with another officer, and the police as a whole possess a sufficient basis to make the arrest. *Here:* drug task force agent participating in this incident did not direct the patrol officer to stop defendant based on existing information; instead, he advised the officer to find an independent basis for stopping the vehicle. Therefore, the fellow officer rule was inapplicable.

People v. Taylor, 131 P.3d 1158 (Colo. App. 2005). Although no officer testified that the officers who contacted defendant were members of an arrest team, there was testimony that the undercover officer was transmitting information to other officers in the area and that the officers who arrested defendant were one of the arrest teams. This testimony gives rise to a reasonable inference that the officers who contacted defendant were also members of an arrest team and were acting as a result of the undercover officer's description of the events she observed, and the individuals involved. Although the officer who contacted defendant may not have had personal knowledge of facts sufficient to give rise to a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime, the evidence was sufficient to support a conclusion that he was acting as a result of the undercover officer's communication. The evidence also clearly established that police had a sufficient reasonable suspicion to support an investigatory stop.

People v. Reed, 56 P.3d 96 (Colo. 2002). Under the fellow officer rule, an affiant need not have personal knowledge of statements in an affidavit. *Here*: information should not have been excised from the affidavit where an officer's reliance on first-hand observations of a fellow officer was reasonable.

Wiretaps: §16-15-101, et seq.

O'Hara v. People, 2012 COA 18. §16-15-102(1)(a), the "wiretapping" statute, requires the AG or an elected DA to personally authorize an application to initiate or extend a wiretap, but does not require the elected official to personally prepare or submit the application. The elected official must also personally authorize any extension applications. An application to initiate or extend a wiretap containing the signature of the elected official is presumed to be properly authorized. If no signature exists, the prosecution may establish personal authorization through the sworn testimony or affidavit of the elected official, or similar proof. *Here:* trial court did not make a specific finding that the elected DA personally authorized each application to initiate and extend the wiretaps. A remand for further findings and conclusions by the trial court was ordered, given that neither the parties nor the trial court had the benefit of the court's interpretation of the authorization requirements of §16-15-102(1)(a).

In re 2015-2016 Jefferson Cty. Grand Jury, 2018 CO 9. State was required to disclose applications and authorizations for telephone intercepts, pursuant to wiretap statute to subjects of GJ investigation not less than ten days before hearing on motion to quash subpoena duces tecum; while such disclosure would not be required in GJ proceeding, this was ancillary to and distinct from GJ proceeding, and state submitted wiretap summaries as offer of proof in its notice of hearing.

People v. DeGreat, 2015 COA 101. Wiretapping statute, §18-9-303(1), does not apply to inmate phone calls placed from jail.

People v. Baez-Lopez, 2014 CO 26; People v. Cantu-Bojorquez, 2014 CO 26; People v. Soto-Lopez, 2014 CO 26. §16-15-102(8)(a) requires that wiretap recordings shall be made available to the judge issuing the order and sealed under his directions. This provision does not require that the records be delivered to the court or sealed in the judge's presence, nor is the judge required to place an official seal on the recordings. The statute requires law enforcement to employ whatever access-prevention measures the judge directs. There is no statutory requirement that the judge's sealing directions be in written form. The record must contain evidence of the judge's sealing directions; absent a written order, the prosecution may introduce other evidence to establish the content of the judge's directions, including affidavits and/or testimony from persons with knowledge of that information. *Here:* uncontroverted testimony from the prosecutor and case agent demonstrated that the recordings were sealed pursuant to the judge's oral directions-requirements of §16-15-102(8)(a) were met.

People v. Krueger, 2012 COA 80. In determining whether probable cause exists, a court must consider the totality of the circumstances; whether the information is stale is an important consideration. However, time becomes less significant in the wiretap context because the evidence sought to be seized is not a tangible object easily destroyed or removed. *Here:* the evidence supporting probable cause for the wiretap warrant was not stale: though police discovered many of the alleged facts around the time of the murder, they had only identified defendant's fingerprints ten months before, at which point they began to investigate defendant's and the co-defendants' phone numbers and records. It was reasonable for investigators to believe that all three co-defendants would soon be communicating about the murder because the investigators were about to obtain biological samples and interview people in relation to the case.

People v. Gallegos, 251 P.3d 1056 (Colo. 2011). Judge who issued wiretap orders was neutral and detached, despite fact that he issued orders while his son worked for DA's office; application for extension of wiretap order did not violate requirement of wiretap statute that application be made by DA on oath or affirmation to a judge; application for extension of wiretap order contained a statement of results obtained thus far as result of initial wiretap order, as required by statute; failure of law enforcement to file 15-day progress report for subject telephone, as required by wiretap order, did not warrant suppression of evidence; tardiness of 15-day progress report for subject telephone required of law enforcement pursuant to wiretap orders, as well as alleged content deficiencies in other progress reports, did not warrant suppression of evidence; law enforcement's failure to provide notice to subject parties of wiretap order, in violation of notice provision of wiretap statute, did not warrant suppression of evidence; and DA's violation of wiretap statute by failing to provide to defense counsel copies of wiretap applications, accompanying affidavits, and orders not less than ten days before PH did not prejudice defendants.

People v. Mares, 263 P.3d 699 (Colo. App. 2011). The jail's act of recording defendant's outgoing telephone calls from jail did not violate statute that prohibited law enforcement personnel from engaging in wiretaps without a court order, where defendant consented to the recording of his telephone calls, so law enforcement personnel did not commit wiretapping.

People v. Weare, 155 P.3d 527 (Colo. App. 2006). Defendant convicted of murder and other offenses was not entitled to reopen trial to challenge admissibility of his intercepted statements he claimed the prosecution promised not to introduce at trial, in absence of his demonstrating that he detrimentally relied on promise; defendant did not contend that intercepted statements themselves were made in reliance on his belief that they would not be admitted at trial, and defendant did not identify any grounds for suppressing wiretap that were not previously raised but would likely have required suppression.

People v. Lee, 93 P.3d 544 (Colo. App. 2003). An exception to the federal wiretap law is that it is not unlawful for law enforcement officials to intercept a wire, oral, or electronic communication where one of the parties to the communication has given prior consent to the interception. Consent may be expressed or implied. The essential issue is not whether the prosecution proved consent, but whether there is evidence in the record to support the trial court's findings of fact, and as long as there is support for them, a reviewing court will not overturn those findings.

SEARCH WARRANTS: §16-3-301

Generally

People v. McKay, 2021 CO 72. CSC reverses the trial court's order granting defendant's motion to suppress evidence found during the execution of a search warrant. The magistrate who issued the warrant had a substantial basis to find probable cause existed, and the trial court erred in suppressing the evidence.

People v. Dominguez-Castor, 2020 COA 1. The independent source doctrine may apply to evidence seized under a valid warrant issued after the evidence was first discovered during execution of an invalid warrant if the prosecution shows that the second warrant was truly independent of information obtained from the initial search.

Sufficiency of Affidavits

People v. Reed, 56 P.3d 96 (Colo. 2002); Henderson v. People, 879 P.2d 383 (Colo. 1994). Probable cause for a search warrant exists when the affidavit in support of the warrant alleges sufficient facts to cause a person of reasonable caution to believe that contraband or other evidence of criminal activity is located at the place to be searched.

People v. Randolph, 4 P.3d 477 (Colo. 2000). A probable cause determination is limited to the four corners of the affidavit.

Henderson v. People, 879 P.2d 383 (Colo. 1994). The magistrate's probable cause determination is given great deference and is not reviewed de novo.

People v. Pate, 878 P.2d 685 (Colo. 1994). The reviewing court simply ensures that the issuing judge had a "substantial basis" for concluding that probable cause existed.

People v. Pate, 878 P.2d 685 (Colo. 1994). Doubts must be resolved in favor of magistrates' determinations of probable cause.

People v. Flores, 766 P.2d 114 (Colo. 1988). A veracity hearing is an inquiry into the accuracy of statements found in a search warrant affidavit, at least where the good faith of the police officer-affiant was explicitly or tacitly at issue. Veracity challenges to police officers' affidavits are permitted in Colorado, and People v. Dailey, 639 P.2d 1068 (Colo. 1982) is the controlling case. There is a two-part test that must be met to grant a veracity hearing. A motion to suppress: (1) be supported by one or more affidavits reflecting a good faith basis for the challenge; and (2) contain a specification of the precise statements challenged. If both parts of this threshold test are met, then a veracity hearing must be held in order to comply with the Fourth Amendment of the federal constitution.

People v. Grudznske, 2023 COA 36. The affidavit for the blood draw after a vehicular homicide (DUI) contained a typo that said the date of the accident was September 9th instead of September 30th. When the affiant spoke to the judge at the time the judge signed the warrant, he verbally told the judge the accident took place a few hours earlier. The COA held that a reasonable jurist would assume or understand, as Judge McNulty did, that this collision occurred shortly before he was asked to issue the warrant. While the subsequent testimony from the affiant was not necessary to reach this conclusion, it nevertheless was admissible for the proper purpose of explaining what appears from the four corners of the document to be a typographical error referring to the incorrect date of the collision. For these reasons, COA concluded that the reasonable interpretation of the warrant reveals an obvious typographical error: Sunday, September 30 rather than Sunday, September 9. To the extent that such an inference is inconsistent with the affidavit, the affiant's testimony was admissible to provide context to correctly interpret the obvious typographical error. The evidence also would have been admissible under the good faith exception.

People v. Cox, 2018 CO 88. Trial court erred in finding that officer's search warrant affidavit failed to establish probable cause to search defendant's property for marijuana. Court failed to give the search warrant a "presumption of validity" and the magistrate's probable cause determination "great deference." Further, the

court considered extraneous information related to defendant being a registered hemp grower and the similarities between marijuana and hemp. While the trial court's observations could be relevant to a veracity challenge, they are irrelevant to a four-corners review of the affidavit.

People v. Nelson, 2012 COA 37. A search warrant may be issued if the application contains probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized. Probable cause exists when an affidavit for a search warrant alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. In the event that an affidavit for a search warrant includes reference to evidence that was illegally obtained, a valid search warrant may issue if the lawfully obtained evidence, considered by itself, establishes probable cause to issue the warrant.

People v. Rabes, 258 P.3d 937 (Colo. App. 2010). Court declined to adopt an absolute rule that images of child pornography must be attached to the affidavit to establish probable cause. Trial court can conclude that the description of the images in an affidavit to a warrant was sufficient to establish probable cause where the totality of the circumstances supports the inference of reliability. *Here:* (1) the images were discovered as a result of a mandatory reporting requirement imposed by federal statute; (2) the affidavit established that the investigating officer had seen the images and could corroborate the tip using his experience and training; and (3) the officer's conclusion that the search would yield images constituting child pornography was based on his extensive training and experience with internet crimes against children. The court notes, however, that in child pornography cases, a warrant that specifically describes the content of the images would be the *better practice*.

People v. Warner, 251 P.3d 556 (Colo. App. 2010). At a veracity hearing challenging a search warrant affidavit, the court must first determine whether there are erroneous statements in the affidavit; if so, it must decide, by a preponderance of the evidence, whether the source of the error is intentional falsehood or reckless disregard for the truth on the part of the affiant. If either is the case, the false statements must be stricken from the affidavit. An affidavit is sufficient to establish the existence of a dispute regarding the truth of the allegations in the search warrant affidavit; it is not sufficient in and of itself to resolve that dispute. Even in circumstances where affidavits are otherwise admissible, an affidavit not based on the affiant's personal knowledge will not suffice.

People v. Scott, 227 P.3d 894 (Colo. 2010). Where the same judge reviewed and issued two search warrants for the same residence on the same day, both warrants should be read together for the purposes of a probable cause analysis.

People v. Crippen, 223 P.3d 114 (Colo. 2010). Defendant was the head of a business that received public funding and operated the business from his home. After a routine audit revealed gross irregularities in defendant's use of public funds, police obtained a search warrant and seized numerous items of evidence from the home. Trial court suppressed the evidence, holding that: (1) the records evaluated in the audit were several years old and stale; and (2) police failed to identify the person or agency conducting the audit from which the allegations of criminal activity were derived. CSC reversed, finding that, under the totality of the circumstances, the affidavit provided a substantial basis to believe that: (1) the information it contained was reliable, and (2) there was a reasonable probability that evidence of the criminal activity alleged in the warrant would still be found at the defendant's home.

People v. Kerst, 181 P.3d 1167 (Colo. 2008). There is no requirement that an affidavit for a search warrant fully describe all steps taken, all information obtained, and all statements made by witnesses during the course of an investigation; an affiant's duty of disclosure extends only to material or relevant adverse facts. A fact is material for the purposes of vitiating an entire affidavit only if its omission rendered the affidavit "substantially misleading" as to the existence of probable cause. The omission of even adverse and relevant information does not rise to the level of misrepresentation if it does not cast doubt on the existence of probable cause. *Here:*

evidence was set forth in the affidavit that defendant was in possession of and used counterfeit money on multiple occasions; and evidence was obtained connecting her with the use of counterfeit bills at several businesses. Affiant did not include evidence in the affidavit that defendant had allegedly initiated contact with the police for their assistance after one of the businesses had contacted her about passing counterfeit money. It also did not include evidence that, when she contacted the police, she brought approximately $1300 in cash for their inspection, and that two, counterfeit bills, were discovered in those funds. The omission of these facts did not render the warrant invalid. Regardless of whether defendant or the police initiated the meetings, counterfeit bills were found in defendant's possession on two separate occasions when she met with the police, and the serial numbers on those bills served as additional evidence linking her to the use of previously discovered counterfeit money. Under the totality of the circumstances, there was a "fair probability" that evidence of counterfeit money would be found in defendant's home. As such, the fact that defendant initially and repeatedly contacted the police, rather than the other way around, did not sufficiently "cast doubt" on the existence of probable cause to invalidate the search warrant.

People v. Strauss, 180 P.3d 1027 (Colo. 2008). A warrant was executed in 2004 and police seized the defendant's computers. The warrant included a self-imposed requirement that any analysis on the computers be conducted within 90 days. A separate warrant was executed for these computers in 2006. The 2006 warrant was not invalid, despite the fact that it was sought well over the 90-day limitation period set forth in the first warrant, as there was no limitation on the police obtaining a separate warrant at a later date, so long as that warrant was based on probable cause.

People v. Eirish, 165 P.3d 848 (Colo. App. 2007). During a controlled drug transaction, probable cause existed to search the location where the seller went before selling the drugs to police. During an undercover drug buy, a broker told the undercover officer that he needed to go elsewhere to obtain the drugs from his source. The officer followed the broker to defendant's property, where the broker drove to the garage, went inside, then returned to his truck and drove back with the drugs to meet the officer. A search warrant was issued for the "premises," and defendant's house and garage were searched. Drugs, manufacturing equipment, and paraphernalia were discovered. Defendant admitted owning the drugs in the home. The search of the garage was supported by probable cause. After telling the undercover officer that he had to go to his source in the mountains to obtain the drugs, the broker went to the defendant's garage, then immediately returned with the drugs he then sold to the undercover officer. There was no requirement that the warrant name the person who owns or occupies the described premises, thus, the warrant was not invalid simply because it did not name the defendant. The search of the home was not supported by probable cause. There was no evidence linking the broker to the home or linking the home to any suspected criminal activity. The fact that the affiant officer knew, based on his training and experience, it is common for drug dealers to keep evidence of their drug dealing in "locations used as storage facilities" was insufficient to establish an evidentiary nexus between suspected criminal activity and the home.

People v. Pacheco, 175 P.3d 91 (Colo. 2006). CSC upheld trial court's order suppressing evidence seized pursuant to a search warrant, holding that the affidavit filed in support of the warrant failed to give a substantial basis for a finding of probable cause. CSC further rejected a "good faith exception" argument, finding that the searching officer could not, in good faith, reasonably rely on his own "bare bones" affidavit that contained only assertions unsupported by facts.

People v. Pahl, 169 P.3d 169 (Colo. App. 2006). Where a search warrant affidavit includes information obtained unlawfully from a previous warrantless search as well as information from lawful origins, evidence discovered by execution of the search warrant is admissible if the search pursuant to the warrant was supported by information from sources independent of the unlawfully procured information. A court reviewing the legality of a search conducted pursuant to such an affidavit must determine whether the

officers' decision to seek a search warrant was independent of their observations during the illegal entry and whether the illegally obtained information included in the affidavit affected the magistrate's decision to issue the warrant.

People v. Green, 70 P.3d 1213 (Colo. 2003). While direct evidence in the affidavit connecting evidence of the crime to the place to be searched is helpful in establishing probable cause, it is not necessarily required. The facts alleged in the affidavit, together with reasonable inferences drawn from those facts, may be enough. *Here:* victim saw defendant wearing a unique Rolex watch the day it was stolen. The warrant was issued the next day, and it was reasonable to infer that because the watch was expensive and easily stored at a residence, it might be found in defendant's apartment. Follows People v. Hebert, 46 P.3d 473 (Colo. 2002); distinguishes People v. Kazmierski, 25 P.3d 1207 (Colo. 2001).

People v. Reed, 56 P.3d 96 (Colo. 2002). Trial court erred when it ordered erroneous information struck from affidavit without performing an evaluation of the origin of the error. Testimony from the veracity hearing suggested the source of error was not an intentional falsehood, reckless disregard for truth or even negligence. Officers' knowledge of suspect's prior and present conduct, alongside evidence of illegal activity in a motel room he had recently been occupying, gave rise to common sense inference that evidence of criminal activity would be found in his vehicle and in a different room to which he changed in the same motel.

People v. Hebert, 46 P.3d 473 (Colo. 2002). Where the victim's body was found in her car some distance away from where she lived, the reviewing court, in a *de novo* review of a redacted affidavit, concluded there was probable cause to search her house. This "close question" was resolved by the preference accorded to warrants and because there were sufficient facts remaining in the redacted affidavit to support the reasonable inference that the victim was murdered at the home she shared with defendant.

People v. Alvarado, 31 P.3d 145 (Colo. 2001). A warrant affidavit was supported, in part, by information gleaned from defendant's employment record. Trial court found that the employment record was obtained unlawfully, and it redacted this information from the affidavit. The redacted warrant affidavit established probable cause. Statements that defendant had a "hot" urinalysis established probable cause that he had committed a bond violation and possession of a controlled substance.

People v. Kazmierski, 25 P.3d 1207 (Colo. 2001). When a search warrant affidavit contains inaccurate statements made by the affiant either intentionally or in reckless disregard for the truth, the trial court must excise the inaccurate statements and determine whether the remaining affidavit demonstrates probable cause to search. The prosecution bears the burden of demonstrating the veracity of such statements.

People v. Martinez, 32 P.3d 520 (Colo. App. 2001). A search warrant for a vehicle was not fatally defective even though it failed to specifically state that the sexual assault had taken place in the vehicle. The vehicle was present at the scene of the crime, and it was reasonable to believe evidence of the assault might be inside the vehicle.

People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd, 58 P.3d 979 (Colo. 2002). Trial court did not err in concluding that the search warrants were based upon probable cause. The police specifically sought drawings, narratives and journals of defendant, and there was a reasonable indication that those items would be found at his home. The information that formed the basis of the warrants was not stale because the police were seeking evidence of defendant's continued violent sexual fantasies to corroborate the psychologist's recent, not stale, theory of the case.

People v. Randolph, 4 P.3d 477 (Colo. 2000). Search warrant affidavit contained no details from which the magistrate could infer that the informant had a personal basis of knowledge. The informant was not an anonymous informant, but he had no apparent history of providing accurate information to the police. In

addition, the allegation of smoking methamphetamine was stale because it had occurred only sometime within the past two months and no time frames were provided for the other allegations. Also, the affidavit listed at least five separate buildings without connecting the alleged criminal activity to each of the buildings. Under these circumstances, the affidavit was conclusory, lacking in particularity, and insufficient to support probable cause for the issuance of a search warrant.

People v. Meraz, 961 P.2d 481 (Colo. 1998). The source of the informant's information is only one factor in determining whether a warrant affidavit establishes probable cause. Suppression was reversed where the informant had assisted in two earlier busts – and appeared to be reliable – and the information supplied: (1) was current, referencing events four days before the warrant was issued, (2) gave details such as first and last name, type and amount of drugs, location of house (by description, not address), location within the house, and (3) was corroborated by a citizen witness.

People v. Fortune, 930 P.2d 1341 (Colo. 1997). Omission of material facts in an affidavit undermines a finding of probable cause if it renders the entire affidavit substantially misleading. The test is whether the magistrate would have signed the warrant had the omitted information been included. *Here*: Omissions regarding the victim's troubled history and behavioral problems and lack of corroboration did not preclude a valid finding of probable cause.

Staleness

People v. Mapps, 231 P.3d 5 (Colo. App. 2009). Probable cause requires that there be current information of criminal activity or contraband located at the place to be searched. Whether information is current or stale is an important consideration in the totality of the circumstances analysis of probable cause. Information in the affidavit is stale if it is unlikely that the item to be seized is still present in the suspect's home. However, the lapse of time between commission of an offense and the execution of a warrant, while a consideration, is not determinative of the staleness of information. *Here:* while the subject of the search warrant involved items stolen from the victim's home, and the court recognized that "stolen items may be highly mobile," the court concluded that the information in the affidavit was not stale because defendant: (1) had made statements that he keeps firearms for "seven years"; (2) stated that he intended to keep the stolen firearms hidden inside the walls of his home; and (3) was known as a "packrat."

People v. Krueger, 2012 COA 80. In determining whether probable cause exists, a court must consider the totality of the circumstances; whether the information is stale is an important consideration. However, time becomes less significant in the wiretap context, because the evidence sought to be seized is not a tangible object easily destroyed or removed. *Here:* the evidence supporting probable cause for the wiretap warrant was not stale: though police discovered many of the alleged facts around the time of the murder, they had only identified defendant's fingerprints ten months before, at which point they began to investigate defendant's and the co-defendants' phone numbers and records. It was reasonable for investigators to believe that all three co-defendants would soon be communicating about the murder because the investigators were about to obtain biological samples and interview people in relation to the case.

People v. Hoffman, 293 P.3d 1 (Colo. App. 2010), rev'd other grounds 289 P.3d 24 (Colo. 2012). CI's information alleging generalized criminal activity on 2/24/07 was stale by the time the search warrant was issued in this case on 3/21/07. Although it described nightly or ongoing criminal activities, the police did not attempt to ascertain whether the reported illegal activity was ongoing prior to the information being one month old. Although 2 individuals were arrested following their presence at defendant's residence during police surveillance, both of whom were found in possession of drugs, this alone was insufficient to establish a direct

link between the illegal drugs and defendant's trailer where the individuals did not provide information that they had obtained the seized substances from defendant or his premises. Defendant's criminal history added no significant weight to the probable cause determination in this case as he was not charged with, or suspected of, criminal activity arising from a traffic stop at which he was present, as was methamphetamine, and defendant's 3-year-old conviction for an unspecified drug offense was stale.

People v. Hagos, 250 P.3d 596 (Colo. App. 2009). The exclusionary rule does not apply to situations where police act in objectively reasonable, good faith reliance on a warrant, even if a court later finds that the warrant is defective. *Here:* officer acted in an objectively reasonable manner in submitting the affidavit, obtaining the search warrant, and executing the search: while Colorado law suggests that the information in a search warrant affidavit was insufficient to establish the link between clear evidence of drug dealing and presence of books and records in the apartment, in almost every federal circuit it would have been. The affidavit was not so lacking in indicia of reliability as to render belief that the warrant was legitimate entirely unreasonable; and while some information was almost 2 years old, some was as recent as 6 days before the affidavit was signed. It thus presented a chronological account that, in sum, provided indicia of current drug dealing. While staleness is clearly a factor to consider, the "old" information here set the stage for the later linking of more recent facts to the indicia of current drug dealing.

People v. Miller, 75 P.3d 1108 (Colo. 2003). Affidavit based on CI's allegation that, a month earlier, he had observed methamphetamine manufacturing equipment and activity in defendant's home was insufficient to support the issuance of a search warrant for the home. CSC affirmed trial court's suppression of the evidence because the time lapse between the CI's observation of the home and the issuance of the warrant rendered the information stale.

People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd, 58 P.3d 979 (Colo. 2002). Trial court did not err in concluding that the search warrants were based upon probable cause. The police specifically sought drawings, narratives and journals of defendant, and there was a reasonable indication that those items would be found at his home. The information that formed the basis of the warrants was not stale because the police were seeking evidence of defendant's continued violent sexual fantasies to corroborate the psychologist's recent, not stale, theory of the case.

People v. Randolph, 4 P.3d 477 (Colo. 2000). Search warrant affidavit contained no details from which the magistrate could infer that the informant had a personal basis of knowledge. The informant was not an anonymous informant, but he had no apparent history of providing accurate information to the police. In addition, the allegation of smoking methamphetamine was stale because it had occurred only sometime within the past two months and no time frames were provided for the other allegations. Also, the affidavit listed at least five separate buildings without connecting the alleged criminal activity to each of the buildings. Under these circumstances, the affidavit was conclusory, lacking in particularity, and insufficient to support probable cause for the issuance of a search warrant.

Particularity: Place Searched, Things Seized §16-3-304(1) (a); Crim.P. 41(d)(1)(I).

People v. Roccaforte, 919 P.2d 799 (Colo. 1996). The warrant must be sufficiently particular that it enables the executing officer to reasonably ascertain and identify the things authorized to be seized.

People v. Schrader, 898 P.2d 33 (Colo. 1995). The standard for determining whether a search warrant complies with constitutional requirements is one of practical accuracy rather than technical nicety.

People v. Dhyne, 2024 CO 45. This case addressed whether a search for internet-related evidence that extended to a previously unknown basement apartment was reasonable, even though the apartment was not specified in the warrant. The CSC held that: (1) the warrant's reference to the property's "house, garage, and any outbuildings" was sufficiently specific because there were no outward indicators that the basement apartment existed, and (2) execution of the warrant was reasonable in this specific scenario, where the warrant was for all buildings on the property and defendant told police that he lived in the basement and used the IP address that provided grounds for the search.

People v. Seymour, 2023 CO 53. Under CAR 21, the CSC addressed the constitutionality of law enforcement's use of a reverse-keyword warrant to obtain from Google certain user-account data related to a suspected arson that resulted in the deaths of five people. The court discharges its rule to show cause for several reasons: (1) under the Colorado Constitution, defendant has a constitutionally protected privacy interest in his Google search history even when revealed only in connection with his IP address and not his name and that, under both the Colorado Constitution and the Fourth Amendment, he also has a constitutionally protected possessory interest in that same history; (2) defendant's Google search history implicates his right to freedom of expression; thus, the constitutional protections must be applied with "scrupulous exactitude;" (3) the warrant at issue adequately particularized the place to be searched and the things to be seized; (4) the majority assumes without deciding that the warrant required individualized probable cause and that its absence here rendered the warrant constitutionally defective; and (5) law enforcement obtained and executed the warrant in good faith, so the evidence shouldn't be suppressed under the exclusionary rule.

Pettigrew v. People, 2022 CO 2. CSC reviews de novo whether a redacted search warrant and supporting affidavit complied with the Fourth Amendment's particularity requirement.

People v. Coke, 2020 CO 28. Search warrant that allowed police officers to search cell phone belonging to defendant accused of sexual assault on a child violated particularity requirement under Fourth Amendment prohibition on unreasonable searches and seizures; warrant contained no particularity as to alleged victim or to the time period during which assault allegedly occurred, but rather warrant permitted officers to search all texts, videos, pictures, contact lists, phone records, and any data that showed ownership or possession. Argument that, even if the warrant was invalid for failing to comply with particularity requirement, police officers acted in good faith in executing it, and thus, that evidence should be admissible in prosecution for sexual assault on a child under the good faith exception to the exclusionary rule, was not properly before CSC on interlocutory appeal from grant of motion to suppress evidence; argument was not raised below or addressed by trial court.

People v. Raehal, 2017 COA 18. Defendant's digital camera was within the scope of the search warrant, which authorized the seizure of "any and all computer systems and computer equipment," "any and all storage media," "any and all computer peripheral devices attached or unattached to the computer to include but not limited to … physical devices which serve to transmit or receive information to and from the computer," and authorized officers to look for and seize "images, video, or drawings which portray child pornography."

People v. Sandoval, 2016 COA 14. Trial court did not err by denying defendant's motion to suppress the short shotgun found in his shed because the search warrant authorized the police "to enter and search the person, premises, location and any appurtenances thereto" of defendant's residence.

People v. Rabes, 258 P.3d 937 (Colo. App. 2010). Court declined to adopt an absolute rule that images of child pornography must be attached to the affidavit to establish probable cause. In child pornography case, a district court can conclude that the description of the images in an affidavit to a warrant was sufficient to establish probable cause where the totality of the circumstances supports the inference of reliability. *Here:* (1) the images were discovered as a result of a mandatory reporting requirement imposed by federal statute; (2) the affidavit established that the investigating officer had seen the images and could corroborate the tip using his experience

and training; and (3) the officer's conclusion that the search would yield images constituting child pornography was based in his extensive training and experience with internet crimes against children. The court notes, however, that in child pornography cases, a warrant that specifically describes the content of the images would be better practice.

People v. Koehn, 178 P.3d 536 (Colo. 2008). Although the places that may be searched and items that may be seized pursuant to a search warrant are circumscribed by the precise grant of the warrant itself, officers executing the warrant are not required to close their eyes to other incriminating evidence plainly visible to them while conducting a valid search. *Here:* officers' discovery of controlled substances and drug paraphernalia in a pants pocket and kitchen cabinet while executing a search warrant for firearms and ammunition came within the plain view exception to the warrant requirement, since guns and/or ammunition could have been found in either location, and the incriminating nature of the drugs and paraphernalia was immediately apparent.

People v. Martinez, 165 P.3d 907 (Colo. App. 2007). A search warrant authorized a search of defendant's father's residence for evidence of crimes committed by the father. Defendant argued that the officers should not have searched the bedroom that he rented from his parents. Because the door to the bedroom was unlocked and open and the father had ready access to the room, the search was constitutionally reasonable.

People v. Gall, 30 P.3d 145 (Colo. 2001). A court may refer to both the affidavit and the warrant to resolve any potential discrepancy or deficiency in the description of the place to be searched. *Here:* where the body of the affidavit did not specify the apartment number to be searched, a reference to the number in the affidavit's margin and in the warrant was sufficient to direct the officers to the place to be searched. Where the search warrant authorized the seizure of written or printed materials, but did not specify computers, the police properly seized computers because they were "nontraditional, technical containers" of the printed materials.

People v. Randolph, 4 P.3d 477 (Colo. 2000). A search warrant affidavit lacked particularity where it listed at least five separate buildings but did not connect the alleged criminal activity to each of the buildings.

People v. Staton, 924 P.2d 127 (Colo. 1996). Affidavit may cure a deficiency in a search warrant if the affidavit is in the possession of officers executing the warrant or if the affiant officer is present during the search. *Here*: Although the warrant did not describe the objects to be seized with sufficient particularity, the deficiency was cured by the supporting affidavit.

Time & Manner of Execution

People v. Gifford, 782 P.2d 795 (Colo. 1989). Police must ordinarily identify themselves and their purpose before making a forced entry. Presentment of warrant prior to commencement of search is not absolute constitutional requirement, but failure to present warrant when search is commenced creates greater potential for confrontation and violence and should be discouraged. *Here:* officer who forcibly entered defendant's residence to conduct search did not satisfy notice requirement; although police officer identified himself and two other officers to three unidentified persons who were on or near front porch and advised them that search warrant had been issued for house, there was no evidence that those persons had control of or any contact or interest in premises or that police officers had reasonable belief that such persons were occupants, residents or owners in control of home.

People in the Interest of D.F.L., 931 P.2d 448 (Colo. 1997). The permissible intensity of a search depends on the description of the items to be seized.

People v. Raehal, 2017 COA 18. Where a media device is properly seized, its contents may be searched outside the statutory time frame for executing the warrant, as search warrants that specifically authorize the seizure of technology contemplate the later search of that media. A second warrant is not required to search properly seized media (in this case, photographs on a digital camera) where the evidence obtained in the search does not exceed the probable cause articulated in the original warrant.

People v. Webb, 2014 CO 36. The police searched defendant's purse when they executed a search warrant for her house based on information that her adult son was using methamphetamine in the house. CSC held that because the purse was found in a room to which son had access and because the purse was a container in which son could have reasonably hidden contraband, the search of defendant's purse was within the scope of the search warrant.

People v. Nelson, 2012 COA 37. Defendant had standing to challenge entry search of apartment that he occupied; maintenance ruse used by police to get defendant to open apartment door did not render the subsequent entry and search illegal; evidence was sufficient to establish that probable cause existed for entry and search of apartment; exigent circumstances justified warrantless entry of apartment; but subsequent consent by defendant's girlfriend to the search of the apartment was invalid as to defendant; sufficient facts in redacted search warrant affidavit provided probable cause to search the apartment; and case would be remanded for additional findings of fact was to whether evidence found in initial illegal search was admissible under the independent source rule.

People v. King, 292 P.3d 959 (Colo. App. 2011). Strip searches are outside the scope of a warrant for a search "upon person" because strip searches are more invasive and subject the person being searched to potential humiliation and degradation. For that reason, strip searches must be authorized: (1) by a warrant allowing strip searches that includes an articulable basis for the more invasive search, or (2) by officers having particularized reasonable suspicion that the defendant has hidden contraband on his body. *Here:* officers properly forced entry into a motel room without first knocking and announcing their presence because they had a reasonable suspicion that advance warning would likely result in the destruction of the drugs subject to seizure, given the defendant's history of drug dealing and the close proximity of the motel room's bathroom.

People v. Butler, 251 P.3d 519 (Colo. App. 2010). Suppression of evidence is no longer a remedy in a criminal case for violations of the knock-and-announce rule. COA concluded that the inconsistent holdings in *Gifford* and *Hudson* are analogous to the situation in *Geisendorfer*. It concluded that the USSC holding in *Hudson* controls because both decisions interpret the federal Constitution; thus, suppression of evidence is no longer a remedy in a criminal case for violations of the knock-and-announce rule. COA concluded that *Gifford* is no longer good law in light of the *Hudson* ruling, even though *Gifford* has not been formally overruled. COA was convinced that if the CSC were to address this issue, it would necessarily conclude that its holding in *Gifford* has been superseded by *Hudson.*

People v. Aarness, 150 P.3d 1271 (Colo. 2006). The police must meet two requirements before entering a residence to execute an arrest warrant (without a separate search warrant): (1) they must have a reasonable belief that the suspect lives in the residence, and (2) they must have a reasonable belief that the suspect is within the residence when they enter. *Here:* although police had a warrant for defendant's arrest and had reason to believe he was in the apartment, the police had no reason to believe that defendant lived in the apartment, thus, the entry was unlawful.

People v. Russom, 107 P.3d 986 (Colo. App. 2004). No-knock warrants are justified where an announced entry warrant would give rise to a threat of physical violence or the destruction of evidence. The justification needed to get a no-knock warrant is not high. Review is from the perspective of reasonable officers who are legitimately concerned about performing their duties and maintaining their own safety.

People v. Wickham, 53 P.3d 691 (Colo. App. 2001). Police investigating a murder obtained a search warrant 14 days after the murder and executed the warrant two days later. There was still probable cause to believe that defendant had possession of the stolen items.

Exigent Circumstances

People v. Licona-Ortega, 2022 COA 27. COA applies an established rule — the exigent circumstances exception to the Fourth Amendment search warrant requirement — to a novel fact situation: a ping of a cell phone to obtain its (and presumably its owner's) real-time location. As a matter of first impression in Colorado, we hold that under the facts presented, exigent circumstances supported the warrantless ping of the defendant's cell phone to locate him.

Good Faith Exception

People v. Cooper, 2016 CO 73. The trial court erred when it suppressed the results of a search warrant that uncovered drugs, drugs paraphernalia and weapons at the defendant's house. The trial court found that the warrant's lack of exact dates shrouded the warrant in "staleness." On appeal, the Colorado Supreme Court reversed, finding that the good faith exception to the exclusionary rule should apply. There was enough information of an ongoing and currently-operating drug trafficking operation in the warrant that a reasonable officer could have a reasonable, good faith belief that the warrant was proper. For purposes of good faith exception to exclusionary rule, there are four situations in which an officer may not reasonably rely on a warrant: (1) where the issuing magistrate was misled by a known or recklessly made falsehood, (2) where the issuing magistrate wholly abandoned the judicial role, (3) where the warrant is so facially deficient that the officer cannot reasonably determine the particular place to be searched or things to be seized, or (4) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

People v. Altman, 960 P.2d 1164 (Colo. 1998). A warrant that has failed appellate scrutiny can nonetheless form the basis for good faith execution by a reasonable police officer. Only if no reasonable officer would have relied upon that warrant should courts defeat the good faith exception.

People v. Restrepo, 2021 COA 139. As a matter of first impression, the cited pre-*McKnight* precedent — *Illinois v. Caballes*, 543 U.S. 405 (2005); People v. Esparza, 2012 CO 22, abrogated by *McKnight*; and People v. Mason, 2013 CO 32 — is not binding because these cases are distinguishable. COA notes that for the good faith exception to apply, a peace officer must make a reasonable judgmental error concerning the existence of facts or law. §16-3-308(1),(2)(a). A good faith error with respect to the existence of law is reliance upon then-binding appellate court precedent, not merely conduct that is reasonable in the abstract. Because *Caballes*, *Esparza*, and *Mason* are not binding precedent, reliance on them does not trigger the good faith exception. In the absence of probable cause or an applicable exception to the exclusionary rule, the division concludes that evidence should be suppressed pursuant to state constitutional law.

People v. Seymour, 2023 CO 53. Under CAR 21, the CSC addressed the constitutionality of law enforcement's use of a reverse-keyword warrant to obtain from Google certain user-account data related to a suspected arson that resulted in the deaths of five people. The court discharges its rule to show cause for several reasons: (1) under the Colorado Constitution, defendant has a constitutionally protected privacy interest in his Google search history even when revealed only in connection with his IP address and not his name and that, under both the Colorado Constitution and the Fourth Amendment, he also has a constitutionally protected possessory interest in that same history; (2) defendant's Google search history implicates his right to freedom of expression; thus,

the constitutional protections must be applied with "scrupulous exactitude;" (3) the warrant at issue adequately particularized the place to be searched and the things to be seized; (4) the majority assumes without deciding that the warrant required individualized probable cause and that its absence here rendered the warrant constitutionally defective; and (5) law enforcement obtained and executed the warrant in good faith, so the evidence shouldn't be suppressed under the exclusionary rule.

People v. Grudznske, 2023 COA 36. The affidavit for the blood draw after a vehicular homicide (DUI) contained a typo that said the date of the accident was September 9th instead of September 30th. When the affiant spoke to the judge at the time the judge signed the warrant, he verbally told the judge the accident took place a few hours earlier. The COA held that a reasonable jurist would assume or understand, as Judge McNulty did, that this collision occurred shortly before he was asked to issue the warrant. While the subsequent testimony from the affiant was not necessary to reach this conclusion, it nevertheless was admissible for the proper purpose of explaining what appears from the four corners of the document to be a typographical error referring to the incorrect date of the collision. For these reasons, COA concluded that the reasonable interpretation of the warrant reveals an obvious typographical error: Sunday, September 30 rather than Sunday, September 9. To the extent that such an inference is inconsistent with the affidavit, the affiant's testimony was admissible to provide context to correctly interpret the obvious typographical error. The evidence also would have been admissible under the good faith exception.

People v. Folsom, 2017 COA 146M. The good faith exception did not apply to the officers' warrantless search of the defendant's IPods. Although People v. Taylor, 2012 COA 91, abrogated by *Riley* held that a warrantless search of the call history of a cell phone seized incident to an arrest did not violate the Fourth Amendment, it did not address or validate the warrantless search of a device's video recordings. Because at the time off the search, there was no Colorado authority authorizing the warrantless search of the defendant's IPods, the good faith exception did not apply.

People v. Marko, 2015 COA 139. Even if the search warrant issued by a military magistrate to search the defendant's barracks was invalid under the Colorado Constitution because the oath/affirmation was not "reduced to writing," the civilian police properly relied on the warrant in good faith as the procedures they used satisfied military law and procedure. To the extent the police were mistaken in their belief that the warrant also satisfied the requirements of the Colorado Constitution, such a mistake was objectively reasonable.

People v. Barry, 2015 COA 4. Under the good faith exception, exclusion is inappropriate where the officers conducted a warrantless blood draw in objectively reasonable reliance on then-binding appellate court precedent in People v. Schall, 59 P.3d 848 (Colo. 2002).

People v. Hoffman, 293 P.3d 1 (Colo. App. 2010), rev'd other grounds, 289 P.3d 24 (Colo. 2012). Fact that executing officer is same as affiant officer does not preclude application of good faith exception. There was no good faith to justify the deputy's execution of the search warrant when the affidavit in support of the search warrant was based on the deputy's personal observations and those observations did not confirm the informant's information or include any suspicious conduct of the defendant from which the deputy could infer criminal activity.

People v. Gutierrez, 222 P.3d 925 (Colo. 2009). Acting pursuant to a warrant, police seized and searched all of the taxpayer files in an accountant's office; one of the clients challenged the search. A taxpayer has a reasonable expectation of privacy in his tax records, and thus has standing to challenge a search of his accountant's office that resulted in the seizure of the client's file. *Here:* because there was no individualized probable cause as to this client's file, the search of the file must be suppressed. The good-faith exception to the exclusionary rule does not apply because the warrant was so lacking in probable cause that no reasonably well-trained officer could have relied on it.

People v. Hagos, 250 P.3d 596 (Colo. App. 2009). The exclusionary rule does not apply to situations where the police act in objectively reasonable, good faith reliance on a warrant, even if a court later finds that the warrant is defective. *Here:* officer acted in an objectively reasonable manner in submitting the affidavit, obtaining the search warrant, and executing the search: while Colorado law suggests that the information in a search warrant affidavit was insufficient to establish the link between clear evidence of drug dealing and presence of books and records in the apartment, in almost every federal circuit it would have been. Thus, the affidavit was not so lacking in indicia of reliability as to render belief that the warrant was legitimate entirely unreasonable; and while some information was almost 2 years old, some was as recent as 6 days before the affidavit was signed. It thus presented a chronological account that, in sum, provided indicia of current drug dealing. While staleness is clearly a factor to consider, the "old" information here set the stage for the later linking of more recent facts to the indicia of current drug dealing.

People v. Pacheco, 175 P.3d 91 (Colo. 2006). CSC upheld the trial court's order suppressing evidence seized pursuant to a search warrant, holding that the affidavit filed in support of the warrant failed to give a substantial basis for a finding of probable cause. CSC rejected a good faith exception argument, finding that the searching officer could not, in good faith, reasonably rely on his own bare bone" affidavit that contained only assertions unsupported by facts.

People v. Miller, 75 P.3d 1108 (Colo. 2003). The court held that a police officer's reliance on a search warrant based on an affidavit alleging drug manufacturing at the subject residence a month earlier was not objectively reasonable. The good faith exception therefore did not apply.

People v. Kazmierski, 25 P.3d 1207 (Colo. 2001). The test announced in *U.S. v. Leon*, 468 U.S. 897 (1984), is substantially similar to the standard codified at §16-3-308. In both instances, the inquiry is whether it was objectively reasonable for the officer to rely upon the warrant. Reliance would be objectively unreasonable if: (1) the magistrate was misled by a knowing or recklessly made falsehood, (2) the magistrate wholly abandoned his or her judicial role, (3) the warrant is so facially deficient that officers cannot reasonably determine the particular place to be searched or things to be seized, or (4) the warrant is based on a "bare bones" affidavit. The good faith exception does not apply when the officer who executed the warrant was responsible for inaccuracies in the warrant affidavit that were made intentionally or in reckless disregard for the truth.

People v. Gall, 30 P.3d 145 (Colo. 2001). The warrant failed to indicate how the affiant knew that the address stated in the warrant was the defendant's address. However, this deficiency was minor, and did not affect the officer's good faith reliance on the warrant.

People v. Randolph, 4 P.3d 477 (Colo. 2000). Seized evidence was inadmissible under the good faith exception to the exclusionary rule because the bare bones affidavit was so facially deficient that no officer would reasonably have relied on the warrant. Specifically, agents failed to corroborate the details in the affidavit and failed to narrow the search with particularity.

Miscellaneous: Search Warrants

People v. Raider, 2022 CO 40. Search warrants are irrelevant to the issue of consent under expressed consent statute; expressed consent statute does not apply to blood draws performed pursuant to a judicially authorized search warrant for which consent is unnecessary; and expressed consent statute's prohibition against forced specimen collection of blood or breath of any person suspected of DUI applies only to warrantless tests based on implied consent.

People v. Davis, 2019 CO 24. Where police had both a valid search warrant to search defendant's phone and defendant voluntarily provided passcode to enable them to access the contents of the phone, the police did not violate the Fourth Amendment by using the passcode to execute the search warrant.

People v. George, 2017 COA 75. If a police officer conducts a warrantless search based on consent—but a court suppresses evidence obtained because the consent was invalid—the law of the case doctrine does not prevent the officer from lawfully obtaining the same evidence by applying to a different judge for a search warrant based on grounds other than consent and without using the fruits of the earlier unlawful search. This is true even if the officer does not tell the second judge about the earlier suppression order.

People v. Harris, 2016 COA 159. An animal protection agent who is an employee of the Humane Society is not authorized under the Animal Protection Act to obtain a search warrant to investigate the suspected mistreatment of horses.

People v. Marko, 2015 COA 139. The search of defendant's barracks room, pursuant to a warrant signed by a military magistrate, was valid, as §16-3-301 does not preclude the introduction of evidence seized under a search warrant signed by a detached and neutral magistrate from another jurisdiction.

People v. Clendenin, 232 P.3d 210 (Colo. App. 2009). Failure to include affidavit in search warrant requires reviewing court to presume that material portions omitted from record supported the judgment of the court issuing the warrant.

Tattered Cover Inc. v. Thornton, 44 P.3d 1044 (Colo. 2002). When the government seeks to use a search warrant to discover customer book purchase records from an innocent, third-party bookstore, the Colorado Constitution mandates this procedure: the third-party bookstore must be afforded an opportunity for a hearing prior to the execution of the search warrant; at the hearing, the government must demonstrate a compelling need for the precise and specific information sought. There must be a direct connection between the criminal investigation and the information sought. If the information is reasonably available through alternate means or the request is overly broad, the government's need is not compelling. The court must then decide whether the government's need outweighs the harm (to constitutionally-protected interests) that will result from execution of the warrant. (In general, there will be less danger of harm if records are sought for reasons unrelated to the contents of the materials purchased by the customer.)

SEARCH & SEIZURE: PERSONS

Electronics (Cells, Ipods)

People v. d'Estree, 2024 COA 106. The COA reversed the trial court's decision declining to suppress evidence obtained from the second of two warrants issued to search the contents of defendant's cell phone. While the second warrant would have met the independent source doctrine's requirements, here police used an illegally obtained cell phone PIN code to execute the otherwise lawful second warrant. Thus, the trial court should have excluded evidence obtained from the phone at trial. The COA further holds that when police seek to obtain a cell phone PIN code without defendant's consent, in this case via a digital "brute force attack," this constitutes a search under the Fourth Amendment and requires authorization via a warrant. Finally, the COA holds that the use of the PIN code here does not meet the requirements of the inevitable discovery doctrine as police abandoned the lawful search to find the PIN code pursuant to the second warrant and expedited their access to the phone using the PIN code illegally obtained pursuant to the first warrant. Defendant's convictions are reversed, and the case is remanded for a new trial. Judge Grove's special concurrence highlights two aspects of the inevitable discovery jurisprudence that may warrant reconsideration.

People v. Morse, 2023 COA 27. Applying the private search doctrine, when a private party acting lawfully and independently of the government discovers and views an electronic file on another person's device (or "cloud" account) and makes that file available to law enforcement, officers do not violate the Fourth Amendment by viewing that same electronic file without a warrant. *Here:* an independent private party discovered a video on defendant's computer depicting an apparent sexual assault. She showed the video to law enforcement and made

a copy. Trial court correctly denied defendant's motion to suppress the video. COA does not consider whether the officers could lawfully view other files on the computer because no such evidence was admitted at trial. COA also concludes that evidence found on the computer would also have been admissible under the independent source doctrine, where officers later obtained a warrant for the computer.

People v. Folsom, 2017 COA 146. Based on Riley v. California, 134 S. Ct. 2473 (2014), police may not search the contents of an iPod incident to arrest. While ordinarily the police may search a person incident to arrest and seize contraband or other evidence of a crime without further justification, courts have recognized that the warrantless seizure of a person's computer or similar device raises acute Fourth Amendment issues. But in *Riley*, the USSC held that data stored on a cell phone could not be searched incident to arrest, and therefore a warrant was required. Just as smart phones are essentially minicomputers — that happen to have the ability to be used as a telephone — so are iPods. While an iPod does not have telephonic capabilities, the arresting officer testified that the iPods in this case could store videos, photographs, and music, and access the internet. As relevant here, an iPod is the Fourth Amendment equivalent of the device addressed in *Riley*.

People v. Herrera, 2015 CO 60. A search warrant authorizing police to search a cell phone for: (1) indicia of ownership, and (2) text messages between the defendant and person "S" did not authorize police intrusion into another text messaging file labeled with a different person's name. Because there was no objective basis for the police to conclude that the searched file contained information pertinent to person "S", its incriminating contents were also not admissible under the plain view doctrine.

Internal Body Search

People v. Carr, 2016 COA 168. Courts analyze three factors to assess the constitutionality of a warrantless internal body search: (1) a "clear indication" that incriminating evidence will be found; (2) whether exigent circumstances that justify the intrusion and make it impracticable to obtain a search warrant; and (3) whether extraction occurred in a reasonable manner and by a reasonable method. Under (1), a clear indication requires assessing what officers know or have observed at the time combined with their experience and training. Under (2), the suspicion of drugs that can be easily destroyed hidden in a suspect's mouth provides exigent circumstances to perform a cavity search. Under (3), whether the search and extraction is reasonable requires evaluating (a) the extent to which the procedures threaten the health and safety of the individual, (b) the extent of the intrusion upon the suspect's dignity, personal privacy, and bodily integrity, and (c) the community's interest in fairly and accurately determining guilt or innocence. Application of force to the throat to prevent swallowing is not unreasonable if it poses minimal risk to the suspect's health and safety—especially because the mouth is not a sacred orifice. *Here:* because all these factors were met and it was reasonable to believe the evidence would be destroyed, the body cavity search (defendant's mouth) was thus reasonable under *Schmerber* and *Winston*.

Search Incident to Arrest

People v. Bischofberger, 724 P.2d 660 (Colo. 1986); People v. Rios, 43 P.3d 726 (Colo. App. 2001). The scope of a search incident to a lawful custodial arrest is quite broad. The search need not be limited to a mere pat-down of the defendant's outer clothing, but may extend to pockets and other containers, open or closed, found on the defendant's person or within his immediate reach. Such a search of defendant's person requires no independent justification, and the searching officer may seize and examine weapons, contraband, or other articles that the officer reasonably believes to be related to criminal activity even though these articles do not directly relate to the offense for which the arrest itself was affected.

People v. Lewis, 975 P.2d 160 (Colo. 1999). The right to conduct a search incident to arrest applies only if the arrest is lawful. Here: the search was invalid because: (1) the arrest followed the illegal warrantless entry into a motel room and was therefore unlawful; and (2) the search of the motel room took place a half hour before any arrest.

People v. Lancaster, 2015 COA 93. Defendants have a diminished expectation of privacy. Katie's Law requires that persons arrested for a felony have their DNA collected. *Here:* defendant was arrested for a misdemeanor, not a felony, and was also under supervision of the probation department. COA held that the government's interest in taking defendant's DNA outweighed his privacy interests and no 4th Amendment violation occurred.

People v. Pollard, 2013 COA 31M. Defendant's refusal to consent to a search may not be used by the prosecution – either through the introduction of evidence or by explicit comment – to imply the person's guilt of a crime. Recurring references to defendant's refusal to consent to the search, and the prosecution's explicit use of that evidence to imply guilty knowledge on defendant's part, cast serious doubt on the reliability of his conviction, necessitating reversal.

People v. Valencia, 257 P.3d 1203 (Colo. App. 2009). If an arrest is valid, so too is a search of the person arrested. The legality of the search of, and the seizure of blood evidence from defendant's ear depended on whether probable cause existed for his arrest.

Inventory Search

People v. Camarigg, 2017 COA 115. An inventory search may properly permit opening closed containers where the inventory policy gives officers discretion to do so. An officer's subjective curiosity is not relevant if the inventory follows department procedure and is objectively reasonable. Whether officers have alternate options besides impounding a vehicle does not control the question of whether impounding the vehicle was objectively reasonable.

People v. Parks, 2015 COA 158. Colorado Constitution does not prohibit opening and inspecting a closed container found during a vehicle inventory search if the search was conducted in accordance with standardized departmental policy and there is no showing that the police acted in bad faith or for the sole purpose of investigation.

People v. Guthrie, 2012 CO 59. County court held defendant in contempt for coming to court drunk. During a routine inventory search as she was being taken into custody, police found narcotics and charged her with possession. Trial court in the possession case suppressed the evidence, finding that the contempt proceedings had violated defendant's right to due process. *Here*: suppression reversed as an inappropriate remedy. The police were carrying out a lawful court order, according to an established procedure; defendant's remedy for any alleged due process violation in the contempt proceeding was to appeal the contempt finding.

People v. Salaz, 953 P.2d 1275 (Colo. 1998). Jailers are not required to obtain a warrant to conduct a second search of an inmate's clothing when clothing has been inventoried and remains in the jail's custody.

People v. Smith, 926 P.2d 186 (Colo. App. 1996). After suspect is arrested and taken to the police station, it is entirely proper for police to remove and inventory property found on or in the possession of an arrested person who is to be jailed.

Exigent Circumstances

People v. Allen, 2019 CO 88. Officers' search of the passenger side of a vehicle was not justified as a protective search for weapons where the driver and passenger had left and walked into a hotel. Whatever danger the officers may have faced during the roadside encounter, it had clearly dissipated by the time they inventoried the Cadillac.

People v. Ackerman, 2015 CO 27. Where police were in the process of preparing a search warrant but learned that the unconscious and injured defendant was being taken for medical procedures that could alter his blood-alcohol content, warrantless blood draw was justified by exigent circumstances.

People v. Barry, 2015 COA 4. CSC's holding that, because alcohol dissipates quickly in the blood, exigent circumstances exist when the driver is transported to the hospital and the investigating officer is detained at the accident scene, was rejected by Missouri v. McNeely, 133 S.Ct. 1552 (U.S. 2013).

People v. Schaufele, 2014 CO 43. When considering the admissibility of the results of a warrantless involuntary blood draw, the trial court must follow Missouri v. McNeely, 133 S.Ct. 1552 (2013), which instructs the court to consider the totality of the circumstances in assessing exigency. CSC declined to adopt a modified rule proposed by Chief Justice Roberts in his *McNeely* concurring/dissenting opinion. (This is a plurality opinion interpreting a plurality opinion, so it is not worth much in terms of precedent.)

People v. Brant, 252 P.3d 459 (Colo. 2011). If, during the course of a valid protective search for weapons a police officer feels an object that gives immediate rise to a reasonable belief that the item is contraband, the officer may seize the object without a warrant. *Here:* police stopped a vehicle for a broken taillight. As they approached the vehicle, they saw the front-seat passenger leaning over as if she might be hiding something. Officers ordered the passenger out of the car and performed a protective pat-down, finding nothing. An officer then searched the passenger compartment and found a cloth glove in the area where the officers had observed the passenger's furtive movement. Feeling the glove, he recognized the shape of a pipe, and opened the glove to discover a small glass pipe with burn residue on it and a small baggie of suspected illegal narcotics. Protective search of the passenger compartment was justified, and, under the "plain-feel" doctrine, the police properly seized evidence discovered in the glove.

People v. Chavez, 240 P.3d 448 (Colo. App. 2010). In domestic violence cases, the distinction between the doctrines of exigent circumstances and the emergency aid exception collapse because the same facts that give rise to the exigency also provide probable cause to suspect a crime. Deference to officers is particularly warranted in domestic disputes because the signs of danger may be masked by a battered victim's fear or dependence. *Here:* the warrantless entry into the home shared by defendant, his girlfriend, and her two children was justified by the totality of the circumstances, including that: (1) after running to a neighbor's home, the daughter called 911 to report that her mother and defendant were involved in a physical altercation; (2) the report included that weapons were in the house; (3) police arrived within minutes of the 911 call to find the house dark; (4) police's repeated pounding on the front door met with no response; and (5) an officer went to the back of the house and saw the door ajar.

People v. Loggins, 981 P.2d 630 (Colo. App. 1998). No search when government-employed medical personnel (following standard hospital procedures for trauma) saw and retrieved small piece of plastic protruding from defendant's buttocks (baggie of cocaine then turned over to attending officer). Even if this had been a search, it would have been OK under the medical emergency variant of the exigent circumstances doctrine: medical personnel in the course of treating a medical emergency discovered cocaine.

Plain View

People v. Kluhsman, 980 P.2d 529 (Colo. 1999). Plain view exception to warrant requirement addresses warrantless seizures of evidence; it does not implicate warrantless "search" for evidence in plain view, because if article is already in plain view, its observation does not involve invasion of privacy in violation of Fourth Amendment. Observation of evidence in plain view is not search and does not require warrant.

People v. Najjar, 984 P.2d 592 (Colo. 1999). The plain view doctrine applies when officers observe an item as a result of a prior lawful intrusion and legal right of access and the incriminating character of the item is immediately apparent to the officer who observes it.

People v. Swietlicki, 2015 CO 67. For the "incriminating nature" of a container to be "immediately apparent" under the plain view doctrine, the police must have probable cause to associate the item with criminal activity without conducting a further search. *Here:* deputy had probable cause to seize defendant's laptop because he was told by other officers involved in the investigation to seize the laptop, and the police collectively had ample information establishing probable cause to believe that the laptop contained child pornography. The court recognized that possessors of child pornography often hoard and rarely dispose of their materials.

People v. Shover, 217 P.3d 901 (Colo. App. 2009). Police may seize items without a warrant under the plain view doctrine where: (1) the initial police intrusion onto the premises was legitimate; (2) the police had a reasonable belief that the evidence was incriminating; and (3) the police had a right of access to the evidence. The difference between the first requirement and the third is that the former refers to where the officer stands when he *sees* the item, and the latter refers to where he must be to *retrieve* the item.

People v. Manier, 197 P.3d 254 (Colo. App. 2008). Detective asked to search defendant's person, defendant said yes, pulled a key on a black holder out of her pocket, and held it out in her hand for inspection. Another officer asked defendant about the key, which defendant identified as a car key. However, the officer recognized the key as a Ford truck key based on his personal experience owning Ford vehicles, and by that time, the officers knew that the stolen truck they were investigating was a Ford, parked nearby with fictitious plates. The police properly seized the key and had probable cause to associate it with criminal activity because its incriminating nature was "immediately apparent."

People v. Gothard, 185 P.3d 180 (Colo. 2008). The plain view doctrine allows police to seize, without a warrant, evidence that is plainly visible, so long as: (1) the initial intrusion onto the premises was legitimate; (2) the police had a reasonable belief that the evidence seized was incriminating; and (3) the police had a lawful right of access to the object. The plain view doctrine provides that police are not required to close their eyes to any evidence that they plainly see while conducting otherwise legitimate searches. Here: warrantless seizure of plastic baggie of methamphetamine on top of defendant's nightstand in motel room came within plain view exception to warrant requirement; officer's presence in motel room was legitimate, officer observed plastic baggie in plain view, and incriminating nature of substance in plastic baggie was immediately apparent.

People v. Koehn, 178 P.3d 536 (Colo. 2008). Although the places that may be searched and items that may be seized pursuant to a search warrant are circumscribed by the precise grant of the warrant itself, officers executing the warrant are not required to close their eyes to other incriminating evidence plainly visible to them while conducting a valid search. *Here:* police officers' discovery of controlled substances and drug paraphernalia in a pants pocket and kitchen cabinet while executing a search warrant for firearms and ammunition came within the plain view exception to the warrant requirement, since guns and/or ammunition could have been found in either location, and the incriminating nature of the drugs and paraphernalia was immediately apparent.

People v. Hammas, 141 P.3d 966 (Colo. App. 2006). When conducting a search of one taken into civil protective custody, items found may be removed from the individual, and if it is immediately apparent that those items are or contain contraband, the contraband may be seized under the plain view doctrine. *Here:* officer's training and experience and his view of the clear baggie containing a white crystalline substance were sufficient to establish probable cause to seize and open the bag and test its contents.

People v. Rushdoony, 97 P.3d 338 (Colo. App. 2004). The "plain feel" doctrine from *Minnesota v. Dickerson*, 508 U.S. 366 (1993), can be used as an exception to the warrant requirement. Seizure under the plain feel doctrine, just as with the plain view exception, requires that the officer have reasonable ground to believe that the object is incriminating, which requires the incriminating nature of the object to be immediately apparent to the officer, without further search, or manipulation of the object. *Here:* officer's testimony that he felt an item in defendant's pocket "consistent from previous dealings that felt like a pipe" was sufficient to establish that the incriminating nature of the meth pipe was readily apparent to the officer.

People v. Dotson, 55 P.3d 175 (Colo. App. 2002). After defendant answered the door, police entered his residence to execute an arrest warrant. Police were not required to order defendant out of the residence in order to arrest him. They were legitimately on the premises, and evidence discovered in plain view was properly seized.

People v. Trusty, 53 P.3d 668 (Colo. App. 2001). Police arrested defendant in the bathroom, and he then asked for his clothes from a nearby bedroom. When the officer picked up a pair of pants on the bedroom floor and felt for weapons, a pants pocket gaped open, and the officer saw bags of crack cocaine. Evidence was lawfully seized because its incriminating nature was immediately apparent.

People v. Pitts, 13 P.3d 1218 (Colo. 2000). Plain view exception to warrant requirement did not apply to checks, social security card, and other items of identification seized from defendant's bedroom during police officer's execution of valid search warrant relating to drug investigation; there was no evidence that items seized were incriminating because none of the items had been reported as stolen, and police officers did not have any information that items seized related to narcotics investigation or were associated with anyone living in apartment.

Miscellaneous: Search & Seizure Persons

Fitzgerald v. People, 2017 CO 26. When there has been no search, and when the applicable implied consent law does not criminalize a drunk driving suspect's refusal to undergo chemical testing, introducing evidence of that refusal at trial does not impermissibly burden the defendant's Fourth Amendment right to be free from unreasonable searches. *Here:* police, with probable cause for a drunk driving offense, asked the driver to take a chemical test. The driver refused, and his statement of refusal was offered in evidence against him at trial under §42-4-1301(6)(d).

People v. Lancaster, 2015 COA 93. The purposes of DNA collection include: (1) preventing crime; (2) exonerating innocent people; (3) preventing and solving violent crime.

People v. Ramos, 2012 COA 191, aff'd other grounds, 2017 CO 6. Crim. P. 41.1 applies only to requests for nontestimonial identification evidence made before the police have probable cause to make an arrest. Once defendant has been arrested and charged with an offense, Crim. P. 16(II)(a)(1) governs, which does not require an affidavit or special circumstances before a trial court may order a defendant to provide such evidence.

People v. Wilson, 2012 COA 163M, rev'd other grounds, 2015 CO 54M. Crim. P. 41.1 is facially constitutional, including its provision for the collection of saliva samples as non-testimonial evidence.

People v. Tallent, 174 P.3d 310 (Colo. 2008). Police may temporarily detain personal property upon reasonable suspicion that the property was involved in criminal activity. Such a detention must be limited both in terms of time and intrusiveness. To determine the nature and the quality of the intrusion, the following factors are relevant, but not exclusive: (1) whether the police had a compelling reason for detaining the property; (2) how long the property was detained; (3) whether the police forced the defendant to relinquish the property; and (4) whether the property was moved a significant distance. *Here*: officers investigating a report of suspicious activity observed a car matching the description of the car involved. Although they lost sight of the car, they soon observed the defendant nearby; the defendant fled upon seeing the police. After a chase, the police detained the defendant, obtained his keychain, and used his keyless remote device to locate the nearby car. They then seized the car until a warrant was obtained for a full search. The court held that the temporary detention of the car was not unreasonable as the officers initially did not enter the car until further investigation into defendant's activities was completed, and a warrant was uncovered for the defendant's arrest. The court noted that the car was also parked on a public street in plain view and was not forcibly removed from defendant, and defendant was not ordered to exit the car so that the officers could take possession of it.

People v. Summitt, 132 P.3d 320 (Colo. 2006). Evidence that defendant remained in his house when the police tried to contact him did not raise a Fourth Amendment issue because: (1) the police never entered defendant's home, and (2) the record does not show that he was standing on the right to have the police obtain an arrest warrant.

People v. Rossman, 140 P.3d 172 (Colo. App. 2006). Probationer's constitutional protection against unreasonable search and seizure was not violated by probation condition that required him to provide a biological sample for DNA testing. The use of DNA samples in a DNA database falls within the "special needs exception" to the warrant requirement.

People v. Ramirez, 140 P.3d 169 (Colo. App. 2005). The seizure of a prisoner's DNA for creation of a DNA database, pursuant to §17-2-201(5)(g)(1) does not violate the Fourth Amendment. Rather, such seizures fall within the "special needs" exception to the warrant requirement.

People v. Shreck, 107 P.3d 1048 (Colo. App. 2004). Blood seized from incarcerated defendant in violation of statute at the time (defendant was not a convicted sex offender and statute required blood samples from convicted sex offenders) is not a 4th Amendment violation. This is because DNA databases serve a number of "special needs" beyond the normal need for law enforcement and because prisoners have substantially reduced expectations of privacy. Moreover, even where statute violated, where there is no constitutional violation and where there is no willful and recurrent violation, the evidence should not be suppressed.

People v. Mullins, 104 P.3d 299 (Colo. App. 2004). Where probable cause to arrest or search is not at issue, it is improper to present to the jury evidence about obtaining an arrest or search warrant. *Here*: improper testimony regarding the procedure for obtaining an arrest warrant, in addition to the prosecutor's mistaken statements that only the defendant could claim self-defense, constituted plain error because it so undermined the fairness of the trial as to cast serious doubt on the reliability of conviction.

People v. Ortega, 34 P.3d 986 (Colo. 2001). A "seizure" of personal property occurs when the police interfere in a meaningful way with an individual's possessory interests. *Here*: police did not seize the suitcase when they removed it from the luggage compartment of the bus and subjected it to a dog sniff. Nor did they seize the suitcase by removing the claim tag (this was, at most, a seizure of the tag). However, their further use of the suitcase as part of a ruse to trick the defendant was a seizure.

People v. Herrera, 1 P.3d 234 (Colo. App. 1999). Officers saw defendant with a gas can near an abandoned car. They spoke to him, found that he was intoxicated, and decided to take him into protective civil custody. They handcuffed and searched the defendant, finding a knife and marijuana. *Here:* initial contact was a consensual encounter, but officers exceeded the scope of search for protective custody; the case was remanded for findings on inevitable discovery.

People v. Archuleta, 980 P.2d 509 (Colo. 1999). Police officer does not need reasonable suspicion to chase an individual, because there is no seizure until individual submits to show of state authority.

SEARCH & SEIZURE: PREMISES

Search Incident to Arrest & Protective Sweeps

People v. Walter, 890 P.2d 240 (Colo. App. 1994); Maryland v. Buie, 494 U.S. 325 (1990). A protective sweep is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.

People v. Gothard, 185 P.3d 180 (Colo. 2008). Officer's search of the area within the arrested defendant's immediate control – including a closed drawer in a nightstand -- was a proper search incident to arrest. As such, officer properly seized drug paraphernalia found in the drawer.

People v. Aarness, 150 P.3d 1271 (Colo. 2006). Police are justified in conducting a "protective sweep" of a residence incident to a defendant's lawful arrest where they have an articulable suspicion that the area to be swept harbors a person posing a danger to those present at the arrest scene.

People v. Miller, 143 P.3d 1195 (Colo. App. 2006). Search of shared dwelling for evidence over the express refusal of consent by defendant, who was a physically present resident, could not be justified as reasonable as to him on the basis of consent given to the police by his wife.

Exigent Circumstances & Emergency Aid

People v. Mendoza-Balderama, 981 P.2d 150 (Colo. 1999). There are three general categories of ***exigent circumstances***: (1) a bona fide pursuit of a fleeing suspect; (2) risk of immediate destruction of evidence, and (3) colorable claim of an emergency threatening the life or safety of another.

People v. Hebert, 46 P.3d 473 (Colo. 2002). The ***emergency aid exception*** is an exception to both the warrant requirement and the probable cause requirement and is thus different from the "exigent circumstance doctrine," which requires both the presence of an exigency and probable cause to justify warrantless entry. Under the emergency aid exception, police must have a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. A theoretical possibility that another's life or safety is in danger is not enough. There must be both an immediate crisis and the probability that assistance will be helpful.

People v. Terhorst, 2015 COA 110. Exigent circumstances existed for a warrantless entry into defendant's home because the officers had reason to believe that evidence of underage drinking might be destroyed.

People v. Brunsting, 2013 CO 55. Officer safety concerns fall within the exigent circumstances exception when: (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others; and (2) the manner and scope of the search is reasonable. *Here*: officers had a valid basis to believe there was a need to protect their safety while investigating an auto theft where the alleged thief was inside the residence because: the occupants were known to be dangerous persons who were involved with illegal drugs and who were known to carry weapons; the owner of the house, who was contacted outside, appeared to be trying to alert the other occupants to the deputies' presence; and because of security cameras on the outside of the house the occupants were provided with advance warning of the police presence. The manner and scope of the officer's entry into the backyard of the residence was minimally intrusive and was reasonable due to: (1) legitimate concerns for officer safety, and (2) the lack of time to withdraw and obtain a warrant without compromising the safety of the reporting party and the other officers.

People v. Nelson, 2012 COA 37. When police seek to enter a home without a warrant, the government bears the burden of proving that sufficient exigency existed to justify the warrantless entry and search. Exigent circumstances may exist when: (1) the police are engaged in a bona fide pursuit of a fleeting suspect; (2) there is a risk of immediate destruction of evidence; or (3) there is a colorable claim of emergency threatening the life or safety of another. Additionally, officers are allowed to make a warrantless arrest or conduct a warrantless search if they believe that their own lives or the lives of others are at risk. *Here*: officers had a legitimate safety concern because people involved in drug distribution often possess firearms.

Kentucky v. King, 131 S.Ct. 1849 (2011). Police officers followed a suspected drug dealer to an apartment complex. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. As soon as the officers began knocking, they heard noises coming from the apartment; the officers believed the noises were consistent with the destruction of evidence. They announced their intent to enter the apartment, kicked in the door, and found the drug dealer and several others. They saw drugs in plain view during a protective sweep of the apartment and found additional evidence during a subsequent search. The dealer contended that the exigent circumstances exception to the warrant requirement did not apply because the police created their own exigency by banging on the door and announcing their presence, making it reasonably likely the occupants would try to destroy evidence. Search upheld because the exigent circumstances rule applies

unless the police create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, which was not the case here.

People v. Gothard, 185 P.3d 180 (Colo. 2008). Where exigent circumstances supported officer's entry into defendant's motel room, the plain view doctrine authorized the warrantless seizure of methamphetamine observed on defendant's nightstand.

People v. Aarness, 150 P.3d 1271 (Colo. 2006). Exigent circumstances that necessitate immediate police action are an exception to the warrant requirement. To meet the requirements of the exigent circumstances doctrine, the police must have probable cause to believe that the residence contains contraband or evidence of criminal activity. Exigent circumstances exist where the police believe that their own lives or the lives of others are at risk. Factors relevant to this determination are: (1) whether a grave offense is involved, particularly a crime of violence; (2) whether the suspect is reasonably believed to be armed; (3) whether there exists a clear showing of probable cause to believe that the suspect committed the crime; (4) whether there is a strong reason to believe the suspect is in the premises being entered; (5) the likelihood that the suspect will escape if not swiftly apprehended; and (6) whether the entry is made peaceably. A party may defend the trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court, and the reviewing court may affirm the trial court's denial of a suppression motion on different grounds than those relied upon by the trial court. CSC exercised its discretion to consider exigent circumstances as an alternative justification for entry into home, even though it was not raised in trial court. *Here:* police had an articulable suspicion that another occupant remained inside the apartment because they were told someone was upstairs. They also had reason to believe there might be weapons in the apartment because they found a loaded handgun clip on defendant's person. Although the smell of burned marijuana may provide exigent circumstances to make a warrantless entry into a home, that was not the case here. Because all but one of the occupants had been removed from the apartment and the remaining occupant was sleeping, there was no risk that evidence was being destroyed. Because the police had a warrant for defendant's arrest, the probable cause requirement was satisfied. There was a substantial safety risk to both the police and the occupants of the apartment that justified police entry. Defendant was believed to be armed, and upon seeing the police at the door he reached into the seat of his recliner and disobeyed multiple commands to show his hands. Defendant was also an escape risk based on his outstanding warrant for a parole violation.

People v. Souva, 141 P.3d 845 (Colo. App. 2005). The emergency aid exception applies when there is "a colorable claim of an emergency threatening the life or safety of another." *Here*: victim of home invasion escaped and informed police that a second victim was in his apartment being assaulted, victim provided two different apartment numbers, both of which were wrong. Because victim was confused about his apartment number and because police had reason to believe that emergency assistance was necessary, emergency aid exception applied to allow police to check with all the residents in the building.

People v. Allison, 86 P.3d 421 (Colo. 2004). Under the emergency aid exception to the warrant requirement, prosecution must prove that both an immediate crisis existed and the probability that assistance would be helpful. *Here:* after removing a quarrelling couple from their home, police officer re-entered because he had been told an adult third party might be present. The re-entry was not justified by the emergency aid exception. There were no signs that the third party had been injured or even involved in the domestic disturbance, and thus no signs of an immediate crisis.

People v. Pate, 71 P.3d 1005 (Colo. 2003). Trial court properly suppressed drugs gathered after police made warrantless entry into defendant's residence: no exigent circumstances where officers found no observable evidence that the residence had been burglarized and where they failed to question a key witness who might have provided them with probable cause to enter the residence. No emergency aid exception where, upon entry,

officers had no credible evidence of an emergency threatening someone's life or safety, and where, once inside the apartment, the officers did not inquire about the occupant's injuries or whether he required medical assistance.

People v. Hebert, 46 P.3d 473 (Colo. 2002). Where a woman's body was found in the trunk of her car, there was no immediate crisis triggering the emergency aid exception to the warrant requirement for police to enter and search her house. The theoretical possibility that someone was injured or hurt within the home was not sufficient in itself.

People v. Smith, 40 P.3d 1287 (Colo. 2002). When defendant opened his door and saw the police, he fainted. He recovered quickly and was able to walk back into his house. Police followed defendant into the residence and there obtained incriminating evidence. Evidence suppressed because defendant's fainting spell was not an "immediate crisis" justifying warrantless entry under the emergency variant of the exigent circumstances exception.

People v. Copenhaver, 13 P.3d 413 (Colo. App. 2000). After seeing blood in defendant's truck, which had been in an accident, police entered defendant's apartment to search for an additional injured person. In the apartment, police observed drugs in plain view. The court upheld the warrantless entry under the emergency doctrine, rejecting defendant's claim that the search for an injured person was pretextual.

People v. Winpigler, 8 P.3d 439 (Colo. 1999). There were no exigent circumstances to support warrantless entry under either emergency doctrine or destruction-of-evidence doctrine where the police had only generalized speculation that chemicals used in the manufacture of methamphetamine might cause an explosion and no articulable basis upon which to justify a reasonable belief that evidence was about to be destroyed.

Mendez v. People, 986 P.2d 275 (Colo. 1999). Exigent circumstances existed for a warrantless search of defendant's motel room. While officers were investigating an unrelated criminal trespass, they smelled burning marijuana coming from a motel room. When officers entered the room, they saw the defendant running into the bathroom and heard the toilet flushing. Defendant was arrested, and a bag of cocaine was discovered during an inventory search of his clothing. The odor of burning marijuana gave the officers probable cause. Moreover, as to exigent circumstances, the odor of burning marijuana indicated that the marijuana "was in the process of being burned and thereby destroyed."

People v. Kluhsman, 980 P.2d 529 (Colo. 1999). Police could make a warrantless entry into defendant's home under the exigent circumstances doctrine where: police responded to find defendant hiding in a neighbor's shed; he attacked police and behaved very erratically; he was covered with wet and dried blood; he said that his house contained many people who had engaged in sex acts. Police were justified in looking inside defendant's house for any person who might be injured. Once inside, police quickly saw some bomb-making equipment in plain view. They were not required to stop at this point to obtain a warrant or consent because: (1) under the exigent circumstances exception they were justified in continuing to look in any place that could have contained an injured person; and (2) the discovery of bomb-making equipment created a second exigency – the possibility of an explosion. Therefore, subsequent discovery of completed bomb should not have been suppressed.

People v. Lewis, 975 P.2d 160 (Colo. 1999). Absent probable cause to believe that the suspect is inside, police may not enter and search premises without a warrant under the doctrine of hot pursuit. *Here*: no probable cause to justify a search of the motel room where a man matching the description of the person who had robbed a nearby convenience store was seen standing inside the room, even assuming this was "hot pursuit."

People v. Mascarenas, 972 P.2d 717 (Colo. App. 1998). The exigent circumstances exception requires a showing of an immediate crisis inside the home and the probability that police assistance will be helpful in alleviating that crisis. Entry and search for the defendant was permissible where police, responding to domestic

violence call, were met at the door of an apparently ransacked house by a woman with a red face and an old black eye who denied violence, but admitted to a fight, and who gave inconsistent information about her boyfriend's whereabouts.

Plain View

People v. Kluhsman, 980 P.2d 529 (Colo. 1999). Police officers may seize evidence in plain view provided: (1) the initial police intrusion on the premises was legitimate; (2) the police had a reasonable belief that the evidence seized was incriminating; and (3) the police had a lawful right of access to the object.

People v. Jauch, 2013 COA 127. Under the plain view doctrine, the police may seize an item that is plainly visible without a proper search warrant, so long as: (1) the initial intrusion by the police is legitimate, (2) the police have a lawful right of access to the object seized, and (3) the police have a reasonable belief that the evidence seized was incriminating. *Here*: Although police testimony at the suppression hearing did not disclose exactly where in the bedroom the turquoise shirt was found, the search warrant authorized officers to search the residence for, among other things, two black wallets, a credit card, personal checks bearing the victim's name, a blue rag, and credit card receipts. Thus, the officers had a lawful right of access to the defendant's home and could lawfully search any location in the home that might contain these items.

People v. Tafoya, 2019 COA 176. Warrantless video surveillance from a utility pole allowing officers to view the suspect's fenced-in backyard continuously for more than three months constitutes a "search" in violation of the Fourth Amendment.

People v. Nelson, 2012 COA 37. In the case of a search, probable cause requires the police to establish that reasonable grounds existed to believe that contraband or evidence of criminal activity was located in the area to be searched. *Here:* the glass pipe in plain view, in combination with information the officers already had obtained from the reliable informant regarding drug activity in the apartment, and the other man apparently fleeing from the apartment sufficiently established probable cause that contraband and evidence of criminal activity were inside the apartment.

People v. Glick, 250 P.3d 578 (Colo. 2011). An officer positioned at a lawful vantage point may use a flashlight to make plain view observations that during daylight would not constitute a search. *Here:* police responded to defendant's residence in the early morning hours on a 911 hang-up call and used a flashlight to see into the residence from the front doorstep.

People v. Alameno, 193 P.3d 830 (Colo. 2008). Although search warrant failed to support a search for items other than child pornography, the plain view exception supports the admissibility of narcotics-related evidence and other illegal pornography discovered during the search.

People v. Gothard, 185 P.3d 180 (Colo. 2008). Where exigent circumstances supported officer's entry into defendant's motel room, the plain view doctrine authorized the warrantless seizure of methamphetamine observed on defendant's nightstand.

People v. Bostic, 148 P.3d 250 (Colo. 2006). When a police officer stood near a nightstand in the defendant's motel room, the officer was able to look into a partially open drawer and observe a syringe filled with liquid. *Here:* Because the officer could reasonably believe that the syringe was incriminating, and he had lawful access to it, he was free to seize it under the plain view doctrine.

People v. Campbell, 94 P.3d 1186 (Colo. App. 2004). The "immediately apparent" requirement of the plain view doctrine is satisfied if, without further search, police have probable cause to associate an item with

criminal activity. *Here*: police who seized a photograph depicting two young females engaged in sexual activity had reasonable cause to believe that one of the girls was underage based on her physical characteristics, including her youthful face, underdeveloped breasts, and lack of pubic hair. That the girl might in fact have been over 18 - and that it might take police time to ascertain her actual age - does not detract from the reasonable belief the police had, immediately upon viewing the photo, that the girl was underage when the photo was taken.

People v. White, 64 P.3d 864 (Colo. App. 2002). The plain view exception to the warrant requirement applied to seizure of defendant's shoes where defendant's girlfriend invited officers into the bedroom, officer observed that the shoes were bloody, and the sole pattern appeared to match the bloody shoeprint the officer had seen at the victim's home.

People v. Pitts, 13 P.3d 1218 (Colo. 2000). Officers searched pursuant to a valid warrant but seized items that were not particularized in the warrant. These items included checks, a social security card, and other identification that did not bear the names of people living in the apartment. Deferring to the trial court's finding that the principal witness was not credible, the supreme court upheld the trial court's ruling that the incriminating nature of the seized items was not immediately apparent to the officer who found them. Thus, the items were improperly seized.

Miscellaneous: Search & Seizure Premises

People v. Gillespie, 2024 COA 98. In this animal cruelty case, §18-9-202(1.5)(b), an animal control officer's discovery of the deceased dog's body was not the result of an unconstitutional search, but the officer's warrantless re-entry onto the property to collect the dog's body and document the scene violated the Fourth Amendment. Because the admission of the evidence collected during the unconstitutional search of defendant's property was not harmless beyond a reasonable doubt, defendant's convictions are reversed and case is remanded for new trial.

People v. Woodyard, 2023 COA 78. Distinguishing People v. Tafoya, 2021 CO 62, COA holds that the police's use of a camera mounted on a telephone pole to surveil the street and sidewalk in front of defendant's residence for about seven weeks was not a search within the meaning of the Fourth Amendment to the U.S. Constitution. Therefore, the trial court did not err by denying defendant's motion to suppress the camera evidence. COA also holds that to prove money laundering under §18-5-309(1)(b)(I), there must be evidence that defendant transferred money to someone else; evidence that defendant received money from someone else does not prove money laundering under that subsection. But COA rejects defendant's argument that to prove money laundering under that subsection, the prosecution must present evidence that the money transferred in the charged transaction came from committing another offense. Defendant's two convictions for violating the COCCA are vacated as well as the money laundering convictions and a few of the conspiracy to distribute illegal drugs convictions. Remaining counts are affirmed.

People v. Tafoya, 2021 CO 62. Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted. In determining whether defendant's expectation of privacy in area surveilled is one that society is prepared to recognize as reasonable, court considers public exposure of area as well as duration, continuity, and nature of surveillance. Public exposure may diminish an expectation of privacy, for Fourth Amendment purposes, but it does not necessarily eliminate the expectation altogether. Curtilage is part of home itself for Fourth Amendment purposes. *Here:* three-month-long surveillance of curtilage of defendant's home through pole camera constituted search under Fourth Amendment; defendant had a reasonable expectation of privacy in the area surveilled, the pole camera continuously recorded video surveillance footage of defendant's property, the footage was stored indefinitely

for later review, the camera could pan left and right, tilt up and down, and zoom in and out while viewing the footage live, and it showed defendant's everyday habits and routines, as well as who came to the house and how long they stayed at the house.

Florida v. Jardines, 133 S.Ct. 1409 (2013). Using a drug-sniffing dog on a homeowner's porch to investigate the contents of a home is a search within the meaning of the Fourth Amendment. USSC held that the officer's actions constituted a search because they were "an unlicensed physical intrusion" of a "constitutionally protected area" (the curtilage of a home), done for the purpose of gathering information. The physical invasion was not implicitly authorized by the homeowner because, while homeowners implicitly license a visitor to approach, and knock on, a home's front door, "[t]here is no customary invitation" to "introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence."

Bailey v. U.S., 133 S.Ct. 1031 (2013). Although Michigan v. Summers, 452 U.S. 692 (1981) holds that police officers executing a search warrant may detain the occupants of the premises, it does not justify the detention of a person who has left "the immediate vicinity of the premises being searched." None of the three law enforcement interests that justified *Summers* ─ preventing occupants from endangering the officers conducting the search, preventing occupants from interfering with orderly completion of the search, and preventing flight ─ applies "with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises."

People v. Nelson, 2012 COA 37. The limited use of ruses is supported by the overwhelming weight of authority. *Here:* use of a ruse to get the person inside to open the door to allow officers to conduct a "knock and talk is permissible.

People v. Samuels, 228 P.3d 229 (Colo. App. 2009). A probationer has a lesser expectation of privacy such that a probation officer may search a probationer's home without a warrant if the officer has a reasonable suspicion to believe that the probationer violated a condition of his probation, and that evidence of that violation may be found there.

People v. Pilkington, 156 P.3d 477 (Colo. 2007). Evidence collected by an insurance investigator conducting a parallel investigation of a possible arson case was properly admitted under the 4th Amendment because the investigator was not acting as an agent of law enforcement.

People v. White, 64 P.3d 864 (Colo. App. 2002). Police officers may enter those residential areas that are expressly or impliedly held open to casual visitors and may knock on the door of a residence and seek permission to enter. *Here*: officers lawfully entered the porch in order to request consent to enter the home.

People v. Holmes, 981 P.2d 168 (Colo. 1999). There was a lot of noise inside defendant's house, so the police had to knock hard on the door in order to be heard. When they knocked, the door swung open. The police then smelled marijuana and saw the defendant holding a bong. This was not a search.

SEARCH: VEHICLES

Search Incident to Arrest

Perez v. People, 231 P.3d 957 (Colo. 2010). There are two scenarios in which police officers may search a vehicle's passenger compartment after arresting an occupant: (1) officer may search the vehicle if the arrested occupant is unsecured and can access the interior of the vehicle; and (2) officer may conduct a search if it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Such a belief exists when there is a degree of articulable suspicion commensurate with that deemed sufficient for limited intrusions like investigatory stops. *Here:* police did not have a reasonable belief that evidence of the offense of arrest might be found in the vehicle, as defendant was arrested on an outstanding warrant that had no connection to the vehicle, and the charge underlying the warrant was not named in the record. CSC refused to apply a good faith exception to the warrant requirement even though the search was lawful under precedent controlling at the time search was conducted.

People v. Allen, 2019 CO 88. Officers' search of the passenger side of a vehicle was not justified as a protective search for weapons where driver and passenger had left and walked into a hotel. Whatever danger the officers may have faced during the roadside encounter, it had clearly dissipated by the time they inventoried the Cadillac.Sar

People v. Kessler, 2018 COA 60. A vehicle may be searched incident to driver's lawful arrest for evidence related to that offense if the particular circumstances give rise to a reasonable articulable suspicion that the vehicle might contain evidence of that offense. *Here:* there was probable cause to arrest defendant for DUI, and one of the officers who searched his car testified it was "more common than not"" to find bottles of alcohol in the vehicle of a person who had been DUI.

People v. Crum, 2013 CO 66. Where defendant is seen retrieving controlled substances packaged in a manner consistent with the intent to distribute from a vehicle parked late at night in an area known for high volumes of drug activity, and where defendant attempts to conceal the substances, the facts and circumstances give rise to a reasonable articulable suspicion that the vehicle might contain more evidence of possession of a controlled substance. Under such circumstances, police officers may search the vehicle incident to defendant's arrest for possession of a controlled substance.

People v. Coates, 266 P.3d 397 (Colo. 2011). Search-incident-to-arrest exception to search warrant requirement did not apply to justify police officer's warrantless search of trunk of vehicle following arrest of driver, as the evidence seized from trunk was not seized from the passenger compartment of vehicle in which defendant was a passenger, and the search-incident-to-arrest doctrine in the vehicle context had not been extended to include areas beyond the passenger compartment of a vehicle.

People v. Hopper, 284 P.3d 87 (Colo. App. 2011). In *Davis* the USSC held that the exclusionary rule does not apply to an otherwise-valid search conducted in compliance with binding precedent that is later overruled. *Here*: pursuant to *Davis*, even assuming that defendant could challenge the search of his vehicle on appeal after failing to raise it in the trial court, he is not entitled to suppression of the evidence seized during that search.

People v. Casteneda, 249 P.3d 1119 (Colo. 2011). Defendant's vehicle was involved in a 3:00 a.m. hit and run accident on an interstate highway. Shortly after, police contacted defendant a few miles away on the side of the highway. Defendant claimed she had not been driving the vehicle, and that the real driver – a six-foot tall woman named Jowanna -- had walked away from the scene. *Here:* police had probable cause to arrest defendant

as the driver where: the car was registered to defendant's mother; the car was damaged and matched the description given by the victim; defendant had the odor of alcohol on her breath; defendant was the only woman present with the car; and the driver's seat was pulled too far forward to accommodate a six-foot tall person. Search incident to arrest upheld.

People v. McCarty, 229 P.3d 1041 (Colo. 2010); People v. Chamberlain, 229 P.3d 1054 (Colo. 2010). In Arizona v. Gant, 556 U.S. 332 (2009), the USSC held that a search of a vehicle's passenger compartment incident to the arrest of a recent occupant is only lawful when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Here:* pursuant to *Gant*, the CSC affirmed the trial court's suppression order because there was no suggestion that defendant was capable of accessing his vehicle at the time of the search and because it was not reasonable to believe that evidence relevant to the crime of possession of drug paraphernalia would be found in the vehicle.

People v. Minor, 222 P.3d 952 (Colo. 2010). The driver in control of a vehicle has the power to consent to a search of the vehicle even if he is not the registered owner and the registered owner is present at the time.

People v. Marquez, 195 P.3d 697 (Colo. 2008). Police stopped vehicle for a speeding violation and arrested the driver on an outstanding warrant. They then asked the other occupants of the vehicle to step out while they searched the passenger compartment, where they discovered a handgun on the backset where defendant was sitting. Handgun admissible as the product of a lawful search incident to the driver's arrest.

People v. Patnode, 126 P.3d 249 (Colo. App. 2005). Facts that drug task force detectives asked patrol officers to stop defendant's car if they saw any traffic violations and arrest defendant if possible as a pretext for searching defendant's car did not invalidate search incident to defendant's valid arrest for no proof of insurance.

People v. Kirk, 103 P.3d 918 (Colo. 2005). The authority to search a vehicle's passenger compartment incident to the arrest of an occupant is automatic regardless of the facts of a particular case. *Here*: officer's subjective intent was to impound the car and conduct an inventory search, and the trial court granted the motion to suppress, concluding that the inventory search was unreasonable. CSC reversed, concluding that the search of the passenger's purse was objectively reasonable as a search incident to the driver's lawful arrest.

People v. Taylor, 41 P.3d 681 (Colo. 2002). When the police arrested defendant's passenger, they were authorized to conduct a search incident of defendant's car. Although defendant had to wait during the search, this was only an incidental delay and was not a seizure.

Motor Vehicle Exception

People v. Romero, 767 P.2d 1225 (Colo. 1989). Officers may conduct a warrantless search of a motor vehicle if: (1) there is probable cause to believe it contains evidence of a crime; and (2) the automobile is readily mobile. No separate finding of exigency is required.

People v. Hill, 929 P.2d 735 (Colo. 1996). If officers have probable cause to search an automobile, they may also search any containers inside the automobile that might contain the object of the search.

People v. Smith, 2022 CO 38. In this interlocutory appeal brought by the prosecution, the supreme court considers whether the district court erred in granting the defendant's motion to suppress the illegal narcotics recovered during a search of the car in which he was a passenger. The prosecution contends that the district court mistakenly found that law enforcement lacked probable cause to conduct the search. But the supreme court disagrees and thus affirms the suppression order. Probable cause is subject to a reasonableness standard

and cannot be established by piling hunch upon hunch. Nor is it proper to disregard facts that militate against a finding of probable cause. Looking at the facts of this case in their totality-i.e., considering not only those supporting probable cause but also those cutting against it—leads to the conclusion that law enforcement lacked probable cause to conduct the challenged search. Therefore, while law enforcement had hunch, upon hunch, upon hunch that illegal substances were contained in the car, the search violated the defendant's Fourth Amendment rights.

People v. Allen, 2019 CO 88. The search of the passenger side of a vehicle was not justified under the automobile exception because there was not a fair probability that the car contained evidence of a crime. While officers heard days or weeks before the stop that the passenger might be carrying a gun, and the driver said that he was a convicted felon and could not have a gun, possession of a weapon by the passenger was not a crime. Whatever the passenger may have been trying to conceal, he was doing so under his own seat and the police had already searched under the driver's seat.

People v. Kessler, 2018 COA 60. A vehicle may be searched incident to the driver's lawful arrest for evidence related to that offense if the particular circumstances give rise to a reasonable articulable suspicion that the vehicle might contain evidence of that offense. *Here:* there was probable cause to arrest defendant for DUI, and one of the officers who searched his car testified it was "more common than not" to find bottles of alcohol in the vehicle of a person who was DUI.

People v. Quick, 2018 CO 28. Compliance with a police department policy or procedure is insufficient, in and of itself, to bring the seizure of a vehicle within an exception to the Fourth Amendment warrant requirement. In order to be considered reasonable, a search or seizure must either be authorized by a warrant supported by probable cause or fall within a recognized exception to those requirements.

People v. Ball, 2017 CO 108. Where an officer stops people who are arguing in a car and has an articulable suspicion of domestic violence, it would clearly be unreasonable, if not derelict, under the circumstances of this case for an investigating officer not to ensure by a brief computer check that one of the parties was not barred from all contact with the other. Where defendant admits that she has contraband in the vehicle, a search of both her purse and car was constitutionally permissible under the so-called automobile exception. And to the extent the exception permits the search of a container located within the car, it allows a search of the container even after it has been removed from the car.

People v. Berdahl, 2012 COA 179. Neither the USSC nor the CSC has recognized a blanket patrol car exception to the *Terry* requirement. Colorado law has not recognized an officer safety exception absent a reasonable and articulable suspicion that an individual may be armed and dangerous or intoxicated.

People v. Roth, 85 P.3d 571 (Colo. App. 2003). After defendant's car was stopped based upon reasonable suspicion of littering, officers learned that the thrown object was a marijuana pipe. They had probable cause to believe the car contained evidence of a crime and were justified in searching the car and its contents.

People v. Martinez, 32 P.3d 520 (Colo. App. 2001). Exigent circumstances are not required under the automobile exception. As long as there is probable cause, the vehicle may be searched immediately or seized for a later search after police obtain a warrant.

Impoundment & Seizure: Community Caretaking Function

People v. Litchfield, 918 P.2d 1099 (Colo. 1996). Where a vehicle is validly in police custody, officers may make a warrantless inventory search of the vehicle's contents. To ensure that the intrusion does not exceed the scope necessary to carry out the police caretaking functions, inventory searches must be conducted according to standard police procedure.

People v. Thomas, 2021 COA 23. The ***community caretaking exception*** to the Fourth Amendment's warrant requirement does not permit a police officer to impound a vehicle whenever the driver is arrested and no one else is present to take custody of the vehicle. The prosecution mush show that the seizure furthered a valid community caretaking function. *Here:* because there was no evidence that the seizure furthered a community caretaking function, the seizure was unreasonable.

People v. Allen, 2019 CO 88. Police officers' impoundment and search of a vehicle for "caretaking purposes, violated the Fourth Amendment because it was not conducted according to any written or oral standardized criteria limiting police discretion.

People v. Quick, 2018 CO 28. Seizure of defendant's car under the community caretaking exception was not satisfied because the exception can only apply to conduct that is distinct from the investigation of the criminal activity. A seizure premised solely on the risk that the vehicle will be driven illegally, by a driver cited for driving on a suspended license, can never find justification as a community caretaking function.

People v. Camarigg, 2017 COA 115M. Inventory searches of automobiles are reasonable if: (1) the automobile was lawfully taken into custody, (2) the search was conducted according to an established, standardized policy, and (3) there is no showing police acted in bad faith or for the sole purpose of investigation. Police discretion is permitted in conducting an inventory search of an automobile so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. The policy or practice governing inventory searches of automobiles should be designed to produce an inventory, not as a purposeful and general means of discovering evidence of crime. An automobile inventory search policy need not be in writing to be constitutional, so long as it is routinely used by officers. When assessing whether an inventory search of an automobile was pretextual, the officer's subjective motives are irrelevant. To determine whether an inventory search of an automobile was pretextual, a court asks whether the officer's actions were objectively reasonable under the circumstances.

People v. Brown, 2016 COA 150. The decision to impound a vehicle and the ensuing inventory search are separate processes, both of which must meet the strictures of the Fourth Amendment. The Fourth Amendment does not allow police officers to impound a car only because the driver and sole occupant was cited—but not arrested—for driving with a suspended license. Even where a police department policy allows officers to impound a vehicle, the decision to impound must still satisfy the requirements of the Fourth Amendment.

People v. Parks, 2015 COA 158. Warrantless search of cooler found in defendant's van during an inventory search did not violate state constitutional search and seizure provisions; the search was conducted according to standardized police department policy, and the officer did not act in bad faith or for the sole purpose of investigation.

People v. Vaughn, 2014 CO 71. An inventory search conducted in accordance with an established, standardized policy is generally considered reasonable in the absence of evidence that the officers conducted a search with impermissible motives. Officer's subjective motives for stopping a motorist are irrelevant in determining whether an officer had reasonable suspicion that justified the traffic stop.

Pineda v. People, 230 P.3d 1181 (Colo. 2010). CSC concluded that evidence discovered in defendant's vehicle was found pursuant to a valid inventory search where undisputed evidence established that officers had probable cause to arrest defendant and that officers acted in an objectively reasonable manner when they adhered to departmental policies and procedures by taking custody of the vehicle and conducting an inventory of its contents.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Officers may conduct an inventory search of a lawfully impounded vehicle if the search is conducted pursuant to routine procedures. *Here:* officer testified that it was routine procedure to impound the car if the sole occupant of the vehicle is arrested, and there is no alternative person to take the car. The search of defendant's car was lawful as defendant, the sole occupant of the car, had been arrested. The impound was further justified by the fact that the car could not be left safely unattended in that particular area of town.

People v. Patnode, 126 P.3d 249 (Colo. App. 2005). The rationale of Whren v. U.S., 507 U.S. 806 (1996), applies to inventory searches, despite some suggestion to the contrary. The validity of an inventory search depends on the scope of the law enforcement agency's policies, rules or procedures governing inventory searches prior to the impoundment of property. An otherwise lawful inventory search of an automobile is not invalidated by the fact that officers had the driver lawfully stopped as a pretext to arrest the driver and search his car.

People v. Milligan, 77 P.3d 771 (Colo. App. 2003). The decision to impound a vehicle must be made pursuant to a standardized police policy. Where such policy does not expressly condition impoundment on the driver's inability to provide for custody or removal, it was not error for the officers to impound defendant's car, despite the fact that a friend was willing to come down and retrieve it.

Plain View

People v. Brant, 252 P.3d 459 (Colo. 2011). If, during the course of a valid protective search for weapons, a police officer feels an object that gives immediate rise to a reasonable belief that the item is contraband, the officer may seize the object without a warrant. *Here:* police stopped a vehicle for a broken taillight. As they approached the vehicle, they saw the front-seat passenger leaning over as if she might be hiding something. The officers ordered the passenger out of the car and performed a protective pat-down, finding nothing. An officer then searched the passenger compartment and found a cloth glove in the area where the officers had observed the passenger's furtive movement. Feeling the glove, he recognized the shape of a pipe, and opened the glove to discover a small glass pipe with burn residue on it and a small baggie of suspected illegal narcotics. Protective search of the passenger compartment was justified, and, under the "plain-feel" doctrine, the police properly seized evidence discovered in the glove.

LESSER INTRUSIONS

Consensual Encounters

People v. Paynter, 955 P.2d 68 (Colo. 1998). During a consensual encounter, a police officer seeks the voluntary cooperation of an individual by asking non-coercive questions. The individual is free to leave at any time during such an encounter or to ignore the officer's questions. A person questioned in this manner is not seized within the meaning of the 4th amendment. The test for determining if an encounter between a police officer and an individual is consensual is whether a reasonable person under the circumstances would believe he or she was free to leave and/or disregard the official request for information. This is an objective determination, and it must be made based on a totality of the circumstances surrounding the encounter. In addition, the reasonable person test presupposes an innocent individual.

People v. Taylor, 2018 CO 35. Defendant was not seized by the officer at the time he dropped the cocaine on ground. The officer had not blocked defendant from any means of exiting the encounter. The body-camera footage showed that there were multiple avenues defendant could have taken to walk away from or around the officer. Although the officer's uniform included weapons, possession of weapons alone does not render a stop nonconsensual. The question the officer asked, what do you have in your hand, was not threatening, and the encounter was of an extremely short duration.

People v. Walters, 249 P.3d 805 (Colo. 2011). Where the arresting officer did not stop the defendant's vehicle, approached in a non-threatening manner to ask if the defendant needed assistance, used a conversational tone of voice, and asked, but did not order, the defendant to submit to a pat down and to the search of his vehicle, the encounter was consensual, and evidence seized was admissible.

People v. Ealum, 211 P.3d 48 (Colo. 2009). The mere act of a police check for outstanding warrants, does not transform a consensual encounter into an investigatory stop.

People v. Bowles, 226 P.3d 1125 (Colo. App. 2009). During a valid traffic stop, an officer asked defendant, a passenger in the car, for her identification. Defendant told the officer she did not have her identification but gave the officer a false name and date of birth. The officer checked defendant's information, returned to the car, and received permission from the driver to search the car. Defendant exited the car and stood behind it with a second officer. During the search, the first officer found a glass smoking pipe that belonged to defendant. Defendant's continued presence during the search of the car was consensual, where only overhead lights and not a siren were used throughout the encounter; the first officer did not demand but asked in a conversational tone for the identifying documents and permission to search the vehicle; after the officer returned the driver's documents and received his consent to the search, defendant exited the vehicle without being asked or instructed to do so; neither officer drew a weapon; the encounter lasted twenty minutes; and the officers did not impede the defendant's ability to terminate the encounter and walk away.

People v. Scheffer, 224 P.3d 279 (Colo. App. 2009). An officer may provide instructions to a person necessary required for a safe encounter without converting the encounter into an investigatory stop. Defendant was engaged in a consensual encounter, not an investigatory detention, where: (1) neither officer displayed authority or control over defendant, the patrol officer did not active his siren or lights and just approached the defendant on foot; (2) while two officers were present, only one questioned and searched defendant;(3) neither of the officers approached defendant in a threatening manner; (4) neither officer displayed his weapon; (5) the officer requested information and did not demand it; (5) the officers tone was conversational; (6) defendant consented to a pat-down search; (7) defendant's egress was not blocked; (8) one officer requested, rather than demanded,

that defendant put down his bag, and neither officer touched it until defendant was arrested; (9) the encounter lasted 15 minutes; and (10) while the officer looked at defendant's license, it was not retained by either officer. Instructing defendant to keep his hands out of his pockets did not transform the consensual encounter into a detention.

People v. Marujo, 192 P.3d 1003 (Colo. 2008). Where there were no patrol car lights or sirens, there was only a single officer, and defendant was not separated from his identification or other belongings, evidence established that officer's contact with defendant was a consensual encounter and not an investigatory stop.

People v. Casteneda, 187 P.3d 107 (Colo. 2008). Police stopped defendant's vehicle for a cracked front windshield. After some brief questioning, they issued him a warning ticket and told him he was free to leave. As he was walking away, they requested permission to ask him a few more questions, and to search the vehicle. Defendant consented, and police found packages of marijuana concealed in the spare tire. The trial court suppressed the drugs as the fruit of an illegal detention. CSC reversed, holding that the investigatory stop had turned into a consensual encounter by the time the officers asked for permission to search, and the evidence should not be suppressed. Case summarizes the law on consensual encounters.

People v. Terrazas-Urquidi, 172 P.3d 453 (Colo. 2007). A person is "seized" within the meaning of the 4th Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Here:* defendant was not "seized" when the police knocked on the door, announced their presence, and told him to open the door. The officers did not make any threats or other statements that would have caused a reasonable person to believe he must open the door.

People v. Valencia, 169 P.3d 212 (Colo. App. 2007). The encounter during a traffic stop between defendant/passenger and two police officers was consensual where the duration of the encounter was less than 15 minutes, the officers asked (rather than demanded) information from defendant, and no coercive conduct occurred. That police asked defendant where he had come from, where he was headed, and whether there were drugs or weapons in the car did not transform the encounter into a seizure.

People v. Milligan, 77 P.3d 771 (Colo. App. 2003). A consensual interview is not a seizure when a police officer seeks the voluntary cooperation of a citizen by asking noncoercive questions. *Here*: defendant's initial encounter was consensual where police asked the defendant his name in a noncoercive manner. When defendant volunteered that he had outstanding warrants, the encounter became an investigatory stop.

People v. Coleman, 55 P.3d 817 (Colo. App. 2002). Police officers' contact with a passenger on a bus traveling from Los Angeles to Chicago was consensual where: (1) contact took place during a normal service stop; (2) bus was not delayed; (3) passengers were told that the officers would talk to them only "if that's all right with you" and that they "should all feel free to go about your business as usual;" (4) officers had the bus company's consent; (5) officers left aisles clear to allow passengers to leave; (6) officers used conversational tones and wore plain clothes; and (8) officers did not show their weapons or use force, coercion, or nonconsensual touching.

People v. Heilman, 52 P.3d 224 (Colo. 2002). An officer's contact was a seizure and not consensual because he ordered the occupants of a parked vehicle to raise their hands in plain view, and the nature and tone of his questioning demonstrated that they were not free to leave.

Outlaw v. People, 17 P.3d 150 (Colo. 2001). The encounter was not consensual because officers in a marked patrol car followed defendant (who was walking) at close range for a distance of 30 to 45 feet and then summoned him to their car. Defendant had the burden of proving, by a preponderance of the evidence, that a seizure has occurred. Defendant met that burden, and the prosecution then failed to meet its burden of

demonstrating that the stop was legal because the actions of the police officers were a sufficient show of authority to constitute a seizure.

People v. O'Neal, 32 P.3d 533 (Colo. App. 2000). Following a traffic stop, officer merely asking a passenger for identification does not amount to a seizure of the passenger under the 4th amendment; it is a consensual interview. While using a patrol car's overhead flashing lights is a display of authority directed at the driver of the vehicle, it is no more intimidating to the passenger than if the officer had approached him on foot. Because a passenger may have nowhere else to go during the stop or may choose to remain with the vehicle in order to continue the journey once the stop has concluded, the "free to decline the request" analysis used in *Florida v. Bostick*, 501 U.S. 429 (1991) is appropriate in these circumstances.

People v. Paynter, 955 P.2d 68 (Colo. 1998); People v. Dickinson, 928 P.2d 1309 (Colo. 1996); People v. Hill, 929 P.2d 735 (Colo. 1996). That an officer identifies himself as a police officer, without more, does not convert an encounter into a search or seizure.

People v. Cascio, 932 P.2d 1381 (Colo. 1997). The initial encounter between police and occupants of a parked van was a consensual, rather than investigatory, stop, where: (1) the two deputies acted in a friendly, rather than threatening, manner; (2) the occupants did not feel compelled to answer all questions asked of them; and (3) the police car was parked in such a way that the van occupants could have pulled away had they so desired (though the police did use their flashlights and search light). The voluntary consent to search obtained during this encounter was untainted.

Investigatory Stops

People v. Archuleta, 980 P.2d 509 (Colo. 1999). Police may undertake intermediate intrusions such as investigatory stops consistent with the 4th amendment as long as three conditions are satisfied: (1) there is a specific and articulable basis in fact for suspecting that criminal activity has taken place, is in progress, or is about to occur (that is, "reasonable suspicion"); (2) the purpose of the intrusion is reasonable; and (3) the scope and character of the intrusion are reasonably related to its purpose.

People v. Ball, 2017 CO 108. The scope and character of an investigatory stop are matters to be determined by objective criteria and not merely subjective intent or focus of the officer executing the stop. An officer's inquiry into matters unrelated to the initial reason for the stop does not, in and of itself, exceed the scope of an otherwise lawful stop. While an investigatory stop cannot be measurably extended to inquire into matters for which the officer lacks reasonable suspicion, the permissible scope of an investigatory stop is not exceeded by making inquiries into matters of which reasonable articulable suspicion does exist nor do such inquiries render an investigation less than diligently pursued. A lawful detention begun for one particular purpose does not become unlawful by prolonging that detention beyond the time necessary to diligently investigate for that original purpose, as long as the stop does not measurably extend beyond the time necessary to diligently investigate for a purpose to which reasonable articulable suspicion was acquired during the initial lawful detention. If probable cause to actually arrest a detainee arises during a lawful investigatory stop, his continued detention is no longer attributable to an investigatory stop at all. Once probable cause to arrest has been acquired in the course of a lawful investigatory stop, further detention of the suspect is no longer attributable to the investigatory stop at all. Further detention of the suspect is justified as a lawful arrest, whether a formal arrest has yet been announced or not. An investigatory stop to investigate for suspicion of domestic violence is not limited to the detection of physical violence that is currently occurring or has already occurred, but also to prevent continued or future acts of domestic violence. Prevention remains a primary justification for sanctioning a limited detention. *Here:* where defendant implicated herself in the possession of contraband during a lawful investigatory stop, her admission that she was in possession of contraband provided probable cause to believe she was committing a crime, and her further detention was not subject to the limitations of an investigatory stop but was justified as an arrest.

People v. Barnett, 2024 CO 73. The CSC holds that a license plate registered to a different vehicle than the one it is affixed to provides reasonable suspicion of motor vehicle theft. *Here:* deputies' investigatory stop of defendant's vehicle and subsequent order to defendant and passenger to exit the vehicle were lawful. The CSC remands to the trial court for additional findings regarding how the deputies discovered the glass pipe and further rulings on the propriety of the search.

People v. Dacus, 2024 CO 51. In this DA interlocutory appeal, the CSC held that a Report Every Drunk Driver Immediately (REDDI) report was not an anonymous tip requiring corroboration to justify an investigatory stop, and even if it was, the officers had developed reasonable suspicion by the time they encountered defendant's vehicle. The CSC reversed the trial court's suppression order.

People v. Johnson, 24 CO 47. In this interlocutory appeal, the trial court suppressed evidence based on its determination that the officers unlawfully prolonged their investigatory stop of defendant by waiting for a drug-detection dog to arrive to conduct a sniff of his car for illicit drugs. CSC concludes that the trial court's findings regarding the nature of defendant's seizure were clearly erroneous. Because the officers developed probable cause to arrest defendant, and in fact arrested him, they no longer needed to justify his detention as

part of the original investigatory stop. CSC reverses the trial court's suppression order and remands for the court to determine whether probable cause existed to search the vehicle following defendant's arrest.

People v. White, 2023 CO 43. In this DA interlocutory appeal, the CSC reversed the trial court's order suppressing the results of defendant's consensual blood draw, which revealed THC in his blood seven times the presumptive limit for intoxication. This case involved a "complex and fluid investigation," as defendant struck the victim while he was stopped on the shoulder to change a flat tire. Victim was pinned to the back of his car by defendant's car, and the victim's legs were ultimately amputated as a result. CSC held that, under these circumstances, the officers did not exceed the scope of the investigatory stop to transform defendant's detention into an arrest, so defendant's consent given during that time frame was not invalid.

People v. Harmon, 2019 COA 156. Police may constitutionally exert some level of control over the driver and passengers in a lawfully stopped vehicle under the justification for the stop, but beyond a certain point, police action may constitute a second, distinct Fourth Amendment seizure. For instance, if police handcuffed a passenger and placed him in the back of a police car during a traffic stop, this would constitute a second, distinct seizure. In this case, the officer's direction to "step over here," regardless of its subjective motivation, was merely incidental to the ongoing lawful seizure. Additionally, the officer's questions about drugs, weapons, and the contents of the defendant's purse did not make the seizure unlawful or constitute a separate seizure. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

People v. Brown, 2019 CO 63. A police officer had reasonable suspicion to initiate an investigatory stop where he saw a lone male pedestrian walking away from a storage facility where he had received a report that a crime of domestic violence had just been or was being committed there.

People v. Threlkel, 2019 CO 18. Review of a trial court's order addressing a defendant's motion to suppress involves a mixed question of law and fact. The reviewing court defers to the trial court's factual findings and does not disturb them if they are supported by competent evidence in the record. However, the trial court's legal conclusions are subject to de novo review.

People v. Burnett, 2019 CO 2. A trooper stopped a car after seeing the driver flash her turn signal twice over a distance of less than 200 feet and then change lanes. CSC holds that the trooper, in believing this conduct to violate §42-4-903, misinterpreted the statute, and the trooper's interpretation did not constitute an objectively reasonable mistake of law. It is plain from the text of the statute that a driver is not required to signal continuously for any set distance before changing lanes on a highway; the statute only requires that a driver use a signal before changing lanes.

People v. Johnston, 2018 COA 167. There is no bright-line rule whether there exists reasonable suspicion of intoxicated driving to create reasonable suspicion justifying a stop. Intra-lane weaving can create reasonable suspicion of intoxicated driving.

People v. Fields, 2018 CO 2. Defendants in a truck were "stopped" within contemplation of the Fourth Amendment where: (1) the truck was already parked in a public parking lot; (2) in approaching the truck, the officers did not activate their overhead lights or in any way obstruct the truck from departing; (3) the officers made no show of authority, display of weapons, nor made demands of any kind; (4) the officers explained that they had received a call about the defendants' activated and inquired what was going on, sought identifying information, and asked whether each respective defendant had a record of convictions. The minimal level of object suspicion required for an investigatory stop existed when one defendant was directed to get out of a truck and subjected to a frisk for weapons. The officer was aware of the first-hand

observations of a citizen informant that appeared to her to be a drug deal in progress along with the officer's verification of her observations of the truck and its occupants. Further, the driver admitted to having an outstanding Florida warrant and he had an exposed firearm within grabbing range in the cab of the truck.

Reyes-Valenzuela, 2017 CO 31. An officer is not required to consider innocent explanations for behavior that otherwise would support reasonable, articulable suspicion. Rather, a series of innocent factors, taken together, may warrant further investigation.

People v. Chavez-Barragan, 2016 CO 16. On appeal, a trial court's order suppressing evidence obtained in violation of constitutional protections presents a mixed question of law and fact. Ultimately, CSC determines whether a seizure is reasonable. Traffic stops implicate federal and state constitutional protections against seizures. A brief, investigatory seizure is justifiable when the officer has a reasonable articulable suspicion that criminal activity has occurred, is taking place, or is about to take place. Suspicion of even a minor traffic offense can provide the basis for a stop. And an officer with an objectively reasonable basis to believe that a driver has committed a traffic offense is justified in making a stop. *Here:* where defendant's vehicle crossed over the fog line gave rise to a reasonable, articulable suspicion of a violation of §42-4-1007(1)(a) which requires that a vehicle be driven as nearly as practicable entirely within a single lane.

People v. Martin, 2014 COA 112. Law enforcement officers may justifiably contact an unsuspicious person when other legitimate official reasons exist, such as rendering aid or conducting a welfare check. *Here:* there were reasonable grounds to contact defendant for a welfare check and reasonable suspicion that he was unlawfully trespassing where: (1) defendant had entered and remained in a convenience store restroom for approximately 20 minutes; (2) defendant would not exit upon request by the store employees; (3) store employees asked the police to remove the defendant from the premises; (4) police knocked on the restroom door and the defendant did not immediately respond; (5) after about two minutes defendant exited the restroom; (6) upon exiting the restroom defendant appeared agitated and nervous; and (7) defendant would not respond to the officers other than to tell them that "he could do whatever he wanted because he was on private property."

Tate v. People, 2012 CO 75. A person cannot be seized within the meaning of the Fourth Amendment, even if his freedom of movement is actually restricted, unless he is consciously aware of a show of authority directed at him or his car. *Here*: defendant who was passed out behind the wheel of his parked (but running) vehicle was not "seized" until he woke up and became aware of his circumstances. By the time defendant awoke and was conscious, the officers had reasonable suspicion for an investigatory stop.

People v. Smith, 312 P.3d 1173 (Colo. App. 2010), rev'd other grounds, 318 P.3d 472 (Colo. 2014). An investigatory stop is an intermediate level police response, and it may be employed in narrowly-defined circumstances upon less than probable cause. The less-exacting standard of "reasonable suspicion" applies to an investigatory stop, and, during an investigatory stop, officers may stop suspects and question them and conduct a pat down for weapons. But an investigatory stop must be limited to determining an individual's identity or obtaining an explanation of the individual's behavior. During an investigatory stop, an officer may take steps to ensure the officer's safety and that of any fellow officers. This means that an officer may take control of or seize a suspect. An officer may use force in detaining a suspect, and the fact that some force is used does not necessarily convert the police/citizen encounter into an arrest. The appropriate inquiry is whether such use of force was a reasonable precaution for the protection and safety of the investigating officers.

People v. Barrus, 232 P.3d 264 (Colo. App. 2009). Where defendant was parked in parking lot and ignored police officer's knocks on car window and commands to respond, officer acted reasonably when he opened the car door to question defendant as part of investigatory stop.

People v. Ealum, 211 P.3d 48 (Colo. 2009). The mere act of a police check for outstanding warrants does not transform a consensual encounter into an investigatory stop.

People v. Bowles, 226 P.3d 1125 (Colo. App. 2009). Police may request a passenger's identification in a valid traffic stop without reasonable suspicion. Such a contact does not constitute a seizure, and to the extent that it intrudes on a defendant's Fourth Amendment rights, it is justified in the interest of officer safety.

People v. Tallent, 174 P.3d 310 (Colo. 2008). The police may temporarily detain personal property upon reasonable suspicion that the property was involved in criminal activity. Such a detention must be limited both in terms of time and intrusiveness. To determine the nature and the quality of the intrusion, the following factors are relevant, but not exclusive: (1) whether the police had a compelling reason for detaining the property; (2) how long the property was detained; (3) whether the police forced the defendant to relinquish the property; and (4) whether the property was moved a significant distance. *Here:* officers investigating a report of suspicious activity observed a car matching the description of the car involved. Although they lost sight of the car, they soon observed the defendant nearby; defendant fled upon seeing the police. After a chase, the police detained defendant, obtained his keychain, and used his keyless remote device to locate the nearby car. They then seized the car until a warrant was obtained for a full search. The court held that the temporary detention of the car was not unreasonable as the officers did not enter the car until further investigation into defendant's activities was completed, and a warrant was obtained for the defendant's arrest. The court noted that the car was also parked on a public street in plain view and was not forcibly removed from defendant, and defendant was not ordered to exit the car so that the officers could take possession of it.

People v. Pacheco, 182 P.3d 1180 (Colo. 2008). Law enforcement officers' brief, late-night detention of a vehicle and its occupants while the officers checked out a nearby business did not exceed the scope of a valid investigatory stop. *Here*: officers lawfully arrested the occupants and searched the car after the officer watching the vehicle noticed the smell of marijuana emanating from the car.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). An officer's subjective intentions are irrelevant to the determination of whether the officer has reasonable suspicion to conduct an investigatory stop. *Here:* defendant's car was parked illegally, and then drove away with only one operating headlight. There was thus reasonable suspicion for the traffic stop. Any subjective intent on the part of the officers to investigate drug activity did not invalidate the stop.

People v. McDaniel, 160 P.3d 247 (Colo. 2007). Police had reasonable grounds to contact the defendant, who was parked in the middle of the street with her vehicle was impeding traffic.

People v. Arias, 159 P.3d 134 (Colo. 2007). Observation of an air freshener hanging 5-6 inches below the rearview mirror did not establish reasonable suspicion that driving-while-vision- obstructed statute (§42-4-201(4)) had been violated where the officer did not describe the size of the air freshener, its angle of position, or whether the air freshener actually obstructed the driver's vision. It was not enough that the officer believed that driver's vision "could have" been obstructed; there must be evidence that the officer reasonably believed the air freshener "actually" obstructed the driver's vision.

People v. Fines, 127 P.3d 79 (Colo. 2006). Defendant was a passenger in a car stopped by the police for a traffic infraction. The driver consented to a search of the car, so the officer asked the defendant to step out of the car. The defendant was directed by the officer to a particular location behind the car and in front of two police cars. While separated from the driver, defendant was questioned about drug activity. When she replied that she had rolling papers but no drugs, the officer requested consent to search her purse, which was inside the car. Only after being told that the driver had already given consent to search the car did the defendant reply "go ahead." A reasonable person would believe she was no longer free to leave once: (1) she was asked to step out of the car;

(2) she was directed to a location away from the car; (3) she was questioned about drug activity; and (4) the police remained in control of her purse and had not offered to return it.

People v. Taylor, 131 P.3d 1158 (Colo. App. 2005). A person is seized within the meaning of the 4th Amendment if a reasonable person under the circumstances would not feel free to leave or disregard an officer's request for information. All police-citizen encounters are either arrests, investigatory stops, or consensual encounters. Only arrests and investigatory stops are seizures implicating the 4th Amendment. A lawful investigatory stop permits officers who have reasonable suspicion that an individual has committed, or is about to commit, a crime, to subject that individual to a limited detention so long as the detention is reasonable in purpose, scope, and character. When reviewing the reasonableness of an investigatory stop, courts look to the totality of the circumstances.

People v. Cherry, 119 P.3d 1081 (Colo. 2005). Defendant's conduct of parking her car in the driving lane of a side street, about 3-4 feet from the curb, provided reasonable suspicion that she had committed two traffic offenses, and officer lawfully conducted an investigatory stop of the defendant. Officer's subjective intent is not relevant to a determination that he has reasonable suspicion to conduct an investigatory stop, and the consideration of whether there is a reasonable basis for the stop is not limited to the officer's stated basis for the contact.

People v. Brandon, 140 P.3d 15 (Colo. App. 2005). After a lawful traffic stop for speeding was concluded and the driver's documents were returned to her, there was no basis for a continued detention. Officer's continued questioning of driver amounted to an illegal detention because a reasonable person in driver's position would not have believed she was free to leave or to ignore the repeated requests for more information.

People v. Rushdoony, 97 P.3d 338 (Colo. App. 2004). Facts supported a minimal level of objective suspicion that defendant was committing, had committed, or was about to commit a criminal act where, at 3:30 a.m., in a dark area behind a store in a shopping center where there had been recent burglaries, defendant was digging in a dumpster, and, upon seeing the police car, pulled away from the dumpster and toward a parked car. Defendant's odd answers to officer's questions about the location of the nearby car gave the officers a basis for continuing the encounter for further investigation.

People v. Roth, 85 P.3d 571 (Colo. App. 2003). Officer's observation that a passenger had thrown an object from defendant's car constituted reasonable suspicion to stop the car, even though the object was apparently thrown in response to signs alerting drivers to a drug checkpoint which did not actually exist.

People v. Hardrick, 60 P.3d 264 (Colo. 2002). When an officer is engaged in a valid search or arrest and a third party voluntarily enters the scene, the officer may ask the interloper to show his hands. If the interloper refuses to do so, or makes any furtive gesture, it raises a reasonable suspicion that officer safety may be compromised, and a limited seizure aimed solely at neutralizing any threat to officer or citizen safety is justified.

People v. Heilman, 52 P.3d 224 (Colo. 2002). There was insufficient basis for an investigatory stop where an officer's suspicion of illegal activity was based solely upon a furtive gesture.

People v. Jackson, 39 P.3d 1174 (Colo. 2002). Police officer stopped a car for a traffic violation, and the driver produced a valid driver's license, registration, and proof of insurance. The officer requested the passenger's identification, and the passenger complied. The officer instructed the driver and the passenger to remain in the car while he took the documents back to his patrol car and checked for outstanding warrants. *Here*: passenger was not seized under the 4th amendment when the car was stopped for a traffic violation. Nor, under the totality of circumstances, was there a seizure when the officer asked the passenger for his identification. However, a seizure occurred when the officer retained the passenger's identification while ordering him to stay in the car.

People v. Ortega, 34 P.3d 986 (Colo. 2001). A "seizure" of personal property occurs when the police interfere in a meaningful way with an individual's possessory interests. Although seizures generally require probable cause, a temporary, investigative seizure may be based on reasonable suspicion if the governmental interest justifying the intrusion outweighs the extent of the intrusion. *Here*: police did not seize the suitcase when they removed it from the luggage compartment of the bus and subjected it to a dog sniff. Nor did they seize the suitcase by removing the claim tag (this was, at most, a seizure of the tag). However, their further use of the suitcase as part of a ruse to trick defendant was a seizure. The interest in preventing the flow of illegal drugs outweighs the intrusion occasioned by the temporary, investigative detention of defendant's suitcase. The police kept the suitcase for only 20-30 minutes and did not delay the departure of the bus. Given their training and experience, the police had a reasonable suspicion that the defendant's suitcase contained illegal drugs. The suitcase emitted a strong chemical odor (of the type that could thwart a dog sniff); it was relatively new and expensive; it was unusually heavy; it had an unusually large lock; it had no tags identifying the name of the owner; it came from Los Angeles, a known source city.

People v. Polander, 41 P.3d 698 (Colo. 2001). An unnamed restaurant employee reported that he had seen people passing a marijuana pipe around inside a white van that was located in the restaurant parking lot. This report, in conjunction with partial police corroboration, provided a reasonable articulable suspicion, justifying an investigatory stop.

People v. Mack, 33 P.3d 1211 (Colo. App. 2001). In an area known for narcotics activity, in daylight, police observed a man with money approach and talk to the defendant and another man who were chatting in front of a convenience store. When officers approached the men on foot, the defendant put his hand behind his back. One of the officers drew a weapon and ordered defendant to show his hand. Based on the totality of the circumstances, an investigatory stop was justified.

Outlaw v. People, 17 P.3d 150 (Colo. 2001). The police lacked reasonable suspicion to initiate an investigatory stop where: (1) the stop occurred in high crime area; (2) four people were standing together on a sidewalk; (3) the four people began walking away after seeing a patrol car; (4) the defendant had his left hand closed in a fist; and (5) after the police summoned the defendant to their patrol car, they observed a piece of clear plastic protruding from the defendant's fist. Because the seizure occurred when officers summoned the defendant to their patrol car, the sight of clear plastic protruding from the defendant's hand could not form the basis for reasonable suspicion.

People v. King, 16 P.3d 807 (Colo. 2001). Officers transformed an investigatory stop into an arrest by the unjustified use of force. Although the stop occurred in an isolated area, and the officers' training indicated that persons who cultivate marijuana may be armed and dangerous, there were no specific facts or circumstances suggesting that defendant would either be dangerous or fail to cooperate with the stop.

People v. Dixon, 21 P.3d 440 (Colo. App. 2000). Police received an anonymous tip that unspecified illegal "narcotics" were being sold at a particular residence. This tip was not sufficiently corroborated to justify the detention of a visitor when he arrived, entered the residence, and departed again within one minute, and was the only visitor during a twenty-minute surveillance. Although consistent with drug trafficking at the residence, the conduct reveals no unlawful activity and could not, without more, provide a reasonably articulable suspicion sufficient to detain the visitor. Without more, police may not detain a passenger who exits a vehicle stopped for a traffic offense if the stop occurs at or near the destination or under circumstances in which a passenger might reasonably be expected to leave the vehicle.

People v. O'Neal, 32 P.3d 533 (Colo. App. 2000). When defendant answered with a name different from that given by the driver, the officer had reasonable suspicion to believe defendant was providing false information, a misdemeanor offense. During the investigation, it was reasonable to place handcuffs on the defendant when,

while standing near the patrol car, he began fidgeting, looking repeatedly into a park across the street, and edging away from the police car. Handcuffing did not convert investigative stop into arrest where defendant's actions showed signs of intent to flee, and officer was alone at 5 a.m.

People v. Whitaker, 32 P.3d 511 (Colo. App. 2000). A consensual police interview did not escalate into an investigatory stop where defendant was questioned by two officers for a total of three minutes before he consented to the search of his travel bag. Requiring defendant to disembark from the bus did not escalate the investigatory stop into a warrantless arrest without probable cause.

People v. Ramos, 13 P.3d 295 (Colo. 2000). Where officer has a reasonable basis to suspect that defendant had committed a traffic offense, the officer may request identifying information and detain defendant while checking that information's validity, even though the officer had made a subjective decision not to issue a citation and had communicated that intent to the defendant.

People v. Smith, 13 P.3d 300 (Colo. 2000). A police officer stopped a vehicle for a traffic violation on a highway in the early morning hours. The driver made a cellphone call and shortly thereafter another vehicle arrived and parked directly behind the officer. Fearing an ambush, backup officers approached with guns drawn, ordered the driver out of the second vehicle, and handcuffed him. Under the circumstances, officers used a reasonable amount of force during investigative detention to respond to potential danger, and the force did not transform the investigatory stop into a full-scale arrest at that point.

People v. Pigford, 17 P.3d 172 (Colo. App. 2000). Seizure of the defendant occurred when he was detained by a second officer after the first officer observed him ducking behind a parked car, getting out of the car and walking away, and then running when the officer requested that he stop. At that time, there was reasonable suspicion of criminal activity based on the first officer's observations and the defendant's flight. Moreover, using force to stop defendant, including drawing a weapon, handcuffing defendant, and placing him into a police vehicle, was within the scope and character of the investigatory stop. Although such force is normally associated with a full arrest, defendant's actions necessitated the methods be used to detain him.

People v. Barnard, 12 P.3d 290 (Colo. App. 2000). Although defendant was detained for an hour and a half, detention constituted an investigatory stop. The purpose of the stop was to identify and receive an explanation from a person fleeing from a home where no lawful resident seemed to be present, and the length of the stop was reasonable because the defendant had given a false name that could not be verified.

Pat Downs & Frisk for Weapons

People v. Martinez, 801 P.2d 542 (Colo. 1990); People v. Sutherland, 886 P.2d 681 (Colo. 1994). Once a valid stop has taken place, a protective search is permitted only when the officer has a reasonable basis to suspect that the person might be armed and dangerous. If there is a reasonable basis for this suspicion, the search must still be limited in scope and confined to determine whether any weapons are present and to ensure the safety of the officers and others in the area.

People v. Berdahl, 2019 CO 29; People v. Gow, 2019 CO 30. Where a stranded motorist accepted an officer's offer of a ride in a patrol car, and then submitted to a brief pat down for weapons before getting into the car, he, by his conduct, voluntarily consented to the officer's limited pat-down search, and the search was constitutional.

People v. Martin, 2014 COA 112. In cases where defendant responds to an alleged Fourth Amendment violation with a physical attack upon the officers making the alleged illegal arrest or search, evidence of the new crime is admissible. *Here:* police contacted defendant after he exited a restroom and attempted to pat him down for

officer safety reasons, but a struggle ensued when his actions led the police to believe he was attempting to flee. Under these circumstances, it was unnecessary to determine whether the pat-down search of defendant was lawful because defendant committed a new, subsequent crime, and evidence of that crime was admissible.

People v. Rushdoony, 97 P.3d 338 (Colo. App. 2004). Plain feel doctrine can be used as an exception to the warrant requirement. Seizure under the plain feel doctrine, just as with the plain view exception, requires that the officer have reasonable ground to believe that the object is incriminating, which requires the incriminating nature of the object to be immediately apparent to the officer, without further search, or manipulation of the object. *Here*: defendant's statement that he had a knife was sufficient to justify a weapons patdown search. Officer's testimony that he felt an item in defendant's pocket "consistent from previous dealings that felt like a pipe" was sufficient to establish that the incriminating nature of the meth pipe was readily apparent to the officer.

People v. Hardrick, 60 P.3d 264 (Colo. 2002). When an officer is engaged in a valid search or arrest and a third party voluntarily enters the scene, the officer may ask the interloper to show his hands. If the interloper refuses to do so, or makes any furtive gesture, it raises a reasonable suspicion that officer safety may be compromised, and a limited seizure aimed solely at neutralizing any threat to officer or citizen safety is justified. Officer was concerned for his safety; therefore, the frisk was reasonable.

People v. Mack, 33 P.3d 1211 (Colo. App. 2001). Police were aware that the area was known for criminal activity and one officer had previously taken weapons from people in the area. Thus, when they saw defendant put his hands behind his back, they had a reasonable basis to suspect that defendant might be armed and dangerous. The protective frisk was justified.

People v. Mascarenas, 972 P.2d 717 (Colo. App. 1998). The "reasonable suspicion" standard may, in certain circumstances, apply to frisks in situations other than an investigative stop on the street or in another public place. *Here:* it was legal to pat-down a suspect found in the basement after an alleged domestic violence incident, and to remove a hard object from the defendant's sock to determine if it was a weapon or other dangerous instrument that could jeopardize safety.

Miscellaneous: Lesser Intrusions

People v. McDaniel, 160 P.3d 247 (Colo. 2007). A police officer may search a motor vehicle during an investigatory stop if the officer reasonably believes that the suspect may be dangerous and may have access to a weapon. *Here:* officer had a reasonable belief that defendant may have had a weapon as, during the stop, she ducked down in her vehicle out of sight of the officer for a period of time while the officer was in her patrol car running a check on the vehicle.

People v. Valencia, 169 P.3d 212 (Colo. App. 2007). Although defendant moved to suppress evidence on the ground that he was illegally seized, he did not mention or specifically argue to the trial court that the officer's command to "keep his hands in his lap or on the dash" constituted a seizure. Thus, the court declined to address that claim on appeal.

People v. Taylor, 41 P.3d 681 (Colo. 2002). Police officer stopped defendant's car because he knew that defendant's passenger had an outstanding arrest warrant. When defendant yielded to the officer's lights, he was "seized" within the meaning of the 4th amendment. This seizure was neither an arrest nor an investigatory stop. It does not fit within the traditional framework for analyzing reasonableness. A weighing of the competing interests shows that the seizure was reasonable: (1) securing the arrest of wanted criminals is a compelling public interest; (2) defendant suffered only minimal intrusion.

CONSENT SEARCHES

People v. Berdahl, 2019 CO 29. To assess whether a person's consent was voluntary, courts must apply an objective test that takes into account the totality of the circumstances and determines whether the defendant could reasonably have construed the police conduct to be coercive. Pertinent considerations include defendant's age, education, and intelligence; the duration, location, and circumstances of the search; the defendant's state of mind; and any other factors that could have affected the defendant's free and unconstrained choice in consenting to the search. This includes whether defendant knew that he or she had a choice, although consent can be voluntary even if the defendant did not know that he or she was free to withhold consent. Although Colorado statutory law provides that officers must explain to suspects that they have the right to refuse consent, an officer's failure to give this advisement is only one factor in determining the voluntariness of consent. The essential consideration in determining the voluntariness of a defendant's consent to search is "the impact of overbearing, coercive, or deceptive police conduct on a person with the knowledge and particular characteristics of the defendant."

Validity of Consent to Search

People v. Delage, 2018 CO 45. The voluntariness of a consent to a search must be proven by a preponderance of the evidence (and not by clear and convincing evidence).

People v. Stock, 2017 CO 80. Police officer's limited entry into defendant's hotel room, in her immediate presence and without her objection, did not violate her Fourth Amendment right to be free from unreasonable searches, because she conferred on her father the authority to consent to the officer's limited entry.

People v. Simpson, 2017 CO 25. By driving in Colorado, driver consented to the terms of the expressed consent statute, §42-4-1301.1, and that statutory consent satisfied the consent exception to the 4th Amendment's warrant requirement.

People v. Chavez–Barragan, 2016 CO 66. In assessing the voluntariness of defendant's consent, courts should consider the following: (1) the environment in which defendant gives consent; (2) how the police acted during the encounter; (3) defendant's perceptions and characteristics "such as age, education, and knowledge;" (4) any language barriers; (5) whether defendant knew he had a choice (but consent can be voluntary even if defendant did not know he was free to withhold his consent).

People v. Munoz-Gutierrez, 2015 CO 9. Totality of the circumstances analysis applies to whether defendant validly consented to the search of his car. Failure to advise defendant that he is being asked to voluntarily consent to a search or that he has a right to refuse consent does not in and of itself invalidate the consent; it is only one factor to consider in the totality of the circumstances.

People v. Mares, 263 P.3d 699 (Colo. App. 2011). Where a party consents to the interception of a telephone call, the call is not unlawfully intercepted under §18-9-303(1). Because a prison inmate is required to permit monitoring of telephone calls as a condition of using prison telephones, the prisoner impliedly consents if he has notice of monitoring and still places calls. *Here:* defendant had notice of the monitoring where: (1) a recording was played on the telephone handset before every telephone call that stated that the call would be recorded; (2) at a short jail orientation, prisoners agreed to read and abide by rules contained in a handbook, which stated that outgoing telephone calls would be recorded, and the defendant had participated in that orientation; and (3) defendant acknowledged during one of the recorded calls that prison officials were recording his calls.

People v. Collins, 250 P.3d 668 (Colo. App. 2010). The voluntariness of a consent to search is a question of fact to be determined by the trial court. The reviewing court must defer to the trial court's findings of fact unless

those findings are clearly erroneous or find no support in the record. *Here:* defendant's consent to provide a DNA sample was not rendered involuntary merely because the authorities did not expressly inform him that his DNA sample might be used to implicate him in other crimes.

People v. Minor, 222 P.3d 952 (Colo. 2010). The driver in control of a vehicle has the power to consent to a search of the vehicle even if he is not the registered owner and the registered owner is present at the time.

People v. Scheffer, 224 P.3d 279 (Colo. App. 2009). Defendant's consent to search his bag and person were voluntary, as there was no evidence of duress, coercion, or any other form of undue influence, the officers did not detain defendant, the questioning was calm, and the officers did not display or use any force.

People v. Prescott, 205 P.3d 416 (Colo. App. 2008). Voluntary consent to a search is an exception to the warrant requirement, and the prosecution has the burden of proving that consent was obtained before a search was initiated. The prosecution must prove that defendant by his conduct, words, or both, gave permission to search. Consent to a warrantless search may be expressed or implied from the totality of the circumstances. However, consent to enter a home may not be shown from defendant's failure to object to the entry, and it cannot be based on events that occurred after the entry. *Here*: defendant's request for police assistance cannot establish implied consent to enter the motel room because the request was made after the officer had already entered the room.

People v. Montalvo-Lopez, 215 P.3d 1139 (Colo. App. 2008). Where, at the conclusion of a traffic stop, the officer returned defendant's license and registration to him, informed him he was not going to receive a ticket, told him good-bye, and defendant started walking towards his car, defendant's subsequent consent to search was voluntary.

People v. Castro, 159 P.3d 597 (Colo. 2007). During a traffic stop, defendant consented to a search of his vehicle. The trial court suppressed the products of the search, ruling that the People failed to meet their burden of proof on the voluntariness of defendant's consent because the Spanish-speaking officer who had participated in the stop did not testify. CSC reversed, finding clear evidence in the record that defendant spoke and understood English, and that it was only his passengers who spoke only Spanish.

Turbyne v. People, 151 P.3d 563 (Colo. 2007). Officer's invalid and coercive statement to defendant that he had to submit to a breath test (when the blood test he requested could not be performed) or lose his license requires suppression of breath test results.

People v. Bostic, 148 P.3d 250 (Colo. App. 2006). Although defendant started to step outside to talk with police officers who had knocked on her motel room door, when asked if they could speak with her inside, she stepped back, held the door open, and allowed the officers into the room. No error in the trial court's conclusion that defendant voluntarily consented to the officer's entry into the room and their request to talk with her inside.

People v. Tweedy, 126 P.3d 303 (Colo. App. 2005). Defendant in hotel room validly consented to have police officers enter and search it. Validity of consent to enter and search was not vitiated by the fact that search occurred in early morning hours or by the fact that three police officers knocked on the door. Although encounter may have escalated into a seizure when officer retained the defendant's identification for a warrant check, this did not render defendant's previous consent invalid.

People v. Brandon, 140 P.3d 15 (Colo. App. 2005). An officer's continued questioning of a driver, after a traffic stop for speeding was concluded, amounted to an illegal detention, and the driver's subsequent consent to search was obtained through the exploitation of that unlawful detention. Specifically, the COA concluded that the consent to search was tainted because: the officer did not step aside to let the driver pass from behind her car to the driver's door nor did he tell her she had the right to refuse consent and leave; the driver was outside of her car and separated from her passengers; the first time the officer requested permission to search, the driver

expressed a desire to continue her journey; and the consent immediately followed the officer's illegal detention of the driver by questioning her about matters unrelated to the traffic stop.

People v. Benson, 124 P.3d 851 (Colo. App. 2005). Trial court properly concluded that defendant's consent to a search of his home was voluntary because: (1) during a telephone conversation with a police officer, defendant referred to the marijuana at his home, and (2) after defendant arrived home, he immediately stated that no warrant would be necessary because he wanted to cooperate, and then led officers to a hidden room containing marijuana plants and a freezer containing marijuana buds.

People v. Dotson, 55 P.3d 175 (Colo. App. 2002). Defendant's consent to search was voluntary, even though he had been handcuffed and frisked.

People v. Wiley, 51 P.3d 361 (Colo. App. 2001). A police officer asked defendant whether her purse contained any illegal items, and she stated that it did not. The officer then asked her for permission to search her purse, and defendant agreed. Although defendant testified that she did not consent, it was the trial court's prerogative to resolve the conflict in the evidence based on its evaluation of witness credibility. The officer's decision not to obtain defendant's written consent until after he had conducted the search did not establish coercion.

People v. Mack, 33 P.3d 1211 (Colo. App. 2001). The officers' acts of drawing a weapon and of commanding defendant to show his hands did not constitute coercion of the defendant's consent to search.

People v. Brazzel, 18 P.3d 1285 (Colo. 2001). When defendant voluntarily consents to a search, the 4th amendment does not require the police to obtain a search warrant, even if easy to do so, because consent is an exception to the warrant requirement.

People v. Cervantes-Arredondo, 17 P.3d 141 (Colo. 2001). After issuing tickets for a traffic violation, the officer asked defendant about his reasons for traveling and whether he was carrying any illegal drugs or weapons. The officer then asked if he could search the car, defendant assented, and the officer found illegal drugs. The record was not clear as to when the officer returned defendant's driver's license and registration, or the officer's demeanor when he questioned defendant. CSC remanded for the trial court to determine: (a) whether continuing contact between police officer and defendant was consensual after the traffic stop had terminated; and (b) if the continuing contact was not consensual, whether the officer had a reasonable and articulable suspicion of criminal activity to justify an investigative detention apart from the initial traffic stop.

People v. Mendoza-Balderama, 981 P.2d 150 (Colo. 1999). Where the trial court correctly determined that defendant did not consent to search, the case was remanded for findings on whether warrantless entry into home was supported by probable cause and exigent circumstances.

Scope of Consent

People v. Najjar, 984 P.2d 592 (Colo. 1999). A warrantless search conducted on the basis of consent is limited to the terms given by the consenting party. In a sweep for drugs at a bus station, a police dog "hit" on one suitcase. None of the passengers claimed the suitcase, so the police opened it and found a lot of marijuana. Defendant consented to a search of his hip bag for "weapons or drugs." During this search, the police seized a baggage claim tag that matched the suitcase containing marijuana. Because defendant consented, the search of his hip bag was objectively reasonable. Once inside, police could seize any evidence in plain view. It doesn't matter that the cop was really looking for the baggage claim tag. Inadvertence is not required.

People v. Dumas, 955 P.2d 60 (Colo. 1998). Where consent is confined to certain items, the search must be restricted to areas likely to contain those items.

People v. Collins, 250 P.3d 668 (Colo. App. 2010). A warrantless search conducted on the basis of consent is limited by the terms given by the consenting party. Whether a search remained within the boundaries of the consent is a factual question to be determined from the totality of the circumstances. The relevant question is, "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Here*: there was no evidence that defendant limited the scope of his consent in any way. A typical reasonable person in defendant's place would have understood that the DNA sample taken from him and the data obtained from analysis of the sample would remain in possession of law enforcement and be available for future law enforcement uses; no reasonable person would believe that, absent some express limitation by defendant, the police would be limited in their use of the DNA sample to the crime then under investigation.

People v. Minor, 222 P.3d 952 (Colo. 2010). General consent to search a vehicle extends to all objectively reasonable places in which the implied object of the search may be found. This includes closed containers so long as no forcible obstruction of property is necessary to access any contents.

People v. Wiley, 51 P.3d 361 (Colo. App. 2001). A reasonable person in defendant's position would have understood that granting the officer consent to search the purse for "illegal items" also authorized him to search all containers found inside the purse.

Third-Party Consent

People v. McKinstrey, 852 P.2d 467 (Colo. 1993); Petersen v. People, 939 P.2d 824 (Colo. 1997); People v. Breidenbach, 875 P.2d 879 (Colo. 1994). **Common authority**. The prosecution must show that voluntary consent was obtained either from the individual whose property is searched, or from a third person who had common authority over the premises. This inquiry centers on privacy expectations, not legal property interests. Third party consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." **Apparent authority**. Absent "common authority," the evidence is admissible if the search was reasonable. The test is whether a police officer's belief that a third party had the authority to consent to a search is objectively reasonable.

People v. Stone, 2021 COA 104. Defendant's 17-year-old son had actual authority to voluntarily consent to officer's entry into house; officer did not have a duty to reasonably inquire as to son's authority to consent to

warrantless entry; defendant could not object to officer's entry after son voluntarily consented; as a matter of first impression, initial consent of defendant's son to allow officer to enter defendant's house extended to officer's re-entry after briefly exiting house; and if any error in admitting testimony of resource officer as to condition of interior of defendant's house was harmless. *[Cert was accepted (10/17/22) in case #21SC678: After briefing and argument, cert was dismissed as improvidently granted on 9/22/23]*

Williams v. People, 2019 CO 108. Defendant's objection to police officers' search of his residence, after officers had already entered the residence at defendant's wife's invitation and were in the process of taking possession of drugs and paraphernalia wife had found in defendant's travel bag, did not vitiate the consent to search previously provided by wife; although defendant was physically present on the premises, he did not object at the time officers requested and received his wife's consent to search. The exception identified in *Georgia v. Randolph*, 547 U.S. 103 (2006), that consent to search by one resident is insufficient when another resident is physically present and objects to the search, applies only if, at the time the officers receive an occupant's consent to search, a co-occupant who is physically present on the premises objects.

People v. Morehead, 2019 CO 48. CSC held that on remand following reversal of motion to suppress, trial court was not prohibited from considering new evidence or arguments in support of admission of seized evidence.

People v. Stock, 2017 CO 80. Under the totality of the circumstances, defendant's father consented to the officer's limited entry into defendant's hotel room on her behalf, with her authorization.

People v. Morehead, 2015 COA 131. Defendant's ex-girlfriend had no actual authority to consent to a police search of defendant's apartment where she had access to remove her possessions, but not for any other common purpose of a co-inhabitant, such as socializing or sleeping. Police should have made further inquiry into whether an ex-girlfriend had authority to consent to a search of defendant's apartment where the circumstances, including that her belongings were packed in a truck in the driveway, indicated she lacked the authority to consent to a search.

People v. Nelson, 2012 COA 37. A warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.

People v. Shover, 217 P.3d 901 (Colo. App. 2009). When an individual shares common authority over premises or property, he has no right to prevent a search in the face of the knowing and voluntary consent of a co-occupant with equal authority, unless he is present and has expressly objected to the search. Search of marital premises may properly be based on the consent of only one spouse. *Here:* following the wife's consent to search the premises, the officers validly seized items in a room within the marital home that defendant had padlocked three days earlier, but the wife had later pried open. The wife explained to the officer that the defendant had no right to exclude her from any portion of the house, which is consistent with "societal expectations concerning spousal authority over the marital residence."

People v. Miller, 143 P.3d 1195 (Colo. App. 2006). A warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable, as to him, on the basis of consent given to the police by another resident.

People v. White, 64 P.3d 864 (Colo. App. 2002). To establish common authority, evidence must show: (1) mutual use of property by persons generally having joint access or control; (2) it is reasonable that any of the cohabitants has the right to permit inspection; and (3) the others have assumed the risk that one of them might permit the area to be searched. *Here*: defendant's girlfriend had common authority to consent to the search of her home, including her bedroom in which the defendant's bloody shoes were found. Although an overnight guest, a family friend, did not have common authority to consent to police entry of defendant's father's home,

the guest did have apparent authority to do so, and she had actual authority to admit officers into an area where guests would normally be received.

People v. Trusty, 53 P.3d 668 (Colo. App. 2001). When consent to search is from a third party, the court must determine whether, objectively, the facts available to the officer at the moment would "warrant a man of reasonable caution in the belief" that the third party had authority over the premises. *Here*: apartment owner asked police and the apartment manager to watch her apartment while she was away. This supported an objectively reasonable belief that police had permission from both the owner and the manager to enter the apartment.

Petersen v. People, 939 P.2d 824 (Colo. 1997). "Apparent authority is not a lesser version of common authority. An apparent authority analysis begins by conceding that the consent obtained by police is legally invalid because the consenting third party lacks sufficient authority over the property to consent to a search. Apparent authority is not authority at all, but merely the appearance of authority. A search justified by the apparent authority doctrine is not authorized by consent from one with authority to give it. Rather, such a search, without valid consent, does not violate the 4th amendment because it is not unreasonable."

Miscellaneous: Consent Searches

People v. Tarr, 2024 CO 37. A driver can revoke consent otherwise given under Colorado's Expressed Consent Statute. While every driver in the state is "deemed" to have consented to take a breath or blood test to determine alcohol levels simply by getting behind the wheel of a vehicle, §42-4-1301.1(1), (2)(a)(1), the law is silent as to whether drivers can revoke that consent. CSC holds that a driver can revoke statutory consent and that after consent is revoked the police should obtain a warrant before performing any blood draws. Because the police did not have a warrant before defendant's blood was drawn, the results from those blood draws are inadmissible unless one of the exceptions to the exclusionary rule applies. The case is reversed and remanded for consideration of any outstanding arguments concerning the admissibility of the evidence.

People v. Burdette, 2024 COA 38. In a felony DUI case, the COA considers whether an alleged denial of defendant's Sixth Amendment right to counsel in two prior DUI cases divested the convicting courts of subject matter jurisdiction, rendering defendant's collateral attacks timely. COA concludes that a violation of defendant's Sixth Amendment right to counsel does not strip a trial court of its subject matter jurisdiction. Defendant's reliance on an eighty-six-year-old CSC opinion saying that the right to counsel is "jurisdictional" does not comport with the Supreme Court's and Colorado courts' narrower definition of "jurisdiction" today, including subject matter jurisdiction. Therefore, the trial courts entering defendant's prior convictions did not lose subject matter jurisdiction when they allegedly violated the defendant's Sixth Amendment right to counsel, rendering the defendant's collateral attacks untimely. *[Cert Accepted (11/12/24) in case #24SC388: (1) Whether it violates "anew" the right to counsel to transform a misdemeanor into a felony based on a prior conviction obtained in violation of the right to counsel. (AAG Brenna Brackett)]*

People v. Simpson, 2017 CO 25. By driving in Colorado, the driver consented to the terms of the expressed consent statute, §42-4-1301.1, and that statutory consent satisfied the consent exception to the 4th Amendment's warrant requirement.

People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004). Parent of juvenile need not be present when blood, hair, and saliva samples are taken. While a parent or other responsible adult must be present and consent to the taking of samples, §19-2-511 does not require that that person be present when the samples are taken.

People v. Tafoya, 985 P.2d 26 (Colo. App. 1999). Because defendant was a parolee who had consented to searches as a condition of parole, no warrant was required. However, "reasonable grounds" are still required. In

this context, “reasonable grounds” equates with “reasonable suspicion” that parolee has committed a crime or parole violation. Probable cause not required.

INSPECTIONS AND REGULATORY SEARCHES

People v. Heimel, 812 P.2d 1177 (Colo. 1991); People v. Troudt, 5 P.3d 349 (Colo. App. 1999). A warrantless search without probable cause is constitutional when conducted pursuant to a regulatory program designed to further an important governmental interest where: (1) the program is reasonably tailored to further the governmental interest; and (2) the intrusion on personal privacy is relatively slight in comparison to the interest served by the program.

People v. Triplett, 2016 COA 87. Offenders in a residential community corrections detention facility have no reasonable expectation of privacy. Unless it is humiliating or conducted in a cruel or unusual manner, a search of an offender’s clothing inside the facility does not require individualized suspicion.

People v. Samuels, 228 P.3d 229 (Colo. App. 2009). A probationer's liberty is conditional, that is, it is restricted, though not ordinarily to the extent that a parolee's liberty is restricted. Probation officer's reasonable suspicion that defendant had violated conditions of his probation was sufficient to justify search of defendant's bedroom; neither a warrant nor probable cause was required.

People v. Ramirez, 140 P.3d 169 (Colo. App. 2005). The seizure of a prisoner’s DNA for creation of a DNA database, pursuant to §17-2-201(5)(g)(1) does not violate the Fourth Amendment. Rather, such seizures fall within the “special needs” exception to the warrant requirement.

People v. Galvadon, 103 P.3d 923 (Colo. 2005). In the case of a government search of a highly regulated business such as the liquor business, under certain circumstances proprietors of such businesses might have a diminished expectation of privacy because of long-standing government oversight and consequently have less Fourth Amendment protection, but the expectation of privacy is only diminished to the extent that the search at issue is specifically authorized pursuant to constitutional administrative inspection regulations and conducted pursuant to the purpose of the regulatory scheme.

People v. McCullough, 6 P.3d 774 (Colo. 2000). Under an amendment to the parole statute, §17-2-201(5)(f)(I)(D), parole officers may search parolee’s person, residence, or vehicle without a warrant or reasonable grounds to believe parolee has committed a parole violation. That amendment is constitutional provided that the search is: (1) conducted pursuant to any applicable statute; (2) conducted in furtherance of the purposes of parole, i.e., is related to the rehabilitation and supervision of the parolee; and (3) not arbitrary, capricious or harassing.

People v. Troudt, 5 P.3d 349 (Colo. App. 1999). Officers conducted a lawful administrative search at a Jefferson County Courthouse checkpoint, which had a sign alerting people that they would be searched, when they recovered drugs from the defendant’s cigarette case.

SCHOOL SEARCHES

People in the Int. of J.G., 2024 CO 16. The CSC held that the two-part reasonableness inquiry laid out in *New Jersey v. T.L.O.* applies to a search of a student conducted on school grounds in accordance with an individualized, weapons-related safety plan (J.G. had prior weapon offense/menacing with deadly weapon adjudications and he was on probation for those offenses). *Here:* J.G.’s school instituted a safety plan that required daily searches of his person and belongings. There was a brief lapse in enforcement of the plan at the beginning of J.G.’s tenth-grade year, but on the third day of school J.G. was searched and administrators

discovered a loaded handgun with a scope in his backpack. In juvenile court, J.G. argued that the search violated his Fourth Amendment rights because it was nonconsensual and unsupported by reasonable suspicion, as the safety plan was no longer in effect at the time of the search. Applying *T.L.O.*, the CSC held the search of J.G.'s backpack was: (1) reasonable at its inception because it was carried out in conformity with a formal safety plan - individualized suspicion is not required as reasonableness at inception is a more general inquiry that includes the totality of the circumstances that prompted the search; and (2) appropriately limited in its scope because it was consistent with the goals of the safety plan. Thus, the search was constitutionally reasonable, and the juvenile court's denial of J.G.'s suppression motion was proper. (Includes a helpful outline of USSC school search cases – *Vernonia, Earls, T.L.O.*).

People in the Interest of C.C-S., 2021 COA 127. Under the reasonableness standard, a search and seizure of a student by school officials based on an anonymous tip received through Colorado's Safe2Tell hotline did not satisfy the 4th Amendment. COA determined that school officials improperly relied on information that was anonymous, stale, and uncorroborated, and did not provide reasonable suspicion that the juvenile had violated the law. The exclusionary rule applies to searches of students by school officials and applying it here, the trial court's adjudication of delinquency and remands the case for a new trial.

ADMINISTRATION OF THE EXCLUSIONARY RULE

People v. Burola, 848 P.2d 958 (Colo. 1993); People v. Schoondermark, 759 P.2d 715 (Colo. 1988). The exclusionary rule is a judicially created remedy designed primarily to deter unlawful police conduct. The rule requires that evidence that has been obtained in violation of the 4th amendment be suppressed from presentation in the government's case-in-chief.

People v. Johnson, 2019 COA 159. The court considered the limits of the impeachment exception to the exclusionary rule announced in Walder v. U.S., 347 U.S. 62 (1954), and limited in James v. Illinois, 493 U.S. 307 (1990). Under that rule, evidence that was suppressed as unconstitutionally obtained may nevertheless be admissible under certain limited circumstances. The majority holds that the trial court erred in ruling that the use of truthful testimony about an alternate suspect's positive test for gunshot residue would open the door to the otherwise suppressed evidence of the defendant's positive test. The partial dissent would hold that the trial court appropriately ruled that the evidence of defendant's test would be admissible to prevent the defense from misleading the jury.

People v. Seymour, 2023 CO 53. Under CAR 21, the CSC addressed the constitutionality of law enforcement's use of a reverse-keyword warrant to obtain from Google certain user-account data related to a suspected arson that resulted in the deaths of five people. The court discharges its rule to show cause for several reasons: (1) under the Colorado Constitution, defendant has a constitutionally protected privacy interest in his Google search history even when revealed only in connection with his IP address and not his name and that, under both the Colorado Constitution and the Fourth Amendment, he also has a constitutionally protected possessory interest in that same history; (2) defendant's Google search history implicates his right to freedom of expression; thus, the constitutional protections must be applied with "scrupulous exactitude;" (3) the warrant at issue adequately particularized the place to be searched and the things to be seized; (4) the majority assumes without deciding that the warrant required individualized probable cause and that its absence here rendered the warrant constitutionally defective; and (5) law enforcement obtained and executed the warrant in good faith, so the evidence shouldn't be suppressed under the exclusionary rule.

People v. Threlkel, 2019 CO 18. Review of a trial court's order addressing a defendant's motion to suppress involves a mixed question of law and fact. The reviewing court defers to the trial court's factual findings and does not disturb them if they are supported by competent evidence in the record. However, the trial court's legal conclusions are subject to de novo review.

Casillas v. People, 2018 CO 78. A DNA sample was taken from a juvenile in violation of the juvenile DNA collection statute, §19-2-925.6. Genetic markers from the sample were uploaded to a DNA database and later used to convict him of participating in a carjacking. Suppression was the appropriate remedy for violating the statute because: (1) taking the sample served an inherent law enforcement function; (2) the sample was not taken in reasonable reliance of information provided by a third party such as a court official or employee; (3) the violation was not based on a reasonable misinterpretation of the law; and (4) suppression would deter future violations of the statute.

People v. Archuleta, 2017 COA 9. A defendant must demonstrate the causal connection between the illegality and the evidence sought to be suppressed as fruits of the illegality. Temporal proximity alone is not enough to establish the causal connection that defendant must show in order to warrant application of the exclusionary rule. *Here:* defendant failed to establish a causal connection between the illegality of the warrantless blood draws and the challenged statements because here the police lawfully had custody of defendant during transport to and at the hospital, he was not in the presence of the police solely because of the illegal blood draws.

People v. Lancaster, 2015 COA 93. Evidence seized as a result of a statutory violation, does not ordinarily require suppression, unless the seizure was willful and recurrent.

People v. Glasser, 293 P.3d 68 (Colo. App. 2011). DNA sample taken from defendant pursuant to a plea later vacated is not subject to the exclusionary rule because the rule was crafted to curb police misconduct. Error did not involve the police and failed the "assessment of flagrancy" test.

People v. Butler, 251 P.3d 519 (Colo. App. 2010); Hudson v. Michigan, 547 U.S. 586 (2006), sub silentio overruled People v. Gifford, 782 P.2d 795, 799 (Colo. 1989). As a result, suppression of evidence is no longer a remedy in a criminal case for violations of the knock-and-announce rule.

People v. Doke, 171 P.3d 237 (Colo. 2007). Under the attenuation exception to the exclusionary rule, evidence need not be excluded simply because it would not have come to light "but for" the illegal action of the police. The reviewing court should consider whether the evidence was obtained by exploitation of that illegality or, instead, by means sufficiently distinguishable to be purged of the primary taint. Evidence is admissible when the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. If, following an illegal stop or attempted stop, the detained person's response is itself a new, distinct crime, the police may arrest the person for that crime and the evidentiary fruit of that arrest will not be suppressed; the new act breaks the causal connection between the police illegality and the evidence of the new crime so that sufficient attenuation occurs. Where, as here, defendant menaced sheriff's deputies with a shotgun when they entered his house to serve civil process upon him, evidence of the new crime was outside the scope of the exclusionary rule and therefore admissible.

Fruit of the Poisonous Tree

People v. Padgett, 932 P.2d 810 (Colo. 1997); People v. Schoondermark, 759 P.2d 715 (Colo. 1988). The exclusionary rule applies both to the illegally obtained evidence itself and to the fruit of the poisonous tree - any other evidence derived from the primary evidence.

People v. Archuleta, 2017 COA 9. A defendant must demonstrate the causal connection between the illegality and the evidence sought to be suppressed as fruits of the illegality. Temporal proximity alone is not enough to establish the causal connection that a defendant must show in order to warrant application of the exclusionary rule. *Here*: defendant failed to establish a causal connection between the illegality of the warrantless blood draws and the challenged statements because here the police lawfully had custody of defendant during transport to and at the hospital, he was not in the presence of the police solely because of the illegal blood draws.

People v. Hopper, 284 P.3d 87 (Colo. App. 2011). In Davis v. U.S., 131 S.Ct. 2419 (2011), the USSC held that the exclusionary rule does not apply to an otherwise-valid search conducted in compliance with binding precedent that is later overruled, need not be excluded because the officers acted in good faith based on pre-*Gant* law). *Here*: pursuant to *Davis*, even assuming defendant could challenge the search of his vehicle on appeal after failing to raise it in the trial court, he is not entitled to suppression of the evidence seized during that search.

People v. Vigil, 242 P.3d 1092 (Colo. 2010). Two police officers coerced defendant's confession by using excessive physical force during an unlawful arrest. After his arrest, defendant received six hours of medical treatment, then was released into the custody of the same officers who had coerced his first confession. Those officers questioned him again at 2:00a.m. and elicited a second confession. Suppression of both confessions affirmed under the voluntariness requirements of the Due Process Clause of the Fourteenth Amendment. Because defendant's second confession was infected by his earlier, coerced confession, the officers cannot be allowed to benefit from their earlier, improper conduct. In addition, contraband discovered as a result of the confession and unlawful arrest was appropriately suppressed as fruit of the poisonous tree.

Perez v. People, 231 P.3d 957 (Colo. 2010). Evidence of a crime that is derived from evidence discovered through illegal police activity may be suppressed under the fruit-of-the-poisonous-tree doctrine. A confession that results from unlawful police behavior could be subject to suppression as the fruit of either an illegal arrest or an illegal search or seizure. *Here*: defendant's confession to possession of controlled substance found by police in unlawful search of defendant's vehicle was subject to suppression under fruit-of-the-poisonous-tree doctrine; defendant's confession to the arresting officer in the police cruiser was the direct result of the officer's illegal search, *Miranda* warnings administered to defendant did not cure the taint of that unlawful activity, and suppression of the evidentiary use of defendant's confession was necessary to protect his Fourth Amendment right to be free of unlawful searches.

People v. McClain, 149 P.3d 787 (Colo. 2007). Officers observed two men walking in a "high-drug" area, so they pulled into a parking lot and got out of the police car. Defendant then dropped a clear plastic baggie, and the officers called the defendant over to them. He complied and was placed in handcuffs. Because defendant dropped the baggie of cocaine *before* he was "seized," even if the subsequent seizure was unlawful, the abandoned drugs were not the fruit of an unlawful detention and therefore should not be suppressed.

People v. Heilman, 52 P.3d 224 (Colo. 2002). Where the purported consent flowed directly from the illegal seizure and was in close temporal and physical proximity to it, the prosecution did not meet its burden to demonstrate that the consent was attenuated from the prior illegal contact.

People v. Taylor, 41 P.3d 681 (Colo. 2002). Police discovered cocaine during a search of defendant's car (search incident to arrest of passenger). Defendant said that the cocaine was his. Because the cocaine was the result of a lawful search, defendant's admission was not the fruit of an illegal seizure.

People v. Garcia, 11 P.3d 449 (Colo. 2000). Defendant was detained for 15 minutes in the back of police vehicle for officer safety while police investigated four individuals about a nighttime disturbance involving drugs. This did not constitute an arrest. Because there was no arrest, the absence of probable cause did not require suppression of the evidence obtained through defendant's consent to search his home.

Independent Source / Inevitable Discovery / Attenuation

People v. Schoondermark, 759 P.2d 715 (Colo. 1988); People v. Morley, 4 P.3d 1078 (Colo. 2000)(independent source rule); People v. Diaz, 53 P.3d 1171 (Colo. 2002)(inevitable discovery rule); People v. Burola, 848 P.2d 958 (Colo. 1993)(inevitable discovery rule); People v. Lewis, 975 P.2d 160 (Colo. 1999)(attenuation); People v. Padgett, 932 P.2d 810 (Colo. 1997)(attenuation). Three doctrines have been recognized as exceptions to the exclusionary rule and justify admission of evidence even though it is derived from information obtained in violation of the 4th amendment: Under the **independent source** exception, the unconstitutionally obtained evidence may be admitted if the prosecution can establish that it was also discovered by means independent of the illegality. The **attenuation** doctrine provides that tainted evidence may be admitted if the prosecution can show that the connection between the initial illegality and the evidence has become so attenuated as to dissipate the taint. Under the **inevitable discovery** rule, evidence initially discovered in an unconstitutional manner may be received if that same evidence inevitably would have been obtained lawfully.

People v. d'Estree, 2024 COA 106. The COA reversed the trial court's decision declining to suppress evidence obtained from the second of two warrants issued to search the contents of defendant's cell phone. While the second warrant would have met the independent source doctrine's requirements, here police used an illegally obtained cell phone PIN code to execute the otherwise lawful second warrant. Thus, the trial court should have excluded evidence obtained from the phone at trial. The COA further holds that when police seek to obtain a cell phone PIN code without defendant's consent, in this case via a digital "brute force attack," this constitutes a search under the Fourth Amendment and requires authorization via a warrant. Finally, the COA holds that the use of the PIN code here does not meet the requirements of the inevitable discovery doctrine as police abandoned the lawful search to find the PIN code pursuant to the second warrant and expedited their access to the phone using the PIN code illegally obtained pursuant to the first warrant. Defendant's convictions are reversed, and the case is remanded for a new trial. Judge Grove's special concurrence highlights two aspects of the inevitable discovery jurisprudence that may warrant reconsideration.

People v. Dominguez-Castor, 2020 COA 1. The independent source doctrine may apply to evidence seized under a valid warrant issued after the evidence was first discovered during execution of an invalid warrant if the prosecution shows that the second warrant was truly independent of information obtained from the initial search.

People v. Haack, 2019 CO 52. Under the independent source rule – where police unlawfully followed defendant into his home, and the trial court suppressed evidence acquired inside the home and back outside after defendant

and the police left the home – a remand was necessary for the trial court to address whether the evidence acquired outside was independent of the earlier unlawful entry.

People v. Tomaske, 2019 CO 35. Law enforcement officers entered defendant's property in violation of the Fourth Amendment, and he responded by allegedly assaulting one. Trial court erred in suppressing evidence of defendant's assault on the officer since defendant's decision to resist was an independent act sufficiently attenuated from officers' misconduct-trial court erred by applying the exclusionary rule.

People v. Wambolt, 2018 COA 88. Although defendant was unconstitutionally arrested, his statements were sufficiently attenuated as to be admissible where police removed the handcuffs, the defendant voluntarily spoke, and police provided a proper *Miranda* advisement.

People v. Nelson, 2012 COA 37. Under the independent source exception, the unconstitutionally obtained evidence may be admitted if the prosecution can establish that it was also discovered by means independent of the illegality. When police officers conduct a partially unlawful search of the premises and then include information obtained from that search in the application for a warrant to search the same premises, the focus shifts to whether the officers would have sought the warrant even if they had not entered the house and observed the incriminating evidence.

Perez v. People, 231 P.3d 957 (Colo. 2010). Evidence derived from evidence discovered through illegal police activity will not be rendered inadmissible simply because it would not have been discovered but for the wrongful police activity; rather, derivative evidence may be admissible if the connection between the action and the evidence is sufficiently attenuated that the derivative evidence is distinguishable and can be purged of the primary taint. Attenuation can occur either when the causal connection is remote, or even given a direct causal connection, the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.

People v. Prescott, 205 P.3d 416 (Colo. App. 2008). Evidence obtained following an illegal search may otherwise be admissible where the connection between the conduct of the police and their discovery of the challenged evidence is so attenuated as to dissipate the taint. *Here*: because defendant's request for police assistance occurred immediately after the officer's illegally entered his hotel room, it was not sufficiently attenuated.

People v. Eirish, 165 P.3d 848 (Colo. App. 2007). Case remanded for consideration of whether defendant's statements were sufficiently attenuated from any illegality in the search to justify their admission. When determining whether sufficient attenuation exists, the court must consider: (1) the time elapsed between the illegality and acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

People v. Benson, 124 P.3d 851 (Colo. App. 2005). Defendant's consent to a warrantless search of his home was sufficiently attenuated from an earlier allegedly illegal entry where: during the approximately one-hour interval between the entry and consent, defendant voluntarily drove home from work even though he was aware that police officers were waiting there for him; defendant spoke to one of the officers while driving home and volunteered information about the marihuana on the premises; and, once defendant arrived, he immediately consented to the search and helped the officers find the evidence.

People v. Syrie, 101 P.3d 219 (Colo. 2004). The inevitable discovery exception does not invite speculation about possible series of events under which the evidence may have been discovered but requires an affirmative showing of reasonable probability that the evidence would inevitably be discovered through lawful means already initiated when the seizure was made.

People v. Milligan, 77 P.3d 771 (Colo. App. 2003). When defendant was arrested, his car was going to be towed and impounded pursuant to departmental policy. Cocaine in the fanny pack would have been inevitably discovered had the officers not retrieved it for defendant.

People v. Cruse, 58 P.3d 1114 (Colo. App. 2002). After illegally entering defendant's garage and conducting an illegal dog sniff, the police obtained a search warrant. *Here*: (1) the redacted affidavit established probable cause; (2) on remand, the court must determine whether the police would have sought a warrant, absent information obtained through the illegal entry and dog sniff.

People v. Welsh, 58 P.3d 1065 (Colo. App. 2002), aff'd other grounds, 80 P.3d 296 (Colo. 2003). Under the inevitable discovery exception, evidence initially discovered in an unconstitutional manner may be received if it inevitably would have been obtained lawfully. *Here*: even if the seizure of defendant's car was illegal, the car would have been seized and searched based upon information, obtained independently, indicating that that the victim's wound was not consistent with suicide and that defendant had shot the victim and moved his body

People v. Morley, 4 P.3d 1078 (Colo. 2000). Despite an initial illegal entry, evidence was obtained lawfully from an apartment, and was admissible through the independent source exception to the exclusionary rule, because the officers had begun the process of procuring a warrant well beforehand and the affidavit supporting the warrant relied only on facts obtained prior to the illegal entry.

People v. Lewis, 975 P.2d 160 (Colo. 1999). Independent source for in-court ID: To demonstrate that a show-up identification is not the fruit of a prior illegal search, the record must establish that the state had an independent basis for securing the defendant's presence at the show-up. Under these circumstances, it is not sufficient merely to satisfy the due process test for an independent identification under *Neil v. Biggers*, 409 U.S. 188 (1972). Attenuation for *Miranda*-compliant statements: Factors are: (1) temporal proximity (least important); (2) presence of intervening circumstances (such as termination of illegal custody, subsequent lawful arrest, consultation with attorney); and (3) purpose and flagrancy of police misconduct.

People v. Padgett, 932 P.2d 810 (Colo. 1997). During an illegal investigatory stop, police officers discovered a "possible arrest warrant" for one of the individuals being detained. The citizen was arrested and during a search incident to the arrest, a substantial amount of marijuana was found in the defendant's pockets. The evidence was obtained directly as a result of the illegal investigatory stop "in temporal and physical proximity to the stop without sufficient intervening time and circumstances to carry the prosecution's burden of proof to demonstrate dissipation of the taint."

Miscellaneous: Administration Exclusionary Rule

People v. Morse, 2023 COA 27. Applying the private search doctrine, when a private party acting lawfully and independently of the government discovers and views an electronic file on another person's device (or "cloud" account) and makes that file available to law enforcement, officers do not violate the Fourth Amendment by viewing that same electronic file without a warrant. *Here:* an independent private party discovered a video on defendant's computer depicting an apparent sexual assault. She showed the video to law enforcement and made a copy. Trial court correctly denied defendant's motion to suppress the video. COA does not consider whether the officers could lawfully view other files on the computer because no such evidence was admitted at trial. COA also concludes that evidence found on the computer would also have been admissible under the independent source doctrine, where officers later obtained a warrant for the computer.

People v. Morehead, 2019 CO 48. Where the question before the appellate court is not whether a limited remand should be ordered in lieu of reversal but rather whether the question of officer motivation may be entertained on retrial, the law of the case doctrine places that determination squarely within the discretion of the trial court. Especially where its ruling on the suppression motion at the first trial has been disapproved, it is for

the trial court, except where bound by the ruling of a higher court, to determine the appropriateness of entertaining new and different motions, evidence, arguments, or theories by either party.

People v. Strauss, 180 P.3d 1027 (Colo. 2008). When probable cause exists to support a warrant and any statutory violation was not willful or recurrent, a statutory violation does not rise to the level of a constitutional violation and the exclusionary rule does not apply.

People v. Eirish, 165 P.3d 848 (Colo. App. 2007). Under the severability doctrine, items that are illegally seized during the execution of a valid search warrant do not affect the admissibility of evidence legally obtained while executing the warrant. *Here:* evidence obtained from the garage was admissible, even though the police lacked probable cause to search the home.

People in the Interest of D.S.L., 134 P.3d 522 (Colo. App. 2006). Where defendant fails to demonstrate that the denial of a suppression motion affected his substantial rights, there is no basis for reversal. *Here*: defendant failed to specify what evidence he was seeking to suppress. The record did not indicate that officers discovered any physical evidence during the detention and the only statement the defendant made was not inculpatory. Defendant's subsequent assault on an officer was not the product of the purportedly unlawful seizure.

People v. Kirk, 103 P.3d 918 (Colo. 2005). At the suppression hearing, the prosecutor did not raise a search incident to arrest argument until rebuttal; defense counsel objected, and the trial court stated it would not consider whether the search was reasonable on that basis. CSC did consider the search incident to arrest argument on appeal, reasoning that the purpose of the exclusionary rule is solely to deter police misconduct, and suppression for a procedural flaw in the prosecutor's argument does not serve that purpose.

People v. Ray, 109 P.3d 996 (Colo. App. 2004). Evidence collected from extraterritorial arrest effected by undercover police officers admissible where the officers do not willfully violate §16-3-106. *Here*: no suppression because detective involved in drug buy did not travel outside his jurisdiction of his own volition, but rather was directed there by co-defendant.

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). The state violated the Vienna Convention on Consular Relations by failing to notify the foreign-national defendant's consulate upon his arrest. No suppression required of any custodial statements or other evidence obtained following the arrest.

People v. Powers, 47 P.3d 686 (Colo. 2002). A motion to reconsider a court order, suppressing evidence, must be filed within the 10-day period for filing an interlocutory appeal. That motion tolls the 10-day period for filing an interlocutory appeal and permits an interlocutory appeal to be filed within 10 days after the court rules on the motion to reconsider.

People v. Perry, 68 P.3d 472 (Colo. App. 2002). At trial, officer testified that defendant had refused to consent to a search of his room. Defense did not object. *Held*: even assuming a due process violation, any error in admitting the statement was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming.

People v. Rios, 43 P.3d 726 (Colo. App. 2001). After the trial court denied defendant's motion to suppress evidence, defendant obtained new counsel. New counsel filed a motion to reconsider, alleging ineffective assistance in the conduct of the suppression hearing. Absent a specific showing of prejudice, trial court was not required to reconsider its ruling.

DOG SNIFFS

People v. Gadberry, 2019 CO 37; People v. McKnight, 2019 CO 36. Before a drug-detection dog trained to alert to marijuana can make an exploratory sniff, law enforcement must have probable cause to believe that the item or place to be sniffed contains a drug that violates Colorado law, including possessions or uses of marijuana not authorized by the Colorado Constitution. A sniff from a dog trained to detect marijuana is a "search" under the State Constitution and must be supported by probable cause and justified under an exception to the warrant requirement, such as the automobile exception. For the warrantless use of a drug-detection dog to be lawful, the dog and its handler must be in a place where they have a right to be. The warrantless use of a drug-detection dog during a traffic stop may not impermissibly prolong the stop. A sniff from a dog trained to detect marijuana is a "search" under the State Constitution and must be justified by some degree of suspicion of criminal activity. Abrogating People v. Esparza, 2012 C0 22.

People v. Johnson, 24 CO 47. In this interlocutory appeal, the trial court suppressed evidence based on its determination that the officers unlawfully prolonged their investigatory stop of defendant by waiting for a drug-detection dog to arrive to conduct a sniff of his car for illicit drugs. CSC concludes that the trial court's findings regarding the nature of defendant's seizure were clearly erroneous. Because the officers developed probable cause to arrest defendant, and in fact arrested him, they no longer needed to justify his detention as part of the original investigatory stop. CSC reverses the trial court's suppression order and remands for the court to determine whether probable cause existed to search the vehicle following defendant's arrest.

People v. Lopez, 2022 COA 70M. In this case, the police conducted their dog sniff of defendant's car after the passage of Amendment 64 but before the CSC's announcement of People v. McKnight, 2019 CO 36. In People v. Restrepo, 2021 COA 139, the COA held that, in these circumstances, the police could no longer rely in good faith on prior caselaw suggesting a dog sniff is not a search requiring justification of any sort. In this opinion, the COA supplements *Restrepo*'s reasoning with consideration of the CSC's decision in People v. Zuniga, 2016 CO 52, concluding that *Zuniga* effectively put the police and public on notice that the prior caselaw could no longer be relied on as settled law. COA concludes that, lacking a showing of probable cause by the People on appeal, the evidence discovered in the car should be suppressed.

People v. Bailey, 2018 CO 84. Officers had probable cause to believe there were narcotics in defendant's car before they placed a narcotics-detecting dog in defendant's car; although placing the dog in the car constituted a search, probable cause existed for the search.

People v. Garcia, 251 P.3d 1152 (Colo. App. 2010). A dog sniff search of a vehicle in connection with a traffic stop that is prolonged beyond its purpose to conduct a drug investigation intrudes upon a reasonable expectation of privacy and therefore requires reasonable suspicion of criminal activity. *Here*: under the totality of the circumstances, officer had a sufficient basis for reasonable suspicion of criminal activity involving the defendant and the truck, and the length of the detention was appropriately brief.

People v. Cruse, 58 P.3d 1114 (Colo. App. 2002). After illegally entering defendant's garage and conducting an illegal dog sniff, police obtained a search warrant. *Here*: (1) the redacted affidavit established probable cause; (2) on remand, the court must determine whether the police would have sought a warrant, absent information obtained through the illegal entry and dog sniff.

CONFESSIONS, ADMISSIONS, & STATEMENTS

VOLUNTARINESS

People v. Gennings, 808 P.2d 839 (Colo. 1991). Voluntariness is decided under the totality of circumstances. Courts should consider these factors when assessing voluntariness: (1) was defendant in custody, or was he aware that he was free to leave; (2) did defendant receive a *Miranda* warning and did he waive his rights; (3) did defendant have an opportunity to confer with counsel; (4) was the statement made during an interrogation or was it volunteered; (5) did the interrogator make any threat (overt or implied) or promise; (6) what was interrogator's method and style, how long was the interrogation, where was it held; and (7) what was defendant's mental and physical condition immediately before and during the interrogation.

People v. Miranda-Olivas, 41 P.3d 658 (Colo. 2001); People v. Valdez, 969 P.2d 208 (Colo. 1998). Critical to any finding of involuntariness is the existence of coercive governmental conduct that plays a significant role in inducing the confession or inculpatory statement. Courts should also consider the defendant's background-education, employment, experience with the criminal justice system-in assessing the voluntariness of the statements. The prosecution must show voluntariness by a preponderance of the evidence.

People v. Munoz-Diaz, 2023 COA 105. Applying established law to a novel fact pattern, COA concludes that a defendant's statements made to a police officer over the phone while defendant was in Mexico were voluntary notwithstanding the officer's assurance that he was not going to Mexico to look for defendant. Distinguishes People v. Smiley, 2023 CO 36.

Cardman v. People, 2019 CO 73. Defendant's voluntariness claim was forfeited, not waived, and, as such, was subject to plain error review; because new trial without defendant's involuntary statements was an appropriate remedy that would ensure substantial justice, defendant was not entitled to specific performance of detective's promises; failure by defendant's trial counsel to raise voluntariness claim was not sufficient to allow appellate court to infer that defendant intended to waive it; defendant's statements were involuntarily made and, thus, should not have been admitted; defendant's will was overborne by police coercion during interrogation, and thus, defendant's statements were involuntarily made; and trial court's obvious error in admitting defendant's involuntarily made statements rose to the level of plain error.

People v. In the Interest of Z.T.T., 2017 CO 48. When a defendant knowingly and intelligently waived his *Miranda* rights, knew he was free to leave an interview, and confessed to committing a crime during the course of a conversational, friendly interview devoid of coercive promises or threats, he gave his statements voluntarily. *Here:* Z.T. was in army basic training when a child victim accused him of sexually assaulting her seven years earlier. His commanding officer escorted him to be interviewed by an army investigator. Trial court found a valid *Miranda* waiver but deemed his confession involuntary. CSC reversed finding that: although the interview lasted nine hours at an army base during basic training, the conversational tone and honest conversation, coupled with Z.T.'s discussion of his religious upbringing and statements of guilt, suggest he made the confession of his own free will.

People v. Springsted, 2016 COA 188. Defendant was not free to leave the interrogation room where there was no evidence the door was locked, he was free to go after the interview, but he knocked on the door at one point. Where the record is silent and no argument is made about defendant's prior experience with the criminal justice system and level of education, the silence itself is relevant to assessing a defendant's ability to resist psychological pressures during interviews. When a defendant has the opportunity to consult with an attorney

(e.g. he is interviewed multiple times and released between each interview), this does not support a finding of voluntariness when he is told he is only a witness. As a witness, it is assumed he would have no need to consult with counsel. Where there were five interviews over four days, COA considered them collectively to determine voluntariness. Once one interview is deemed coercive, the government must show that the subsequent interview was not tainted by the first by showing intervening circumstances that insulated the second interview from the effects of the first. Although police may attempt to establish a friendly rapport with a defendant during an interrogation, they may not make promises to avoid punishment or hardship. A single reference to a defendant receiving "more slack" during an interrogation does not constitute a promise that would render the statements involuntary. But threats of life imprisonment, accusations of lying, and implications that a co-conspirator was "not going down alone" constitute implied and explicit threats. The use of more than on interrogator, especially during the course of a continuous interrogation, weighs heavily against a finding of voluntariness. During interrogation, a police officer stating that he will meet with the DA to discuss what charges should be levied against defendant constitutes a promise of leniency amounting to coercion that weighs against a voluntariness finding. Mentioning defendant's religion and asking if his religion condoned the crime (even when religion was first brought up by defendant) constitutes psychological coercion and exploitation of vulnerability. Detective's use of a computer voice stress analyzer (CVSA) is inherently coercive and intended to elicit a confession rather than the truth. Defendant's statements were the product of coercive police tactics where the interrogation was long, two officers participated, there were repeated threats of prison and isolation from his family, there were repeated promises of leniency if he confessed, the officers exploited his religious beliefs, and the officers used a computer voice stress analyzer.

People v. Travis, 2016 COA 88, rev'd other grounds, 2019 CO 15. Coercive behavior by the police is a condition precedent to a finding of involuntariness. *Here:* defendant's statements were voluntary because she was not in custody (had no right to *Miranda* advisement), and there was no coercive behavior by the police. The police were several feet from defendant, their tone was conversational, they made no threats, demands, or promises, and the defendant appeared calm and never asked to stop the interview, which took place in her kitchen.

People v. Quintero-Amador, 2015 CO 59. On retrial, defendant claimed that he only testified during his first trial because his counsel was ineffective, and thus his trial statements should be suppressed. The trial court granted the motion to suppress, finding that defendant's waiver of his Fifth Amendment right was not knowing, voluntary, and intelligent due to counsel's poor performance. CSC reversed, finding that the waiver was supported by the totality of the circumstances surrounding the testimony.

People v. Marko, 2015 COA 139. All of the defendant's statements were voluntary where: although he was ordered to go to the MP station, he was not ordered to speak with the officers; the interviews were conversational; the officers did not make threats, demands, or promises; although the detective initially chose not to read the defendant his *Miranda* rights, he made this decision because he believed defendant was not in custody and not as a ploy to circumvent the defendant's rights; while defendant was fatigued at times, the officers did not prevent him from sleeping, and he was able to sleep during numerous breaks during the interviews; and any misrepresentation about the facts was not sufficient to overbear defendant's will.

People v. N.A.S., 2014 CO 65. Based on a totality of the circumstances analysis, the juvenile was not in custody during questioning by a school resource officer in a school office during which the assistant principal and the juvenile's father and uncle were present. The juvenile's statements were made voluntarily and were not the product of any coercion. Trial court reversed.

People v. Ramadon, 2013 CO 68; People v. Zadran, 2013 CO 69M. In a suppression hearing, when defendant makes a prima facie evidentiary showing of involuntariness, the prosecution bears the burden by a

preponderance of the evidence of establishing that the statements were voluntary under the totality of the circumstances. Coercive physical or psychological conduct by the government renders an otherwise voluntary statement involuntary if the conduct plays a significant role in inducing the statement.

People v. Klinck, 259 P.3d 489 (Colo. 2011). Police investigating a domestic disturbance conversed with defendant for 5-10 minutes on the porch of his girlfriend's home, in a non-confrontational manner. Defendant was calm, did not appear emotionally distraught, did not request termination of the interview, and was not under any form of restraint. *Held*: Suppression order reversed. Defendant was not in custody for *Miranda* purposes, and the trial court erred in basing its decision on that issue on the officer's unvoiced subjective intent to arrest the defendant after their conversation. Defendant's statements were voluntary and admissible.

People v. Gonzalez-Zamora, 251 P.3d 1070 (Colo. 2011). The lack of a videotape of the interrogation, the quick initiation of questioning after defendant signed the advisement form, and the "abrupt" ending to the audiotape at the conclusion of the interview did not render the defendant's statement involuntary. *Here:* defendant's statement was voluntary as no threats or promises were made to him; the interview proceeded in a calm, orderly, and professional manner; and the defendant did not appear to be confused or upset.

People v. Mares, 263 P.3d 699 (Colo. App. 2011). A third party witness's Fifth Amendment rights are personal to the witness and a defendant cannot generally challenge the admission of those statements in his trial. Some courts recognize that the admission of a witness's involuntary statements can violate a defendant's due process rights because the statements are unreliable evidence. *Here:* assuming without deciding that this law applied, the court found the witness's statements to be voluntary because: the interview was at the police station but the witness was free to leave at any time; the witness had voluntarily come to the police station with a male companion who was in the room during the entire interview; although the interrogation was vigorous and challenging, including the investigator stating that he did not believe the witness was telling him the entire truth, and pointing out some potential consequences of lying, he did not make any direct physical threats; the interview lasted less than an hour; although the witness broke down crying at one point, she was relatively young and otherwise appeared to have understood all the questions that were being asked; the officer did not threaten to take away the witness's children, but merely noted that she was "an 18-year old girl with two little kids."

People v. Vigil, 242 P.3d 1092 (Colo. 2010). Two police officers coerced defendant's confession from by using excessive physical force during an unlawful arrest. After his arrest, defendant received 6 hours of medical treatment, then was released into the custody of the same officers who had coerced his first confession. Those officers questioned him again at 2:00 a.m. and elicited a second confession. *Here*: suppression of both confessions affirmed under the voluntariness requirements of the Due Process Clause of the Fourteenth Amendment. Because defendant's second confession was infected by his earlier, coerced confession, the officers cannot be allowed to benefit from their earlier, improper conduct. In addition, contraband discovered as a result of the confession and unlawful arrest was appropriately suppressed as fruit of the poisonous tree.

Effland v. People, 240 P.3d 1199 (Colo. 2010). Under the due process clauses of the U.S. and State Constitutions, a defendant's statements must be made voluntarily in order to be admissible into evidence. While statements made by a defendant in circumstances violating the strictures of *Miranda* are subject to only partial suppression, allowing the prosecution to use the statements for impeachment purposes, involuntary statements must be completely suppressed. For purposes of determining whether a confession is voluntary, coercive police conduct includes not only physical abuse or threats directed against a person, but also subtle forms of psychological coercion. The focus of the voluntariness of confession question is whether the behavior of law enforcement officials was such as to overbear defendant's will to resist and bring about a confession not freely self-determined. While a defendant's mental condition, by itself and apart from its relationship to official

coercion, does not resolve the issue of constitutional voluntariness, the deliberate exploitation of a person's weakness by psychological intimidation can under some circumstances constitute a form of governmental coercion that renders a statement involuntary. *Here:* statements made by defendant during hospital room interrogation were not voluntary and, thus, should have been suppressed under the due process clauses of the U.S. and State Constitutions, where defendant was suffering from extreme depression at the time of the interrogation, defendant had recently attempted suicide pursuant to a suicide pact with his wife and daughter, defendant had recently learned that his wife and daughter had died, defendant was confined to a hospital bed, the investigating officers failed to advise defendant of his *Miranda* rights, defendant's expressed desire not to speak with investigating officers until after he had spoken with an attorney went unheeded, and the statements were not volunteered, but were rather made during an interrogation in which defendant was confronted with the evidence against him.

Perez v. People, 231 P.3d 957 (Colo. 2010). In cases where a confession follows an illegal arrest, the fact of illegal custody is just one factor to be considered when determining the voluntariness of a confession.

People v. Clayton, 207 P.3d 831(Colo. 2009). Defendant was sufficiently advised of and validly waived his *Miranda* rights after receiving three separate advisements and stating he wished to speak to police after each advisement. Waiver of these rights was knowing and intelligent where defendant repeatedly expressed an understanding of his rights and the consequences of waiving his rights. Defendant's alleged intoxication did not render him cognitively incompetent. In addition, societal or other subjective pressures to cooperate with police do not render a waiver involuntary. In the absence of police misconduct, defendant's *Miranda* waiver was voluntary.

People v. Harper, 205 P.3d 452 (Colo. App. 2008). Involuntary statements are inadmissible for any purpose. A statement is involuntary if it is the product of coercive government conduct. Voluntary statements made during custodial interrogation may not be introduced during the prosecution's case-in-chief unless the suspect waived his *Miranda* rights.

People v. Speer, 216 P.3d 18 (Colo. App. 2007), rev'd other grounds, 255 P.3d 1115 (Colo. 2011). Defendant's statement was found not to be involuntary where: (1) although he became emotional during the interrogation, the officers stopped questioning him until he regained his composure; (2) while the officers made some false statements about the evidence against defendant, the officers' conduct was not otherwise coercive, and (3) throughout the interrogation defendant continued to deny any involvement in the offense. As such, the evidence demonstrated that defendant's will was not overborne by any coercive conduct.

People v. Wallin, 167 P.3d 183 (Colo. App. 2007). After defendant's assault on his wife was reported to his parole officer, the parole officer directed defendant to go to the police department and contact a particular police officer. Defendant did not do so, but instead left a phone message for the officer. The court held that this statement was not coerced or involuntary, despite the fact that defendant was directed to contact the police by his parole officer, and defendant was required to follow his parole officer's directives as a condition of parole. Defendant did not, in fact, comply with the parole officer's directive to go to the police department. Defendant was not told that his parole would be revoked if he did not incriminate himself; he was only told to speak with the detective. Finally, the statements were made of the defendant's own volition, and were made in an attempt to exculpate himself.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). Defendant's *Miranda* waiver and subsequent statements were not involuntary, despite the officer's initial assertion of authority, as defendant was not intimidated by the officer's aggressive remarks, the officers did not physically threaten defendant or make false statements to him, and after the brief period of tension the interrogation became calm and civil.

People v. Bostic, 148 P.3d 250 (Colo. App. 2006). An officer's comment to defendant telling her that the police had found a quantity of drugs in the motel room and that she should probably be cooperative did not constitute either a threat or a promise, and the trial court properly concluded that both defendant's statement and her waiver of her *Miranda* rights were voluntary.

People v. Blessett, 155 P.3d 388 (Colo. App. 2006). For a confession to be involuntary, police coercion must have played a significant role in obtaining it. *Here*: detectives told defendant that bomb threats could be charged as a state or federal offense, that the FBI takes bomb threats very seriously, and that punishment would be much more severe if federal charges were filed. They did not directly threaten to take defendant's children away, but asked, "Do you want to lose your children?" and also told defendant that it was in her best interest to "tell us what happened and why." Trial court nevertheless found that any threats or promises did not play a significant role in inducing defendant to confess. Since the trial court's factual findings were supported by the record and it employed the proper legal standard, the court of appeals upheld the denial of defendant's motion to suppress.

People v. Humphrey, 132 P.3d 352 (Colo. 2006). Coercive conduct is a necessary predicate to the finding that a confession is not voluntary. *Here:* trial court's findings – particularly defendant's susceptibility to pressure and the finding of official coercion – support the trial court's conclusion that defendant's will had been overborne.

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). Defendant's statements to police were voluntary, despite the fact that the police did not tell her that other officers were executing a search warrant on her house at the time she was making the statements. Although the officers were, at times, aggressive and insistent in their questioning, this fact alone did not render the statements involuntary, nor was it rendered involuntary because the police did not reveal their intent to arrest defendant.

People v. Flippo, 134 P.3d 436 (Colo. App. 2005), rev'd other grounds, 159 P.3d 100 (Colo. 2007). A defendant's statement is admissible only if it is voluntary. In determining whether a statement is voluntary, the court must consider the totality of the circumstances surrounding the statement. A reviewing court defers to the trial court factual findings that have competent record support but makes de novo the ultimate legal determination whether a statement is voluntary. A statement is involuntary if coercive governmental conduct played a significant role in inducing it. The question is essentially whether the coercive government conduct has overborne the individual's free will.

People v. Platt, 81 P.3d 1060 (Colo. 2004). Statements and confessions received as a result of a non-custodial interrogation are admissible, if they are voluntary. A statement is not involuntary for reason of intoxication unless government conduct caused the intoxication.

People v. Klausner, 74 P.3d 421 (Colo. App. 2003). Defendant claimed that his confession was involuntary, for the sole reason that the officer's statement that police had found defendant's semen in sexual assault victim was false. The statement was not wholly inaccurate, because tests showed that semen contained DNA consistent with defendant's (and not with only other suspect), and defendant offered no other support for his claim.

People v. Koverman, 38 P.3d 85 (Colo. 2002). Statements are the product of coercion through threat of loss of employment when: (1) defendant subjectively believes that employment will be terminated if he exercises his 5th amendment rights; and (2) that belief is objectively reasonable. *Here*: defendant's belief that he would be terminated from CBI employment if he failed to answer questions about missing ecstasy tablets was not objectively reasonable, because: he was advised of his Miranda rights, including his right to remain silent; although those questioning him outranked him, none of them had the power to fire him; no CBI agent had ever been fired for invoking his 5th amendment rights; and CBI policy that statements made during official investigations be "full, complete, and truthful," did not require employees to waive their 5th amendment rights.

People v. Roybal, 55 P.3d 144 (Colo. App. 2001). Although the evidence was in conflict as to the manner in which the police conducted the polygraph exam, defendant had expressed a complete willingness to cooperate on several occasions and had received numerous *Miranda* warnings.

People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001). Defendant complained of coercive interrogation techniques - *i.e.*, police questioned him at the police station, badgered him about how he planned to pay for the victim's car without apparent means, claimed that they had independent evidence of guilt, and characterized the confession as an "opportunity." The trial court properly found that the statement was voluntary: the techniques were not coercive, and defendant's will, was not overborne.

People v. Wickham, 53 P.3d 691 (Colo. App. 2001). During a 5 hour interview, detective made two comments that may be interpreted as promises, suggested that defendant's companion would implicate defendant, and misrepresented the possible charges and the extent of the detective's knowledge of fingerprint evidence. Given the totality of circumstances, the trial court properly found that the confession was voluntary. Defendant received *Miranda* warnings, was mentally and physically healthy, and never mentioned being tired. The detective neither offered to exchange specific help in exchange for the confession, nor was he ever threatening or overbearing. While the court does not condone the use of misrepresentations, the conduct here does not compel a conclusion that defendant's statement was involuntary.

People v. Miranda-Olivas, 41 P.3d 658 (Colo. 2001). Defendant's girlfriend said that defendant required her to go into the bedroom during drug transactions because he did not want her to become involved. Hearing this, the police officer told defendant that his earlier denials were lies, that it was important to tell the truth, and that the officer did not want to see defendant's girlfriend become involved. Defendant then confessed. The trial court suppressed the confession as involuntary, finding that it had been coerced by the police officer's "threat to arrest" the girlfriend. *Here:* it is coercive for police to obtain statements by expressly bargaining over the release of others or threatening to arrest or charge others. But this officer did not threaten to arrest defendant's girlfriend. Properly understood, the reference to defendant's girlfriend was merely part of a general exhortation to tell the truth. Given the other circumstances - a valid waiver of *Miranda* rights, no request for counsel, and the officer's calm and polite demeanor - the undisputed evidence shows a voluntary confession.

People v. Medina, 25 P.3d 1216 (Colo. 2001). A police officer's deliberate exploitation of a defendant's weaknesses by psychological intimidation can render a statement involuntary. *Here:* officer's threat that defendant's father would be arrested, and his abused child taken away unless he confessed to child abuse rendered defendant's statements involuntary.

People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000). The trial court properly admitted defendant's voluntary statements. Defendant was under the influence of drugs and alcohol when he made the statements, but there was no evidence that either statement was obtained through the use of any improper influence.

People v. Grant, 30 P.3d 667 (Colo. App. 2000), aff'd other grounds, 48 P.3d 543 (Colo. 2002). Where a suspect's initial, suppressed statements were voluntary, any later Mirandized statements are admissible as long as they were knowingly and voluntarily made. The trial court properly concluded that the first statement, while inadmissible as a violation of §19-2-511, was knowingly and voluntarily made; thus, the second statement was admissible.

People v. Valdez, 969 P.2d 208 (Colo. 1998). Statements were voluntary where: (1) although the first officer was angry and confrontational, there was no coercion because defendant was not intimidated; (2) that defendant was hungry and tired does not show involuntariness, absent evidence that officers deprived him of food and rest as a means of physical punishment.

People v. Daniels, 973 P.2d 641 (Colo. App. 1998). After being advised of his *Miranda* rights and executing a waiver, defendant asked to speak to a particular homicide detective with whom he was acquainted. Defendant then volunteered information about an unrelated sexual assault because he was under the erroneous impression that, since he knew the detective and the two were alone, the information would be kept confidential. The statement was voluntary - - no need for an additional *Miranda* advisement.

People v. Gray, 975 P.2d 1124 (Colo. App. 1997). Defendant agreed to an interview, received a *Miranda* advisement, and signed a written waiver. During questioning, he indicated displeasure about the questioning and scuffled with the police in an attempt to leave. COA held that: (1) confrontation between police and defendant did not rise to the level of coercion; (2) police are not required to tell defendant the strength of their evidence; (3) police told defendant that it "could help" for him to write a letter to the judge explaining what had happened, but this was not a promise of leniency which rendered the statements involuntary.

People v. Pease, 934 P.2d 1374 (Colo. 1997). The voluntariness prong focuses on whether police conduct was coercive. In this regard, there is a difference between: (1) affirmative misrepresentations that are designed to break down a defendant's will; and (2) the failure to provide information that concerns only the wisdom, and not the voluntariness, of a waiver. The knowing and intelligent prong focuses on the suspect's state of mind (i.e., did defendant understand his rights?). The law does not require that a suspect know of all the circumstances that might affect his decision. *Here:* deliberate failure to tell defendant that there is a warrant for his arrest does not by itself make a custodial statement involuntary if the statement is made after a proper *Miranda* advisement and a voluntary, knowing, and intelligent waiver of rights.

People v. Sapp, 934 P.2d 1367 (Colo. 1997). *Garrity analysis*: In order for statements to be considered involuntary, the employee must subjectively believe that he will be fired for asserting the privilege, and his belief must be objectively reasonable under the circumstances. Absent an "automatic penalty" (a statute or ordinance that will jeopardize one's job for assertion of the privilege), ordinary job pressures are insufficient to support an objectively reasonable expectation of discharge. To be objectively reasonable, the subjective belief must be supported by some demonstrable action of the state. *Here*: no state action contributed to officers' belief that they would be fired for asserting the privilege.

People v. Lopez, 946 P.2d 478 (Colo. App. 1997). Although coercive techniques were used at various parts of the interrogation (which lasted nearly 30 hours over five days), defendant's final statements regarding his role in the offense were voluntary. The exclusionary rule does not apply to evidence obtained by private citizens, unless the citizens were acting as agents of the police. *Here*: while the involvement of defendant's mother during the interrogation (i.e., holding a gun to defendant's head and threatening to kill him and his younger sister if he did not talk to the police) was highly unusual, the mother was not an agent of the police.

People v. Butler, 929 P.2d 36 (Colo. App. 1996). Defendant executed a plea bargain, made statements pursuant to that agreement, and later withdrew his plea. OK to use his statements as impeachment at trial: the offer of a reduced sentence was not coercive, particularly when defendant was represented by counsel and was asked simply to tell the truth. Asking defendant to go forward with evidence of involuntariness did not shift the burden of proof. The court's ruling made it clear that the prosecution had the ultimate burden of showing voluntariness by a preponderance of the evidence.

MIRANDA

People v. Robledo, 832 P.2d 249 (Colo. 1992). *Miranda* applies to law enforcement officers or civilians acting as the agents of law enforcement.

People v. Redderson, 992 P.2d 1176 (Colo. 2000). For *Miranda* to apply, the suspect must be in custody and the statement must be the product of a police interrogation.

People v. Leyba, 2019 COA 144. A defendant who is being interrogated by law enforcement may revoke his request for an attorney by reinitiating discussion about the investigation immediately after having made the request, and here, defendant did so.

People v. Davis, 2018 COA 113. Even assuming the trial court erred in admitting defendant's statements to a Denver detective after defendant had invoked his right to counsel in Miami, any error was harmless beyond a reasonable doubt because: (1) defendant did not challenge the admissibility of his statements to the Miami detective; (2) the statements were exculpatory as to the most serious offenses; and (3) the evidence against defendant on all of the charges was overwhelming.

People v. Jaquez, 2018 COA 76. A defendant has no Fifth Amendment protection in the sound of his or her voice. State can make a defendant repeat a phrase for the purposes of conducting a voice-identification procedure without *Miranda* warnings. After having found that the police had violated defendant's Fifth Amendment rights by subjecting him to custodial interrogation without a *Miranda* advisement, the trial court erred in allowing the People to use defendant's statements as substantive evidence of his guilt. Although defendant has no Fifth Amendment protection to the sound of his voice and *Miranda* would not have barred the prosecution from presenting evidence that the victim had identified defendant's voice, the trial court violated defendant's Fifth Amendment rights here by admitting defendant's statements as substantive evidence of his guilt.

People v. Wakefield, 2018 COA 37. *Miranda* does not apply to defendant's statements to a "privately employed" security guard who did not work for the police and who was responding to an immediate public safety issue even when relaying information to the 911 operator, because the guard was not acting in furtherance of a criminal investigation but was instead helping a response to an emergency situation and ensuring that defendant did not leave the scene.

Carter v. People, 2017 CO 59M. The adequacy of *Miranda* warnings is assessed objectively for what the warnings reasonably convey or would convey to a reasonable suspect in their totality. Where a defendant was expressly advised that the police could not talk to him until after he was advised of his rights, and he was then advised that he had the right to have an attorney, the warnings reasonably conveyed that defendant had the right to the presence of an attorney both before and during any interrogation by the police.

Custody

People v. Matheny, 46 P.3d 453 (Colo. 2002). In determining whether someone was in custody, a court must examine all the circumstances surrounding the interrogation. The ultimate inquiry is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. This depends on objective circumstances, not on the subjective views of the interrogating officers or the person questioned. A suspect is in custody when he is subjected to the constraints associated with formal arrest or interrogated under circumstances that significantly deprive the suspect of his freedom of action.

People v. Reddersen, 992 P.2d 1176 (Colo. 2000). A suspect is not in custody when detained pursuant to an investigatory stop unless the police use extra force.

People v. Eugene, 2024 CO 59. Although some of the individual circumstances listed by the COA may weigh in favor of custody, the totality does not. None of those facts, when viewed alongside the remaining circumstances of this interrogation, "present the serious danger of coercion" that is required to conclude a suspect was in "custody" for *Miranda* purposes. "Miranda warnings were expressly developed as an added protection against incommunicado interrogation of individuals in a police-dominated atmosphere." *Here:* the time and place of the interrogation, outside defendant's apartment in broad daylight, strongly suggests he was not in custody. This daytime, public encounter at a "neutral" location is a far cry from the type of coercive environment at issue in *Miranda*. Officers barely restrained defendant, let alone to a degree commensurate with a formal arrest. What little restraining force the officers did impose, monitoring him from a comfortable distance, making him wait to go to the bathroom, and briefly frisking him for weapons, was not force traditionally associated with concepts of custody and arrest. And the officers did not yell at or threaten defendant; the entire encounter spanned less than a half hour, with questioning of defendant lasting just twelve or so minutes; defendant agreed to exit his building and speak with the officers; defendant didn't seem distressed or intimidated; and he never sought to terminate the encounter. The COA is reversed.

Niemeyer v. People, 2024 CO 58. The CSC holds defendant was in custody when she was interrogated by police because: police questioned defendant after her husband suffered a gunshot wound to the head; defendant was alone, in a closed interrogation room at the police station, late at night; officers restricted her freedom of movement throughout the encounter and affixed bags with zip ties to her hands; and police repeatedly refused her requests to go to the hospital to see her husband. Despite other facts weighing against custody, under a totality of the circumstances, a reasonable person in defendant's position would have believed their freedom of movement was restricted to the degree associated with a formal arrest.

People v. Bohler, 2024 CO 18. Despite other factors weighing in favor of finding that defendant was in custody, the CSC concludes that under the totality of the circumstances, a reasonable person in defendant's position would not have believed that his freedom of movement was restricted to the degree associated with a formal arrest. *Here:* defendant was not in custody for *Miranda* purposes prior to being handcuffed. Defendant was walking down a four-lane street, and officers inquired about the concerning amount of blood on his shirt and arms. The officers' actions and demeanor objectively resembled a welfare check; officers did not tell defendant he was under arrest; they did not touch, accuse, or threaten defendant; the officers did not draw their weapons; and the exchange lasted less than six minutes.

People v. Frazee, 20CA0035. In an UNPUBLISHED case, the COA held that the test as to whether a private citizen (DHS caseworker) has acted as an agent of the police for purposes of criminal investigation is whether the person in light of all the circumstances of the case, must be regarded as having acted as an instrument or agent of the state. *Here:* the trial court denied the motion to suppress because: (1) defendant was not in custody

during the DHS interview, and (2) while conducting her investigation on behalf of DHS, the caseworker wasn't acting as an agent of law enforcement. COA held that because it agreed defendant was not in custody for *Miranda* purposes during the interview, it didn't need to consider the argument the caseworker was acting on behalf of the police. *[Cert Accepted (11/4/23) in case #23SC35: (1) Whether a Department of Human Services caseworker is law enforcement under Miranda, and if so whether Miranda's test for custody applies when someone in pretrial detention is questioned about the facts underlying their custody (SAAG Brittany Zehner)]*

People v. Willoughby, 2023 CO 10. Officers arrived at defendant's apartment to investigate DV allegations. Defendant refused to come outside or leave his apartment, and instead he spoke to officers from his second-story balcony while officers remained on the ground below. While still outside, an officer told defendant that he was under arrest three times. Defendant did not yield to the officers' authority. Defendant later stated that he had exculpatory evidence inside his apartment, which he offered to show one of the officers. The officer responded, "I'm not gonna lie to you and tell you you're not going to jail," and "if you're voluntarily willing to let us go in there and look, and it proves your side of the story, then it will probably change you going to jail, but I'm not going to tell you one way or another." Defendant then allowed the officer inside and made incriminating statements. Later, defendant moved to suppress the statements, arguing they were obtained in violation of his Fifth Amendment right against self-incrimination. CSC holds that defendant was not in custody for *Miranda* purposes. Applying the factors from *People v. Matheny*, 46 P.3d 453 (Colo. 2002), the court concludes that, under the totality of the circumstances, a reasonable person in defendant's position would not believe their freedom of movement was restricted to the degree associated with a formal arrest. CSC reverses and remands.

People v. Davis, 2019 CO 84. Where police went to defendant's home, where he lived with his parents, and alternated between talking to him in the basement and the alleged victim upstairs, defendant was not in custody for *Miranda* purposes. Given the neutral location, the lack of force or physical restraint, and the conversational tone of the questioning, a reasonable person in defendant's position would not have felt restrained to a degree associated with formal arrest at the time he made the challenged statements.

People v. Cline, 2019 CO 33. Confronting defendant with the methamphetamine and paraphernalia found in his bedroom did not turn his interrogation into a custodial one. To the extent defendant's liberty was infringed while his residence was searched, it was more typical of the type associated with a mere investigatory stop than that associated with formal arrest. Additionally, defendant agreed to allow his parole officer to search him or his residence at any time.

Marko v. People, 2018 CO 97. Soldier was not in custody, for *Miranda* purposes, during initial 40-minute period before civilian police officers, who were investigating missing-person report, advised soldier of *Miranda* rights, although military police officers picked soldier up at his barracks and transported him to the provost marshal's office in handcuffs, where cuffs were removed before interview, interview room was unlocked, civilian police officers did not block soldier's exit from interview room in any way, and civilian police officers told soldier that he was free to leave at any time and was not under arrest. When making a determination as to whether a defendant was in custody, for *Miranda* purposes, a court considers, but is not limited to, such factors as the time, place, and purpose of the interrogation, the persons present during the interrogation, the words spoken by the officer to defendant, the officer's tone of voice and demeanor, the length and mood of the interrogation, whether restraints or limitations were placed on defendant's movement during interrogation, the officer's responses to any of defendant's questions, whether defendant was given directions during the interrogation, and defendant's verbal or nonverbal responses to these directions.

People v. Sampson, 2017 CO 100. Defendant in hospital being treated for knife wounds was not in custody for *Miranda* purposes.

People v. Espinoza, 2017 COA 122, rev'd other grounds, 2020 CO 43. Based on the totality of the circumstances, defendant was not restrained to the degree associated with a formal arrest and therefore was not in custody. Defendant agreed to speak with detectives, consented to a pat-down search, and rode unrestrained to the police station. The detectives told defendant he was not under arrest and was free to leave, he was not physically restrained, and although the detectives had visible firearms, they did not make a show of force or restrain defendant in any way. The tone of the interview was conversational, and the interview lasted for only 27 minutes. When detectives confronted defendant with evidence that might refute his statement, defendant said that he understood the criminal justice system and immediately invoked his right to counsel in response to the confrontation. The detectives immediately ceased questioning and released him 5 minutes later.

People v. Travis, 2016 COA 88, rev'd other grounds, 2019 CO 15. Defendant was not in custody when she was unrestrained, calm, the interview was brief (no more than 10 minutes), only one officer questioned her (although there were more officers at the scene), and it took place at night in defendant's kitchen with her husband in view. Defendant's reasonable belief that she was about to be arrested is only one factor and it did not outweigh the other factors supporting the conclusion that she was not in custody.

People v. Montante, 2015 COA 40. The trial court correctly denied a motion to suppress statements by a doctor who made false medical marijuana recommendations because he was not in custody when he spoke to police in his own office.

People v. N.A.S., 2014 CO 65. Juvenile was not in custody during questioning by a school resource officer in a school office during which the assistant principal and the juvenile's father and uncle were present. The juvenile's statements were made voluntarily and were not the product of any coercion.

Mumford v. People, 2012 CO 2. Defendant, whose home was being searched pursuant to a warrant, was not in custody under the following circumstances: although the police drew their guns when they first arrived at the home, they did so only briefly, and no weapon was displayed when the defendant was being questioned; defendant was not under any physical restraint; while the defendant was not free to leave as he was being lawfully detained, he was not in handcuffs and was not being closely guarded; defendant knew from the officers' words and actions that they were focused on someone else; defendant was questioned in a neutral area – on the curb outside his home; detective was not aggressive or threatening, and spoke in a conversational tone; any reassurances made to defendant were not relevant to the custody determination; and at the time of the questioning, the police had not discovered evidence incriminating defendant which would have virtually precluded the possibility of release short of formal arrest.

People v. Klinck, 259 P.3d 489 (Colo. 2011). Police investigating a domestic disturbance conversed with defendant for 5-10 minutes on the porch of his girlfriend's home, in a non-confrontational manner. Defendant was calm, did not appear emotionally distraught, did not request termination of the interview, and was not under any form of restraint. *Held*: Suppression order reversed. Defendant was not in custody, and the trial court erred in basing its decision on that issue on the officer's unvoiced subjective intent to arrest defendant after their conversation.

People v. Cowart, 244 P.3d 1199 (Colo. 2010). Defendant invited three officers into his home and conversed with them at length in the presence of his wife. Defendant was not advised that he was under arrest, and the officers did not use any physical force or restraint. The conversation was pleasant, and the officers did not confront defendant with the victim's allegations that defendant had sexually assaulted her. No reasonable person in defendant's position would have found his freedom of action deprived to the degree associated with formal arrest. Defendant was not in custody during this pre-arrest interview.

Effland v. People, 240 P.3d 868 (Colo. 2010). Whether an individual is in custody for *Miranda* purposes is a question of law that appellate courts review de novo. In determining whether an individual has been subjected to custodial interrogation, the relevant inquiry is "whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom to the degree associated with a formal arrest." The custody inquiry analyzes the totality of the circumstances, including: (1) the time, place, and purpose of the encounter; (2) the persons present during the interrogation; (3) the words spoken by the officer to the defendant; (4) the officer's tone of voice and general demeanor; (5) the length and mood of the interrogation; (6) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; (7) the officer's response to any questions asked by the defendant; (8) whether directions were given to the defendant during the interrogation; and (9) the defendant's verbal or nonverbal response to such directions. A police officer's unarticulated plan has no bearing on whether an individual is in custody for *Miranda* purposes unless that plan would somehow affect the way a reasonable person would perceive his situation. *Here:* defendant confined to a hospital bed was in custody for *Miranda* purposes when he was interrogated, even though defendant was informed that he was not under arrest and defendant's mobility was limited for medical reasons unrelated to police conduct, where defendant's expressed desire not to speak with investigating officers until after he had spoken with an attorney went unheeded, defendant was questioned in a small room with the door closed, the investigating officers sat between defendant and the closed door, defendant was emotionally distraught and was crying throughout the interrogation, the interrogating officer's questions provided all of the details of the incident and were designed to elicit agreement from defendant, and the interrogating officer confronted defendant with the evidence against him.

People v. Holt, 233 P.3d 1194 (Colo. 2010). Defendant was subjected to custodial interrogation when: (1) at least six police officers entered his apartment with guns drawn; (2) police handcuffed the defendant and removed him from the apartment and from his fiancée; (3) police interrogated him inside a police vehicle for 25 minutes; (4) no one told the defendant he was free to leave or to refuse to answer questions; and (5) given the circumstances, defendant had every reason to believe he would be arrested following interrogation. As such, the failure to advise the defendant pursuant to *Miranda* warranted suppression of his statements.

People v. Null, 233 P.3d 670 (Colo. 2010). Defendant was subjected to custodial interrogation when: police detained him on the side of the road for "a relatively lengthy period"; he was not free to leave; he failed several roadside sobriety tests, giving the officers reasonable grounds for arrest; and two officers surrounded him and interrogated him without advising him of his rights. As such, the failure to advise the defendant pursuant to *Miranda* warranted suppression of his statements.

People v. Sandoval, 218 P.3d 307 (Colo. 2009). Defendant was in custody for *Miranda* purposes when he was told by police that if he would not come to the police station for questioning voluntarily, he would be forced to go against his will. Defendant's subsequent statements, made without benefit of *Miranda* warnings, were subject to suppression.

People v. Scheffer, 224 P.3d 279 (Colo. App. 2009). Defendant was not in custody where: (1) he was questioned at 12:45 p.m. on a public sidewalk; (2) the officers did not impede the defendant's progress; (3) neither officer drew his weapon;(4) the officers' tone of voice was calm; (5) and the officer's requests to defendant to put down his bag and remove his hands from his pockets did not constrain the defendant and were related to officer safety.

People v. Hankins, 201 P.3d 1215 (Colo. 2009). Suppression order reversed because defendant was not in custody when he led police to the site where he buried his wife's body: defendant had originally invited the officers to his home; officers encouraged him to tell the truth and warned him of the consequences of lying; defendant was unrestrained before and after he identified the location of the body; officers were reasonable,

respectful, inquisitive, and un-abrasive; defendant was the one who suggested that they go to the burial site; and officers repeatedly told the defendant while driving to and from the site that he was free to go.

People v. Elmarr, 181 P.3d 1157 (Colo. 2008). The totality of the circumstances combined to create a custodial atmosphere" including that: defendant was asked to accompany police officers to the station for questioning, but he was transported in the back of a police car to a non-public area of the station, where he was directed to wait in a small, closed-door interview room; defendant was never told he was not under arrest, or that he was free to leave; defendant was subjected to aggressive interrogation by multiple officers who expressed doubts regarding his truthfulness, discounted his denials, confronted him with potential evidence of his guilt, and accused him of committing murder; and after the defendant requested an attorney, he was kept in the interview room and was asked about his willingness to submit to a polygraph test, and then was directed to disrobe for photographs, about which he was told, "You really don't have a choice."

People v. Stephenson, 159 P.3d 617 (Colo. 2007). Custody is determined under a different analysis from that applied to determine whether there has been a seizure under the Fourth Amendment. The question is not whether a reasonable person would believe he was not free to leave, but whether such a person would believe he was in police custody to the degree associated with a formal arrest. *Here*: defendant was not in custody for *Miranda* purposes when, during a traffic stop, the officer took his driver's license, told him to remain in the car, and then ordered him and the passenger out of the car so that he could conduct the consensual search. These activities are routine aspects of a traffic stop, and do not rise to a level tantamount to formal arrest. After finding methamphetamine in the car, the officer commented to the defendant: "Come on, I found this … right in your seat." Under the totality of the circumstances, the defendant was not in custody at that point as the initial contact was not drug-related, the defendant's freedom of action was not restrained, and it was not "apparent to all" that there were grounds to arrest him.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). Defendant was in custody when he was interrogated by the police where he had been arrested, handcuffed, and transported to a secure interview room where he was questioned by officers for two hours. Defendant's custodial status existed even when he was questioned about offenses other than the one for which he was arrested. Because he was not given *Miranda* warnings, that statement should have been suppressed.

People v. Blessett, 155 P.3d 388 (Colo. App. 2006). Defendant was not in custody where detectives told her several times that she was free to leave (though they did not give her the security code required to leave the building), she had appeared voluntarily at the police station, the tone of voice during the interrogation was conversational (though the police clearly did not believe defendant), the interrogation lasted one hour, there was no limitation on defendant's movement, and no directions were given to defendant before she confessed.

People v. Pascual, 111 P.3d 471 (Colo. 2005). The trial court properly found that defendant was in custody based upon several objective factors: the length of the detention (which lasted a total of over 9 hours, including 2 hours outside of a bar and then 7 hours at a police station); the number of officers and squad cars involved (6 officers and 6 cars); the suspects not being free to leave (suspects were not allowed back in to their van, were left standing outside in 30-degree temperatures for roughly 2 hours, and were not told they were free to leave); the nature and tenor of the interrogation (the police had difficulty communicating with the Guatemalan suspects who spoke Kanjobal as their first language, were not particularly proficient in Spanish, and had no competency in English).

People v. Wallace, 97 P.3d 262 (Colo. App. 2004). When a suspect is interrogated in the comfort of his home, a court is less likely to find the circumstances custodial. *Here*: defendant was not in custody when he was questioned by police officers in his bedroom, after police responded to a call alleging sexual assault.

People v. Minjarez, 81 P.3d 348 (Colo. 2003). A police officers' knowledge, intentions, or beliefs are only relevant to a custody determination to the extent that they affect how a reasonable person in the defendant's position would evaluate his situation. Police who created an atmosphere equivalent to that of formal arrest by effectively blocking a suspect's access to the exit of a small room and repeatedly confronting him there with the weight of evidence against him should have begun the interrogation with a *Miranda* advisement.

People v. Milligan, 77 P.3d 771 (Colo. App. 2003). To make a determination of custody, the court should engage in an objective assessment of whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action to the degree associated with a formal arrest. *Here*: Defendant was not in custody for *Miranda* purposes, when, before he was formally arrested, in a consensual interview, he admitted that he had driven to the scene.

People v. Trujillo, 75 P.3d 1133 (Colo. App. 2003). After observing defendant walking on the street, the officer stopped the vehicle, approached defendant, and asked him some questions about his presence in the area. Since defendant was not in custody while speaking to the officer, his statements were admissible, and because all statements were made prior to being handcuffed, this restraint had no coercive effect on the decision to answer questions.

People v. Baird, 66 P.3d 183 (Colo. App. 2002). Defendant was not in custody where he was told not to go outside of his house but was not otherwise restrained or limited in his movement, officers did not draw their weapons, and he indicated his refusal to be arrested in his home.

People v. Auman, 67 P.3d 741 (Colo. App. 2002), rev'd other grounds, P.3d 647 (Colo. 2005). Where defendant responded to some questions but not others and made unsolicited comments her statements to police were voluntary, despite handcuffs and no *Miranda* advisement. The officers' harsh words, asking about the co-perpetrator's location and how he was armed, were necessary for officer and public safety.

People v. Mangum, 48 P.3d 568 (Colo. 2002). Although defendant was told he was not under arrest by officers executing an order for non-testimonial identification evidence, the nature and degree of force used was the kind associated with custody and arrest where defendant was chased by officers on foot and by vehicle, threatened at gunpoint, sprayed in the face with mace, and ultimately subdued and handcuffed.

People v. Taylor, 41 P.3d 681 (Colo. 2002). Ordinary traffic stops do not place one in custody for purposes of *Miranda*. But additional circumstances may place a motorist in such a position that a reasonable person would believe himself to be deprived of his freedom of action to the degree associated with a formal arrest. *Here*: Defendant was in custody: (1) relatively lengthy detention; (2) several officers on the scene; and (3) officers used physical force to control defendant's movement.

People v. Lawrence, 55 P.3d 155 (Colo. App. 2001). Defendant came to the sheriff's office voluntarily upon the request of a police officer, he was not handcuffed or searched, he was not told he was under arrest, and he was allowed to leave at the conclusion of the interview. Evidence was sufficient to support the trial court's conclusion that defendant was not in custody during the interview.

People v. Polander, 41 P.3d 698 (Colo. 2001). The test for whether someone is in custody is not whether a reasonable person would believe he was not free to leave. Rather, the question is whether such a person would believe he was in police custody of the degree associated with a formal arrest. *Here*: When defendant made the statement admitting ownership of the drugs, it was apparent to all that the police had grounds to arrest the occupants of the van, and defendant had every reason to believe that she would not be briefly detained and then released. Thus, her freedom of action was curtailed to a degree associated with formal arrest.

People v. Reddersen, 992 P.2d 1176 (Colo. 2000). Routine traffic stops do not constitute custody for *Miranda* purposes because: (1) they are usually brief; (2) they are conducted without weapons, in an atmosphere that is

less "police dominated" than a typical interrogation; and (3) most are conducted in public view. No warnings are necessary unless the police exert extra force, curtailing defendant's freedom in a way that is normally associated with formal arrest. *Here*: Because this was a routine traffic stop, involving no extra force or coercive action, the defendant was not in custody. That defendant was not "free to leave" during the stop does not make it custodial.

Interrogation

People v. Taylor, 41 P.3d 681 (Colo. 2002). "Interrogation" refers not only to express questioning by a police officer, but also to any words or actions that a reasonable officer should know are reasonably likely to elicit an incriminating response from the suspect.

People v. Wakefield, 2018 COA 37. Defendant's answers to questions regarding the extent of his injuries and whether there was anyone else in the residence were not excluded by *Miranda* because the officers, having just arrived on the scene, had a legitimate concern that there could be other armed suspects or injured victims in the vicinity. The officers were justified in trying to determine whether defendant was severely injured or needed other medical attention.

People v. Frye, 2014 COA 141. Asking defendant if she has any contraband on her as she is being booked into the jail is a question designed to elicit an incriminating response, and defendant's answer should not have been admitted at trial. Here, the error was harmless beyond a reasonable doubt because defendant's response was not inculpatory and there was overwhelming evidence of her guilt.

People v. Brown, 250 P.3d 718 (Colo. App. 2010). Because warnings are required only for custodial interrogation, *Miranda* provides no basis for excluding statements that are volunteered without any interrogation.

People v. Bonilla-Barraza, 209 P.3d 1090 (Colo. 2009). To determine whether the police "scrupulously honored" a suspect's expressed wish to remain silent, the following factors are relevant: (1) whether the police immediately ceased the initial interrogation upon the suspect's request; (2) whether the police resumed questioning only after the passage of a significant period of time; (3) whether the police gave a fresh set of *Miranda* warnings prior to the second interrogation; and (4) whether the second interrogation was restricted to a crime that was not the subject of the first interrogation. None of these factors is conclusive, and this list is not exhaustive. *First contact*: After being arrested for murdering his fiancée, defendant and four young children were transported to the police station. Defendant was advised of his rights and invoked his right to remain silent. The detective then asked defendant twelve questions about the names, ages, and gender of the children, and which of the four children he had fathered. The contact then ended. *Second contact*: The detective recontacted defendant about 2 ½ hours later, reminded him that he had said he didn't want to talk to the detective, and asked him if he now wanted to talk about what had happened. When defendant said, "well actually no ... no," the detective asked: "is there a reason why?" Defendant responded, " No, because what happened is bad ... I know you have to do more paperwork for me, but it is just too difficult." No further questioning occurred. *Third contact*: The detective contacted defendant the next afternoon, reminded defendant that he had previously indicated he did not want to talk to him, and again asked if defendant would speak with him. Defendant agreed and was advised of his *Miranda* rights. Defendant told the detective that some attorneys had come to the jail to speak with him the previous day, and those attorneys told him they should be present during questioning. The detective responded, "if you want them here that's fine … ultimately it is not going to make a huge difference other than help me understand." Defendant signed a written waiver of his *Miranda*

rights, then gave a statement in which he gave incriminating details about his role in the death of his fiancée. *Here:* defendant was subject to "interrogation" during the first interview. While "interrogation" does not include words or actions of the police which are "normally attendant to arrest and custody," the detective's failure to ask about the children *before* providing a *Miranda* advisement, when he initially asked defendant about personal identifying information, demonstrates that these questions were not part of a procedure "normally attendant to arrest and custody." Defendant was also subjected to interrogation during the second contact, as the officer asked him why he did not want to talk to him, and during the third contact, when he asked the defendant what happened. Defendant's right to silence was not "scrupulously honored" during any of these three contacts because the detective did not immediately cease interrogation, defendant was not re-advised of his *Miranda* rights at the outset of the second and third contacts, and all three interviews concerned the same alleged crime. The court also found significant the fact that the detective "cast doubt on the effect of the defendant's representation by an attorney" by telling him, in effect, that the only reason to have an attorney is to help the police understand what he did to the victim.

People v. Madrid, 179 P.3d 1010 (Colo. 2008). Defendant, who was undisputedly in custody, was not subjected to interrogation where: except for asking if defendant had been arrested before, the detective did not ask any questions; the exchange was initiated by defendant; detective's statements were an explanation of why defendant was being interviewed; defendant's statements during this exchange were spontaneous interruptions; and detective did not employ any of the equivalents of express questioning such as "positing the guilt of the subject," "minimizing the moral seriousness of the offense," or "casting blame on the victim or on society." Defendant's *Miranda* waiver was not involuntary when the detective implied that giving a statement was in the best interest of defendant's family, falsely asserted that the police already knew what happened, and offered defendant a way to minimize his culpability by claiming that the incident was a "mistake." Despite defendant's "harried emotional condition," these tactics did not attempt to affirmatively misrepresent any facts, minimize defendant's culpability, or otherwise coerce him into waiving his rights.

People v. Allen, 199 P.3d 33 (Colo. App. 2007). As defendant was being booked into jail on an unrelated arrest, jailers asked defendant several times (without *Miranda* warnings) whether he possessed any contraband. They also pointed to signs describing "contraband" (which includes marijuana) and told defendant that introducing contraband into the jail would be a class 4 felony. Defendant repeatedly said he had none. Officers' repeated inquiries whether defendant had any contraband violated *Miranda*, and defendants' responses thereto should have been suppressed: the "booking exception" to *Miranda* did not apply, because that exception extends only to "basic identifying data" and not to "unrelated subjects"; the "public safety" exception to *Miranda* might have excepted the officers' inquiries about possession of "weapons or other dangerous items" (such as weapons or needles), but did not extend to marijuana; the public safety exception to *Miranda* might have covered the officers' overly-broad questions if the officers had been in a dangerous situation where "precision" questioning could not be expected, but this was not such a situation; and the officers' questions exceeded the scope of the public safety exception, and violated *Miranda*.

People v. Patnode, 126 P.3d 249 (Colo. App. 2005). During a post-*Miranda* conversation with police initiated by defendant, defendant's request that police let him go and give him his "shit" back (referring to drugs found in his car), was voluntary and not made in response to interrogation, notwithstanding the fact that officers made some remarks during the conversation.

People v. Vigil, 104 P.3d 258 (Colo. App. 2004), rev'd other grounds, 127 P.3d 916 (Colo. 2006). Officer's question, "What are you doing?" to suicidal defendant who was putting a knife to his throat did not amount to the type of interrogation with which *Miranda* was concerned. Defendant's statement to medical personnel after he was clearly in custody, which was overheard by a nearby police officer, was not made in response to any questions and was spontaneous and did not require a prior *Miranda* advisement.

People v. Minjarez, 81 P.3d 348 (Colo. 2003). Police conduct may be considered the functional equivalent of interrogation if police employ compelling influences or psychological ploys in tandem with custody to obtain confessions. *Here*: The conduct was not equivalent of interrogation. After in-custody interrogation, police simply granted defendant's request to see and speak with his wife. Thus, defendant's statements to his wife in the officers' presence should not have been suppressed as the product of interrogation.

People v. Milligan, 77 P.3d 771 (Colo. App. 2003). After police informed him that they had decided to impound his vehicle defendant asked them to retrieve his fanny pack, which was in the car. This statement was not a result of police interrogation because the police posed no question that prompted the request for the fanny-pack nor did they take any action reasonably likely to elicit an incriminating response.

People v. Baird, 66 P.3d 183 (Colo. App. 2002). Defendant was asked "what happened?" by the first officer to arrive on the scene of the stabbing. Questioning that enables an officer to determine what has happened and who has been injured is not an interrogation under *Miranda*. Defendant's statements were made in response to appropriate on-the-scene investigation.

People v. Johnson, 30 P.3d 718 (Colo. App. 2000). Officer's statement to jailed defendant that the police knew his true identity and that defendant now faced additional charges of criminal impersonation did not constitute interrogation. The officer's statements were not designed to elicit any response, let alone an incriminating response.

People v. Blankenship, 30 P.3d 698 (Colo. App. 2000). A *Miranda* warning need not be given before initial questioning to determine an arrested suspect's age and possible status as a runaway. Such preliminary questions do not constitute interrogation because they are incident to arrest and custody and are not reasonably likely to elicit an incriminating response.

People v. Rivas, 13 P.3d 315 (Colo. 2000). Arrested juvenile who had been given a proper *Miranda* warning in his father's presence, refused to give a statement and requested a lawyer. After the father left, the juvenile asked police what charges were being filed. When an officer recited the charges, the juvenile volunteered statements about the incident for which he was arrested. The police did not ask follow-up questions because they could not locate the juvenile's father at that point. The truthful response to the juvenile's question did not constitute interrogation.

Warnings & Waivers

People v. Platt, 81 P.3d 1060 (Colo. 2004). A waiver of *Miranda* rights must be voluntary, knowing, and intelligent.

People v. Densmore, 18CA1304. In an UNPUBLISHED case, COA held that the test as to whether a private citizen (DHS caseworker) has acted as an agent of the police for purposes of criminal investigation is whether the person, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state. Among the nonexclusive factors to consider are whether the police suggested or directed the questioning, whether the police participated in the questioning, whether the questioner was employed by the state, the purpose of the questioning, whether the questioner had access to police reports, the questioner's job duties, whether the questioner intended to assist police, and whether the questioner had a duty to report to authorities what they learned. *Here:* there's no evidence that law enforcement directed, controlled, or participated in DHS' child welfare investigation; DHS never consulted or coordinated with law enforcement about questions to ask defendant; she had only brief contact with law enforcement officers before she began her child welfare investigation and learned that he was being held on a child custody violation; there's no evidence

she reviewed any police reports or other materials related to the criminal investigation. This is not to say a child welfare worker may never act as an agent of law enforcement - trial courts should carefully scrutinize law enforcement's involvement with a child welfare investigation. *[Cert Accepted (11/4/23) in case #23SC81: (1) Whether Miranda applies when a Department of Human Services caseworker conducts a custodial interrogation (SAAG Grant Fevurly)]*

People v. Frazee, 20CA0035. In an UNPUBLISHED case, the COA held that the test as to whether a private citizen (DHS caseworker) has acted as an agent of the police for purposes of criminal investigation is whether the person in light of all the circumstances of the case, must be regarded as having acted as an instrument or agent of the state. *Here:* the trial court denied the motion to suppress because: (1) defendant was not in custody during the DHS interview, and (2) while conducting her investigation on behalf of DHS, the caseworker wasn't acting as an agent of law enforcement. COA held that because it agreed defendant was not in custody for *Miranda* purposes during the interview, it didn't need to consider the argument the caseworker was acting on behalf of the police. *[Cert Accepted (11/4/23) in case #23SC35: (1) Whether a Department of Human Services caseworker is law enforcement under Miranda, and if so whether Miranda's test for custody applies when someone in pretrial detention is questioned about the facts underlying their custody (SAAG Brittany Zehner)]*

People v. Smiley, 2023 CO 36. CSC holds 4-3 that a 19-year-old homicide suspect's waiver of his *Miranda* rights was involuntary in part because detectives made affirmative misrepresentations, such as repeatedly assuring him he wasn't in trouble and would be leaving the stationhouse that day (when, in fact, he was the sole suspect and they had a court order to collect certain samples from him), immediately before giving him the *Miranda* advisement. CSC affirms the order suppressing defendant's confession.

Leyba v. People, 2021 CO 54. Once defendant invokes his right to counsel and police stop interrogation, no minimum amount of time must pass before suspect may validly reinitiate discussion of investigation; and defendant affirmatively revoked his previous request for counsel during interrogation. Overruled People v. Redgebol, 184 P.3d 86 (Colo. 2008)

People v. Nguyen, 2017 CO 92. Translated *Miranda* advisement that "all you say will and may be used as evidence in court" reasonably conveyed to defendant that anything he said could be used against him. It did not matter that the advisement given may have given him the impression that his statements could be used in his favor. Also, statement that "[I]f you do not have money to hire an attorney the court will . . . appoint a person to you at no cost to represent you before asking questions . . . ." sufficiently conveyed that the court would appoint counsel to represent defendant.

People v. Kutlak, 2016 CO 1. In determining whether defendant has invoked his Fifth Amendment right to counsel, the proper inquiry is whether a reasonable police officer in the circumstances would understand the statement to be a request for an attorney; defendant's references to counsel during a custodial interrogation did not amount to an unambiguous and unequivocal Fifth Amendment request for counsel, as required to suppress his statements; and defendant knowingly and voluntarily waived his *Miranda* rights before answering detective's questions. Overruled People v. Romero, 953 P.2d 550 (Colo. 1998); People v. Adkins, 113 P.3d 788 Colo. 2005); People v. Lynn, 2012 CO 45.

People v. Verigan, 2015 COA 132. Because the rationale of the plurality and concurring opinions in Missouri v. Seibert, 542 U.S. 600 (2004), are mutually exclusive, *Seibert* has no binding precedential force on lower courts. In the absence of guidance from CSC, the COA applies the majority rule in Oregon v. Elstad, 470 U.S. 298 (1985)(if a pre-advisement statement is voluntary, then *Miranda* warnings given and validly waived before the post-advisement statement render the later statement admissible). *Here:* trial court properly found that defendant's pre-advisement statements were voluntary, and defendant did not challenge the voluntariness of her subsequent waiver. Therefore, defendant's pre-advisement statements, although obtained in "technical"

violation of *Miranda*, did not render her post-advisement statements inadmissible and any error in the admission of the pre-advisement statements was harmless beyond a reasonable doubt.

People v. Thames, 2015 CO 18. Under a totality of the circumstances analysis, the CSC reversed a trial court order that suppressed defendant's statements on the ground that he "had trouble understanding spoken paragraphs regarding abstract concepts. Citing defendant's prior experience with the criminal justice system, his at least rudimentary understanding of spoken paragraphs, his responses indicating that he understood the advisement, and the nature and tone of the interrogation, the Court found that defendant knowingly and intelligently waived his *Miranda* rights and agree to speak with investigators.

Sanchez v. People, 2014 CO 56. There is no requirement that, under *Miranda*, a suspect be advised an appointed attorney will be free of charge or no cost. As long as the suspect is made to understand that regardless of his present ability to retain counsel, he will be entitled to have an attorney appointed to intercede on his behalf with the police, and he voluntarily waives that right, his Fifth Amendment right to counsel has been adequately safeguarded. It is far from clear that a suspect who cannot afford to retain counsel prior to custodial interrogation is constitutionally entitled to the assistance of counsel without incurring any future financial obligation.

People v. Knedler, 2014 CO 28. Defendant's level of intoxication alone is not sufficient for a court to conclude that his waiver of his *Miranda* rights was not knowing and intelligent. The well-settled "totality of the circumstances" analysis applies.

People v. Hughes, 252 P.3d 1118 (Colo. 2011). By erroneously conflating Fourth Amendment "seizure" standards with Fifth Amendment "custody" determination, trial court created and applied an improper standard for evaluating admissibility of defendant's statements to police.

People v. Gonzalez-Zamora, 251 P.3d 1070 (Colo. 2011). A valid waiver is obtained if a defendant understands his rights and he proceeds to speak with police. *Here*, although defendant made no audible response when the officer asked whether he understood each of his rights and defendant was not specifically asked whether he wanted to waive his rights, defendant's waiver was nevertheless voluntary as there was no "intimidation, misconduct, or trickery" on the part of the police to obtain the waiver. The waiver was also knowing and intelligent where defendant was advised of his rights by an officer who was a native Spanish speaker and who read from a standard card written in Spanish. The officer also told defendant to request further explanation should he not understand any of his rights, the officer reviewed the rights one by one and provided additional explanation where it was deemed necessary, and defendant signed the advisement card after being told that in doing so he was indicating that he understood his rights.

People v. Vickery, 229 P.3d 278 (Colo. 2010). Defendant was in custody on charges in one jurisdiction and was interviewed by officers investigating a different offense in another jurisdiction. He was represented by counsel on Case #1. Defendant was given a *Miranda* advisement on Case #2, signed a waiver, and then proceeded to discuss both offenses, volunteering information about Case #1. The trial court suppressed defendant's statements, finding that defendant's waiver was knowing, voluntary, and intelligent, but was insufficient to waive defendant's sixth amendment right to counsel. A knowing, voluntary, and intelligent *Miranda* waiver is sufficient to waive both a defendant's Fifth and Sixth Amendment rights to counsel. Citing Montejo v. Louisiana, 129 S.Ct. 2079, 2090 (2009).

People v. Ferguson, 227 P.3d 510 (Colo. 2010). The voluntary waiver test asks if there was coercive government conduct, and the test for a knowing and intelligent waiver weighs the totality of the circumstances according to a multitude of factors. *Here*: trial court's analysis was flawed in both respects. Reviewing de novo

the totality of the circumstances (and there are many), the CSC finds that defendant's waiver was voluntary, knowing, and intelligent.

People v. Martin, 222 P.3d 331 (Colo. 2010). Under the particular facts and circumstances of this case, defendant impliedly waived his *Miranda* rights. Defendant came to the police station voluntarily in order to speak with police officers about a shooting. Prior to questioning, he was advised of, and acknowledged, each of his *Miranda* rights. He answered the officers' questions without hesitation for almost an hour and forty-five minutes. During this time, defendant had several opportunities to pause and consider his rights. He did not choose to assert his rights until after the officers told him that witnesses had identified him as the shooter. Under these particular facts and circumstances, defendant's knowing, intelligent, and voluntary waiver may be inferred from his course of conduct.

People v. Gomez-Garcia, 224 P.3d 1019 (Colo. App. 2009). *Miranda* does not apply to foreign law enforcement officers unless they interrogate a suspect at the behest of American law enforcement officers in a "joint venture" between the foreign and American officers. An American officer's mere presence at an interrogation alone does not render an interrogation a joint venture. *Here:* defendant was arrested in Mexico by Mexican police officers accompanied by a U.S. deputy marshal. The Mexican officers did not advise defendant of his *Miranda* rights, and he made statements to them about the crime in question. The record supported the trial court's finding that the deputy marshal had not been involved in a joint venture with the Mexican officers.

People v. Lucas, 232 P.3d 155 (Colo. App. 2009). Where the police employed a "question first, warn later" procedure similar to Missouri v. Seibert, 542 U.S. 600 (2004), the second confession is admissible even through it was preceded by a first, unwarned interrogation. Because the COA was unsure which approach taken in the *Seibert* opinion would control in the future, it analyzed the issue under both the plurality approach, looking at the completeness and detail of the questions in the first interrogation, and under the concurring approach, which would focus on the subject intent of the police conducting the interview.

People v. Clayton, 207 P.3d 831 (Colo. 2009). Defendant was sufficiently advised of and validly waived his *Miranda* rights after receiving three separate advisements and stating he wished to speak to police after each advisement. Furthermore, waiver of these rights was knowing and intelligent where defendant repeatedly expressed an understanding of his rights and the consequences of waiving his rights. Defendant's alleged intoxication did not render him cognitively incompetent. In addition, societal or other subjective pressures to cooperate with police do not render a waiver involuntary. In the absence of police misconduct, defendant's *Miranda* waiver was voluntary.

People v. McDowell, 219 P.3d 332 (Colo. App. 2009). Missouri v. Seibert, 542 U.S. 600 (2004), does not apply retroactively because it is not a watershed rule of criminal procedure. Defendant may not benefit from Crim.P. 35(c)(3)(VII)'s procedural bar exception for claims based on new rules of constitutional law.

People v. Redgebol, 184 P.3d 86 (Colo. 2008), overruled other grounds, Leyba v. People, 2021 CO 54. The prosecution appealed a trial court order suppressing defendant's statements made, a recent Sudanese refugee to the U.S., during a custodial interrogation. Because of the inadequate translation of the *Miranda* advisement, the substantial miscommunication between defendant and the officer, and defendant's cultural background and limited intellectual ability, defendant did not knowingly and intelligently waive his *Miranda* rights and agree to speak to the officer without a lawyer present.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Defendant validly waived his *Miranda* rights under the following circumstances: although the advisement was read quickly, the officer stopped after each line and asked whether defendant understood, and defendant had been advised of his rights the day before; and despite defendant's alleged mental disabilities, he appeared to be mentally coherent and alert throughout the interview.

People v. Jewell, 175 P.3d 103 (Colo. 2008). A person makes a knowing and intelligent waiver of his *Miranda* rights when he has full awareness of the nature of the right being abandoned and the consequences of its abandonment. A defendant's intoxication at the time of the *Miranda* warning is a factor that the trial court may consider when assessing the validity of a waiver. Where the intoxication is self-induced, the trial court should examine whether defendant was so intoxicated that he could not have made a knowing and intelligent waiver. Several factors are relevant: whether defendant seemed oriented to his or her surroundings and situation; whether defendant's answers were responsive and appeared to be the product of a rational thought process; whether defendant was able to appreciate the seriousness of his or her predicament, including the possibility of being incarcerated; whether defendant had the foresight to attempt to deceive the police in hopes of avoiding prosecution; whether defendant expressed remorse for his actions; and whether defendant expressly stated that he understood his rights. *Here:* despite his level of intoxication (.291) and injuries following a car accident, defendant exhibited several readily observable characteristics showing that he was acting knowingly and intelligently: he was able to assess his own physical condition and apprise the officer that he was not hurt; he followed the officer's directions; he advised the officer that he was armed; he paid attention while the officer read the *Miranda* warnings; and he stated that he understood his rights and readily agreed to speak with the police. Therefore, he was not too intoxicated to knowingly or intelligently waive his *Miranda* rights.

People v. Speer, 216 P.3d 18 (Colo. App. 2007), rev'd other grounds, 255 P.3d 1115 (Colo. 2011). Defendant's *Miranda* waiver was valid where the officer read defendant his *Miranda* rights from a police-issued card and went over the advisement form with defendant, and defendant stated he understood his rights and agreed to talk to the officers.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). Defendant's *Miranda* waiver and subsequent statements were not involuntary, despite the officer's initial assertion of authority, as defendant was not intimidated by the officer's aggressive remarks, the officers did not physically threaten defendant or make false statements to him, and after the brief period of tension the interrogation became calm and civil.

People v. Blessett, 155 P.3d 388 (Colo. App. 2006). Telling defendant that she was a suspect in the crime and referring to the tragedies at Columbine High School and the World Trade Center did not render her *Miranda* waiver invalid. There is no evidence that the detectives' reference to these tragedies affected defendant's free and deliberate choice to waive her rights. The passage of time alone does not invalidate previously given *Miranda* warnings. *Here*: questions asked during the booking process did not have to be preceded by additional *Miranda* warnings where defendant had been warned during the official interrogation. The character of the interrogation did not change significantly, and none of the questions would have caused defendant to forget her rights.

People v. King, 151 P.3d 594 (Colo. App. 2006). Detective gave defendant a form advising him of his rights and told him that his signature on the form did not constitute an admission of guilt; defendant signed the portion of the form indicating that he understood his rights and wished to make a statement. Defendant knowingly, intelligently, and voluntarily waived his rights.

People v. Humphrey, 132 P.3d 352 (Colo. 2006). Under *Miranda*, an officer is obligated to ensure that a suspect is aware of and understands her constitutional rights, but officers have no obligation to inform a suspect of the possible subjects of an interrogation or the facts and circumstances that may be pertinent to her decision to talk to police. In reviewing the trial court's determination of the validity of a *Miranda* waiver, appellate courts defer to the trial court's ruling if it is supported by competent evidence in the record. Purely factual determinations by the trial court are accorded due deference, but the application of the legal standard to those facts is reviewed de novo.

People v. Hall, 107 P.3d 1073 (Colo. App. 2004). Police officer testified that, when defendant was advised of his rights at the scene of the accident, he only responded by blowing kisses at the officer. *Here:* The officer's testimony did not constitute an improper reference to defendant's right to silence; rather, the testimony described defendant's behavior on the night in question.

People v. Aguilar-Ramos, 86 P.3d 397 (Colo. 2004). Where police officer with only a rudimentary knowledge of Spanish failed to accurately communicate basic *Miranda* rights, defendant's waiver was not knowing and intelligent. Defendant had only been in the country 15 days before the interview, and the videotaped interrogation showed numerous communication difficulties, including the fact that it took the detective eight attempts to learn the suspect's name.

People v. Platt, 81 P.3d 1060 (Colo. 2004). Intoxication will not invalidate an otherwise valid *Miranda* waiver if the suspect was capable of understanding the nature and ramifications of the rights being waived. In considering intoxication, a court should employ the same inquiry as in cases involving mental incompetence or language difficulty: whether defendant's answers were responsive and appeared to be the product of rational thought process; whether defendant was able to appreciate the seriousness of his or her predicament, including the possibility of incarceration; whether defendant had the foresight to attempt to deceive the police in hopes of avoiding prosecution; whether defendant expressed remorse for his or her actions; whether defendant expressly stated that he or she understood the rights being waived. The trial court erred when, in assessing the validity of a *Miranda* waiver, it failed to take into account the totality of the circumstances and only considered that the suspect was intoxicated.

People v. Al-Yousif, 49 P.3d 1165 (Colo. 2002). A defendant need not have an understanding of the tactical implications of his *Miranda* rights in order for a waiver of them to be valid. The test for a waiver of *Miranda* rights is whether the suspect "minimally understood" that: (1) he did not have to talk to the police; (2) he could request a lawyer; and (3) if he spoke, what he said could be used against him to obtain a conviction. *Here*: The waiver was valid. Defendant's English language abilities were adequate only for casual conversation, but when he was given his *Miranda* warnings, he said that he understood them and neither indicated any misunderstanding, nor asked for clarification.

People v. Freeman, 47 P.3d 700 (Colo. App. 2001). Where an initial *Miranda* advisement and waiver is followed by a later interrogation not preceded by another *Miranda* advisement, the ultimate question is whether, considering the totality of the circumstances, defendant was sufficiently aware of the continuing nature of his constitutional rights so as to render any subsequent statement the result of a knowing, intelligent, and voluntary waiver of those rights. *Here:* where defendant was properly advised of his rights and waived them before an interview in the morning, was not advised of his rights when he was interviewed again five hours later, and then was properly advised of his rights and waived them before a third interview about one hour later, the evidence supported the trial court's conclusion that defendant was aware of and voluntarily waived his rights before the second interview.

People v. Wiley, 51 P.3d 361 (Colo. App. 2001). In testifying about defendant's oral waiver, the police officer admitted that defendant did not sign the written waiver until after the interview. This admission did not undermine the trial court's finding of a valid waiver. Upon finding contraband in defendant's purse, there was no requirement that the officer re-administer a *Miranda* advisement with specific reference to possible drug charges.

People v. Kaiser, 32 P.3d 480 (Colo. 2001). A defendant's IQ is not the only, or even primary, factor in determining whether she can execute a knowing and intelligent waiver. *Here:* defendant, a mildly disabled adult, waived her *Miranda* rights and gave a statement to police. The trial court suppressed the statement, finding that the police took insufficient steps to ensure that defendant understood her rights before she waived

them. CSC reversed finding the totality of circumstances showed that defendant understood her rights and the consequences of talking to police. Police took appropriate steps, such as tailoring the *Miranda* advisement, to ensure defendant understood her rights.

People v. Garcia, 11 P.3d 449 (Colo. 2000). A *Miranda* warning is not required before police officers can request that a suspect, even though in custody, consent to a search. Although a consensual search may produce incriminating evidence, the consent itself is not self-incriminating in the 5th amendment sense.

Public Safety Exception

Perez v. People, 2021 CO 5M. The public safety exception to *Miranda* applies when, under the totality of the circumstances, the officer's questioning relates to an objectively reasonable need to protect the public from immediate danger. This inquiry looks at the circumstances that exist when the questioning occurs.

People v. Allen, 199 P.3d 33 (Colo. App. 2007). As defendant was being booked into jail on an unrelated arrest, jailers asked defendant several times (without *Miranda* warnings) whether he possessed any contraband. They also pointed to signs describing "contraband" (which includes marijuana) and told defendant that introducing contraband into the jail would be a class 4 felony. Defendant repeatedly said he had none. *Here:* officers' repeated inquiries whether defendant had any contraband violated *Miranda*, and defendants' responses thereto should have been suppressed: the "booking exception" to *Miranda* did not apply, because that exception extends only to "basic identifying data" and not to "unrelated subjects"; the "public safety" exception to *Miranda* might have excepted the officers' inquiries about possession of "weapons or other dangerous items" (such as weapons or needles), but did not extend to marijuana; the public safety exception to *Miranda* might have covered the officers' overly-broad questions if the officers had been in a dangerous situation where "precision" questioning could not be expected, but this was not such a situation. Therefore, the officers' questions exceeded the scope of the public safety exception and violated *Miranda*.

People v. Ingram, 984 P.2d 597 (Colo. 1999). Defendant's admission that he owned a black 9mm gun was properly suppressed because the interrogating detective failed to "scrupulously honor" the defendant's invocation of his right to silence. This failure cannot be excused under the "public safety exception" because: (1) unlike *Quarles*, the questioning here took place after the defendant had been advised and had invoked his right to silence; and (2) also unlike *Quarles*, there was no immediate need to know the whereabouts of the gun.

Assertions

Request for Counsel

People v. Trujillo-Tucson, 2022 CO 31. CSC concluded that defendant's question, "Am I able to get a phone call? . . . To my lawyer?" to a non-investigating officer during a casual conversation during a break in the interrogation was not an unambiguous and unequivocal request for counsel, but instead was a logistical question aimed at exploring his options. CSC reversed the order suppressing incriminating statements made in the subsequent interrogation.

People v. Leyba, 2019 COA 144. A defendant who is being interrogated by a law enforcement officer may revoke his request for an attorney by reinitiating discussion about the investigation immediately after having made the request, and here, the defendant did so.

People v. Cardman, 2016 COA 135, rev'd other grounds, 2019 CO 73. After a suspect invokes his right to counsel, he may reinitiate communication with the police through a third party. To establish that a subject has reinitiated discussions with the police after previously invoking his right to counsel, the prosecution must show that: (1) the police reasonably believe that the suspect directed a third party to inform them that he wanted to

have a generalized about the investigation; and (2) the police confirmed with the suspect that he had so indicated.

People v. Kutlak, 2016 CO 1. The CSC wrote to clarify the test for determining whether an in-custody suspect has made an unambiguous request for counsel. In Davis v. U.S., 512 U.S. 452 (1994), the USSC held that the appropriate test is whether "a reasonable police office in the circumstances would understand the statement to be a request for an attorney." Colorado has subtly, but materially, expanded the *Davis* standard to encompass any statement that reasonably "could be construed" as such a request. CSC overruled the language in its prior cases that materially deviates from *Davis*. *Here:* defendant said that he had an attorney on retainer and asked, "Can we get him down here now, or…?" The officer responded, "It's entirely up to you" and he did not know whether the attorney could get to the station "now." Seconds later, defendant said he would "roll the dice" and talk to police. He indicated both verbally and in writing that he understood his rights and agreed to waive them. Defendant's motion to suppress statements was properly denied because he did not actually invoke his right to counsel and otherwise validly waived his *Miranda* rights before making any incriminating statements.

People v. Curtis, 2014 COA 100. Defendant's statement that he had to get home for dinner did not amount to an unequivocal invocation of his right to remain silent, cease questioning, or right to an attorney.

People v. Aryee, 2014 COA 94. After a detective asked for a DNA sample, defendant responded: "But until I talk to my lawyer, if I can talk to my lawyer." This comment was not an unambiguous and unequivocal request for counsel when viewed in light of the totality of the circumstances presented in this case. Thus, the detective's limited follow-up questions were not coercive or harassing, but instead were aimed at clarifying the defendant's statement.

People v. Klinck, 259 P.3d 489 (Colo. 2011). Where defendant willingly spoke at length with detectives who were not aware that he had earlier invoked his right to counsel, statements were voluntary and admissible for impeachment. Nothing that occurred during the course of this interview indicated that defendant's will was overborne by improper state conduct.

People v. Broder, 222 P.3d 323 (Colo. 2010). Where defendant police officer's alleged request for counsel was ambiguous, interrogating officer's subsequent clarifying questions were permissible.

People v. Jimenez, 217 P.3d 841(Colo. App. 2008). After defendant invoked his right to counsel, he later re-initiated contact with the police one or two hours after he had been advised of *Miranda* rights for the second time, and thus, was not required to be re-advised.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Defendant did not unambiguously and unequivocally invoke his right to counsel during the interview when he stated: (1) "Maybe I should get a lawyer or whatever to find out where I stand"; (2) "I don't want to say the truth without a lawyer or something"; and (3) "I don't want to say the truth cause it's not a court of law and I don't have an attorney." These statements demonstrate that defendant was merely hesitant about telling the truth during questioning.

People v. Bradshaw, 156 P.3d 452 (Colo. 2007). When an accused's statements are ambiguous, the police are allowed a limited inquiry for the sole purpose of determining whether an attorney was requested. A defendant requesting counsel is not subject to further interrogation unless the accused himself initiates further communication, exchanges, or conversations with the police. Defendant invoked his right to counsel by stating, soon after being advised of his *Miranda* rights, "I'm going to have to talk to an attorney about this." Because the officer did not scrupulously honor the request for counsel, but instead continued the interrogation, statements made thereafter are inadmissible. Defendant also invoked his right to counsel when the officer asked, "Are you telling me that you want to talk to a lawyer now?" and the defendant replied, "Well, yeah." Even if the officer failed to understand defendant's comments as unequivocal requests for counsel, defendant's legal

questions immediately following his mention of an attorney should have provided the officer with further notice that defendant was exercising his right to counsel. *Here:* not only was the first request for counsel unambiguous, but the first question asked by the officer after the defendant's comment was whether the sex was consensual. Therefore, the questioning was not designed to clarify the defendant's statement or his wishes regarding counsel. After the officer asked three times whether defendant wanted to continue talking to him, defendant finally relented and said "Alright. Let's talk." This did not constitute a re-initiation of the interrogation by defendant as the initial interrogation never ceased.

People v. Vasquez, 155 P.3d 588 (Colo. App. 2006). The Fifth Amendment privilege against self-incrimination and right to counsel is a personal right that cannot be invoked by a person other than the suspect. An attorney cannot invoke a suspect's *Miranda* rights anticipatorily by filing a motion purporting to invoke the rights during arraignment in an unrelated case.

Grant v. People, 48 P.3d 543 (Colo. 2002). A suspect's execution of a financial eligibility form and interview with the public defender's office does not constitute an unambiguous invocation of the right to counsel. Juvenile's mother's expression of concern about how, due to her financial circumstances, legal representation could be obtained, was not a clear assertion of the right to counsel.

People v. Gordon, 32 P.3d 575 (Colo. App. 2001). After defendant insisted on remaining silent and getting an attorney, interrogation ceased. While using the restroom in presence of an officer, defendant spontaneously stated that he would "like to talk to you," but would be "cutting his own throat." During cross-examination of defendant at trial, trial court admitted the quoted statement. Prosecution asked what defendant meant by the quoted statement, and defendant explained that by this statement, he meant that he would be foolish to talk to police without an attorney because he had committed a crime "of sorts." *Here:* the statements were properly admitted. The first was not evidence of defendant's exercise of his right to an attorney or to remain silent, because defendant had already exercised those rights, and they had been "scrupulously honored." He was not under interrogation when he volunteered the statement. That defendant sought to "explain" his earlier exercise of rights - and made an incriminating statement in the explanation - was admissible. Further, the prosecutor did not commit misconduct by asking what defendant meant by the quoted statement, because the question did not call for him to admit his previous invocation of his rights.

Request to Cease Questioning

People v. Arroya, 988 P.2d 1124 (Colo. 1999). If the suspect clearly articulates the desire to cut off questioning during the interview, the police must scrupulously honor this assertion in order to comply with *Miranda*.

People v. Cerda, 2024 CO 49. In this DA interlocutory appeal, the CSC affirms the trial court's order suppressing defendant's statements made after being given *Miranda* warnings because defendant unambiguously invoked his right to remain silent and the officers did not scrupulously honor his invocation. However, CSC reversed the trial court's finding that defendant's statements were involuntary. *Here:* when asked if he wanted to talk after being read a *Miranda* advisement, defendant said, "No." But after police asked a few more questions, defendant decided to speak when the officers told him he was being charged with murder.

People v. Marko, 2015 COA 139. Defendant did not unambiguously invoke his right to silence when he told the detective "I want to go home," as this statement did not express a clear desire to cut off questioning. After the defendant agreed to take a lie detector test and was advised of his Miranda rights, he indicated that he "want[ed] to talk with a lawyer when the machine is present." The court held that this statement was ambiguous as to

whether the defendant wanted to have his lawyer present immediately or when the test was administered, and thus the detective was permitted to ask questions to determine whether the defendant was willing to continue the interview without an attorney present. Because the detective did so, and defendant's responses unambiguously established that he would talk to the detective without his attorney present, defendant did not invoke his right to counsel.

People v. Richardson, 2014 COA 50. Defendant did not unequivocally and unambiguously invoke his right to silence during custodial interrogation when he made the following comments expressing concern about admitting guilt: "I'm not gonna spill my guts about anything," I don't think I want to admit to anything," and "I feel like that would be the wrong thing to do."

People v. Bonilla-Barraza, 209 P.3d 1090 (Colo. 2009). To determine whether the police "scrupulously honored" a suspect's expressed wish to remain silent, the following factors are relevant: (1) whether the police immediately ceased the initial interrogation upon the suspect's request; (2) whether the police resumed questioning only after the passage of a significant period of time; (3) whether the police gave a fresh set of *Miranda* warnings prior to the second interrogation; and (4) whether the second interrogation was restricted to a crime that was not the subject of the first interrogation. Defendant's right to silence was not "scrupulously honored" during any of the three contacts because the detective did not immediately cease interrogation, defendant was not re-advised of his *Miranda* rights at the outset of the second and third contacts, and all three interviews concerned the same alleged crime. The court also found significant the fact that the detective "cast doubt on the effect of defendant's representation by an attorney" by telling him, in effect, that the only reason to have an attorney is to help the police understand what he did to the victim.

People v. Jimenez, 217 P.3d 841 (Colo. App. 2008). Under the totality of the circumstances, defendant's "I ain't helping you no more till I see my wife-Doing nothing else, saying nothing else till I see my wife" was not an unambiguous request to end the interview.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Defendant did not unambiguously and unequivocally invoke his right to remain silent during the interview when the officer asked: "Do you still wish to talk to us?" and the defendant's response, although somewhat inaudible, was either "I guess I say I do," or "I didn't say I did." In either event, the response was ambiguous, and after the officer attempted to clarify the defendant's intent, defendant's subsequent answer indicated that he was not attempting to invoke his right to remain silent.

People v. Muniz, 190 P.3d 774 (Colo. App. 2008). The trial court did not abuse its discretion by denying defendant's motion to suppress statements because a reasonable police officer could have understood the defendant's statements that he wanted to end the interview, take a blood test, and then go home as an expression of defendant's desire to go home promptly, rather than as an invocation of his right to remain silent.

People v. Speer, 216 P.3d 18 (Colo. App. 2007), rev'd other grounds, 255 P.3d 1115 (Colo. 2011). Defendant's claim that his right to cease questioning was violated when the officers continued to interrogate him after he invoked that right did not warrant reversal as the statements made after that alleged invocation were used solely for impeachment.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Defendant was initially given a *Miranda* advisement and waived his rights; nine hours later, he was arrested, and, although he was not readvised of the *Miranda* rights, he asserted his right to silence, and the police asked him no questions; however, minutes later, he voluntarily initiated a further conversation with the police, following which the police interrogated him. *Here:* although nine hours elapsed between the initial *Miranda* advisement and the later interrogation, the totality of the circumstances showed that the defendant was sufficiently aware of the continuing nature of his *Miranda* rights so as to render his subsequent statement the result of a knowing, intelligent, and voluntary waiver of his rights;

and although the defendant had previously invoked his right to silence, he was subject to further interrogation upon initiating a further conversation with the police.

Application of Exclusionary Rule

People v. Mendoza-Rodriguez, 790 P.2d 810 (Colo. 1990). When defendant is subjected to custodial interrogation both before and after *Miranda* warnings, admissibility of the post-*Miranda* statements depends on voluntariness. If the pre-*Miranda* statements were voluntary, then the post-*Miranda* statements are admissible. If pre-*Miranda* statements were coerced, then the post-*Miranda* statements can be admitted as voluntary only if they were not tainted. Relevant factors include the amount of time between confessions; a change in place of interrogation; and a change in identity of the interrogators.

People v. Trujillo, 938 P.2d 117 (Colo. 1997). Even if there were a *Miranda* violation, defendant's pre-*Miranda* statements were voluntary. Consequently, his voluntary post-*Miranda* statements would be admissible.

People v. Wambolt, 2018 COA 88. Although defendant was unconstitutionally arrested, his statements were sufficiently attenuated as to be admissible where police removed the handcuffs, defendant voluntarily spoke, and police provided a proper *Miranda* advisement.

Verigan v. People, 2018 CO 53. The question on cert was whether the USSC's fractured opinion in Missouri v. Seibert, 542 U.S. 600 (2004), created a precedential rule that could be applied to future cases. CSC joined the vast majority of courts that have addressed this issue in concluding that Justice Kennedy's concurring opinion in *Seibert* enunciated the narrowest grounds on which the members of the majority concurred and is therefore the controlling precedent to be applied. Applying Justice Kennedy's test here, the CSC concluded that the officers in this case did not engage in a two-step interrogation in a deliberate attempt to undermine the effectiveness of *Miranda* warnings provided to defendant. Therefore, the framework from Oregon v. Elstad, 470 U.S. 298 (1985), applies. Because defendant's pre- and post-warning statements were indisputably voluntary, the COA correctly determined that the post-warning statements were admissible.

People v. Jaquez, 2018 COA 76. After having found that the police had violated defendant's Fifth Amendment rights by subjecting him to custodial interrogation without a *Miranda* advisement, the trial court erred in allowing the People to use defendant's statements as substantive evidence of his guilt. Although a defendant has no Fifth Amendment protection to the sound of his voice and *Miranda* would not have barred the prosecution from presenting evidence that the victim had identified defendant's voice, the trial court violated defendant's Fifth Amendment rights here by nonetheless admitting defendant's statements as substantive evidence of his guilt.

People v. Wakefield, 2018 COA 37. A due process voluntariness inquiry is distinct from an inquiry into whether a defendant's statement was volunteered for purposes of *Miranda*. Compliance with *Miranda* alone is not determinative of whether a statement was voluntarily given and therefore admissible. It is critical that a trial court make findings regarding voluntariness on the record and where the trial court has failed to rule on the issue of voluntariness,' the appellate court should remand for an evidentiary hearing on the issue.

People v. Gosselin, 205 P.3d 456 (Colo. App. 2008). Evidence obtained after a defendant invoked his right to counsel in violation of Edwards v. Arizona, 451 U.S. 477 (1981), is admissible if the statements leading to the discovery of the evidence are voluntary.

People v. Davis, 187 P.3d 562 (Colo. 2008). Police arrested defendant in his home on probable cause, but without a warrant. At the police station, defendant was advised of his *Miranda* rights, and voluntarily,

knowingly, and intelligently waived them; he thereafter gave a statement. The trial court suppressed the statement, holding that the police failed to secure an arrest warrant and there were no exigent circumstances justifying the warrantless arrest in his home. CSC reversed relying on New York v. Harris, 495 U.S. 14 (1990), finding that the exclusionary rule does not extend to suppress statements outside the home, when the arrest is based on probable cause and the statements are made after a proper *Miranda* warning and a knowing, intelligent, and voluntary waiver of defendant's rights.

People v. Speer, 216 P.3d 18 (Colo. App. 2007), rev'd other grounds, 255 P.3d 1115 (Colo. 2008). Defendant's claim that his right to cease questioning was violated when the officers continued to interrogate him after he invoked that right did not warrant reversal as the statements made after that alleged invocation were used solely for impeachment.

Dunlap v. People, 173 P.3d 1054 (Colo. 2007). Once a defendant places his mental capacity at issue, the prosecution may offer in rebuttal evidence based on defendant's voluntary statements that were not made in compliance with *Miranda*.

People v. Bradshaw, 156 P.3d 452 (Colo. 2007). Toward the end of the illegal interrogation, defendant consented to a swab of his mouth for DNA, which yielded incriminating evidence. Although the trial court suppressed this evidence under the fruit of the poisonous tree doctrine, the CSC reversed, holding that the exclusionary rule does not apply to *Miranda* violations and that the proper inquiry is whether the consent was voluntary.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Failure to give a suspect a *Miranda* warning does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.

People v. Trujillo, 49 P.3d 316 (Colo. 2002). A defendant's voluntary custodial statements, made without a *Miranda* warning, may only be used to impeach the defendant if he testifies at trial, and thus, may not be used either to rebut a defense theory or impeach a witness other than the defendant.

People v. Barnard, 12 P.3d 290 (Colo. App. 2000). Defendant's *Mirandized* statements were attenuated from his earlier involuntary statements. There was a 45-minute break, a change in the place of interrogation, and different interrogators.

JUVENILE STATEMENTS: §19-2-511

People v. Barrios, 2019 CO 10. Trial court suppressed the juvenile's statements to police, finding there was not a reliable *Miranda* waiver under §19-2-511. The court was concerned that, in obtaining waivers from the juvenile and from the juvenile's guardian, the police minimized the seriousness of the victim's allegations, and there was no actual consultation between the guardian and the juvenile, because they were physically separated. CSC reversed the suppression order, concluding that, in evaluating the totality of the circumstances, the *Miranda* waiver was knowing, voluntary, and intelligent.

People v. N.A.S., 2014 CO 65. Based on a totality of the circumstances analysis, the juvenile was not in custody during questioning by a school resource officer in a school office during which the assistant principal and the juvenile's father and uncle were present. The juvenile's statements were made voluntarily and were not the product of any coercion.

People v. S.X.G., 2012 CO 5. Under §19-1-108(5.5), a juvenile magistrate's order suppressing a juvenile's statements must first be reviewed by the district court before the prosecution can appeal the order to the supreme court.

People v. Barrow, 139 P.3d 636 (Colo. 2006). A juvenile must be advised of his right to have a parent present during police interrogation before he can validly waive that right under §19-2-511.

People v. Blankenship, 119 P.3d 552 (Colo. App. 2005). §19-2-511(2)(a)(III), which allows the admission of statements that are taken without the presence of a parent where the juvenile is a runaway from another state, does not violate equal protection.

People v. White, 64 P.3d 864 (Colo. App. 2002). Trial court properly concluded that defendant's father's interests were not adverse to defendant's interests, despite the fact that the father was under investigation for the possession of a stolen weapon.

Grant v. People, 48 P.3d 543 (Colo. 2002). Under §19-2-511, a parent must be present during interrogation of a juvenile, but such presence may be expressly waived "in writing." The written waiver need not necessarily be signed by both the parents and the juvenile, as long as the circumstances clearly demonstrate that the juvenile and parent agreed to waive their rights.

People v. Blankenship, 30 P.3d 698 (Colo. App. 2000). Requirement that a parent be present during custodial interrogation did not apply to juvenile who was a runaway. Totality of the circumstances established that juvenile's statement was knowing, voluntary, and intelligent even though it was given without the presence of a parental figure. A juvenile is of "sufficient age and understanding" to waive his constitutional rights if he is able to understand the constitutional rights and waiver.

People v. Rivas, 13 P.3d 315 (Colo. 2000). §19-2-511 mirrors *Miranda* safeguards in that it applies only to statements made by someone while in custody and responding to interrogation by law enforcement officials. Law enforcement has no duty to readvise of *Miranda* rights or obtain the presence of a parent or lawyer before permitting a juvenile to volunteer statements.

People v. Lucas, 992 P.2d 619 (Colo. App. 1999). Where the DSS had custody, a GAL was appointed, and the father was dead; and where the mother, although not explicitly assenting to his independence, had neither provided any financial or emotional support nor had any meaningful relationship with the child for over three months, the juvenile was emancipated within the meaning of §19-2-511.

People v. Legler, 969 P.2d 691 (Colo. 1998). A "physical custodian" is an adult with whom the child resided immediately before the arrest and custodial interrogation. If this adult has interests that are objectively hostile to the child's interests, he or she is not a "physical custodian" for purposes of the statute. *Here:* grandmother was not a custodian. She had not lived with the teenager for months, and the teenager was not welcome to return; the grandmother was ready to "walk away" from the teenager in order to raise the teenager's child.

MISCELLANEOUS: CONFESSIONS & STATEMENTS

People v. Sanders, 2023 CO 62. Where a trial court orders evidence suppressed on the separate bases of custody and voluntariness, an appellant challenging that order must address both bases for suppression to prevail on appeal. In doing so, it is the appellant's responsibility to set forth the grounds upon which its argument relies, with citations to the relevant authorities and parts of the record. *Here:* the DA challenged the trial court's custody determination but failed to address the voluntariness determination, which established an independent basis for suppression. The suppression order is affirmed.

People v. Castro, 2022 COA 101. Following his arrest and *Miranda* warnings, defendant twice made very brief, exculpatory statements to the police. At trial, defendant testified to various details consistent with those statements. The prosecutor cross-examined defendant about, and later commented in closing argument on, why he had not given the police those details following, or since, his arrest. COA found that Doyle v. Ohio, 426 U.S. 610 (1976), and its progeny, prohibited the prosecutor from cross-examining defendant about, and commenting in closing argument on, his failure to inform the authorities of the details to which he testified at trial. Case reversed and remanded new trial.

People v. Gutierrez, 2018 CO 75. The trial court properly suppressed defendant's statements where the police officer was not present to testify but could appear by Skype. The court had accommodated the prosecution in its difficulty in procuring the officer's presence, the defense had requested in-person testimony, the court had warned the prosecution that it could not meet its burden without the officer, and the court found that the in-person testimony was important because there were credibility issues.

People v. Ruch, 2016 CO 35. Because the defendant completely refused to attend treatment, his invocation of the Fifth Amendment was premature and amounted to a prohibited, blanket assertion of the privilege. The trial court properly revoked probation based on the total refusal to attend treatment. *Here:* while his trial conviction was on appeal, probationer completely refused to enroll or participate in sex offender treatment based on his concern that, in the course of treatment, he would be compelled to incriminate himself; trial court revoked his probation.

People v. Stroud, 2014 COA 58. A defendant's statements at a contested D&N adjudication or termination hearing are not admissions to a petition in dependency or neglect for purposes of §19-3-207(3) and are therefore admissible in subsequent criminal trials.

People v. Richardson, 2014 COA 50. So long as one party to a telephone conversation agrees to interception and/or recording of the conversation, the interception does not violate the statutes prohibiting wiretapping and eavesdropping. Parental presence is not required before a minor, who is not in custody, may validly consent to the interception and/or recording of a telephone conversation.

People v. Cunningham, 2013 CO 71. Whether a search or seizure is warrantless or performed pursuant to a warrant, under Crim.P. 41(e) the defendant bears the burden of going forward to show that the search or seizure violated his Fourth Amendment rights.

People v. Copenhaver, 21 P.3d 413 (Colo. App. 2000). Trial court deferred ruling on motion to suppress statements, later failed to rule on the motion, and defendant failed to ask for a ruling on the motion. Because no statements were introduced which should have been suppressed, the lack of a ruling did not prejudice the defendant's ability to formulate a trial strategy and consider pursuing a plea agreement.

PRETRIAL

JURISDICTION: §18-1-201 & VENUE: §18-1-202

People v. Verbrugge, 998 P.2d 43 (Colo. App. 1999). A court must always have jurisdiction to act, and any action taken by court when it lacks jurisdiction is a nullity; subject matter jurisdiction cannot be waived.

People v. Burgess, 946 P.2d 565 (Colo. App. 1997). Jurisdiction and venue distinguished: Criminal *jurisdiction* over felonies committed in Colorado generally extends to all district courts in the state. *Venue*, §18-1-202. is the place for trial. Subject matter jurisdiction may not be waived, but venue, which is for defendant's benefit, may be waived. By statute, venue is not an element of any offense and need not be proven by prosecution unless required by statute defining the offense. *Here:* objection based on lack of jurisdiction loses because district court had jurisdiction over any felony alleged to be committed within state; (2) if based on venue, objection loses for formal reasons (§18-1-202 requires timely filing of written objection).

People v. Hughes, 946 P.2d 509 (Colo. App. 1997), overruled other grounds, Valdez v. People, 966 P.2d 587 (Colo. 1998). Jurisdiction depends on allegation, not the result. *Here:* juvenile faced several charges, but only the COV charge subjected him to district court's jurisdiction; district court could impose sentence on convictions for other charges, even though juvenile was acquitted of COV charge.

People v. Sherrod, 204 P.3d 466 (Colo. 2009). Question of whether county judge was properly designated to preside over matters in district court is a question of authority, not of jurisdiction. Where constitutional or statutory authorization exists to allow judge to perform certain judicial duties upon appointment and the judge is otherwise qualified under the constitutional or statutory authorization, actions taken by judge under the color of authority are valid even if irregularities in the record later reveal a minor defect in appointment. Although a *nunc pro tunc* order documenting legality of judge's actions is not necessary to render such actions valid, such orders generally should be executed where irregularities are discovered.

People v. McCulloch, 198 P.3d 1264 (Colo. App. 2008). CSC Chief Justice has authority to delegate to chief judges of various judicial districts the authority to appoint county court judges to hear district court felony cases; Chief Justice does not need to personally assign county court judges or do so on case-by-case basis.

People v. Black, 2022 COA 127. A trial court's ruling as to whether venue is proper presents a mixed question of fact and law. The plain language of §18-1-202(1) provides that a case "shall be tried" either in the county where the offense was committed or in any other county in which an act in furtherance of the offense occurred. The nine subsections that follow "define the place where a criminal act is *committed*, but do not, in themselves, further limit or define where or under what circumstances an act in furtherance of the offense occurs. Subsection (2)-(10) define where specific offenses are committed and where they may be tried but they do not negate or modify in any way the provision of §18-1-202(1) which allows trial in any other county where an act in furtherance of the offense occurred *in addition to* the place where the criminal act was committed.

Gonzales v. Arapahoe County, 2020 COA 104. The continuing offense analysis for venue purposes is obviously different from the continuing offense analysis for statute of limitations. An offense may continue in different geographic locations for venue purposes without qualifying as a continuing offense for statute of limitations purposes. COA recognized this important distinction, noting that if the crime is deemed to be a continuing offense for venue purposes, defendant is merely exposed to prosecution in a different district. But if the crime is a continuing offense for statute of limitations purposes, defendant may be prosecuted after a time at which he

would otherwise have no exposure whatsoever. Interpreting a crime as a continuing offense for statute of limitations purposes has more serious consequences than it does in the context of venue.

People v. West, 2019 COA 131. The trial court may change the trial's venue when adequate grounds are presented by the motion of a party or whenever it is necessary to obtain an impartial jury. In the absence of such grounds, however, the propriety of venue is a matter of fact and law. Proof of venue is not an element of any offense, and venue need not be proved by the prosecution unless required by the statute defining the offense.

People v. Tee, 2018 COA 84. Under §13-73-107(1), "[a]ny indictment by a state grand jury shall be returned to the chief judge who is supervising the statewide grand jury without any designation of venue." *Here:* Arapahoe County District Court did not lack jurisdiction over allegedly incomplete indictment returned by grand jury, under rule requiring that indictment be "presented in open court by a grand jury to the district court which charges the commission of any crime," where statute required that indictment be returned to chief judge who is supervising the statewide grand jury without any designation of venue, and that, once indictment was returned, "the chief judge shall, by order, designate any county in the state as the county of venue for the purpose of trial," and district court of Arapahoe County was designated as venue for trial.

People v. Lewis, 2017 COA 147. Proof of the county in which the offense occurred did not constitute an element of any offense, and did need not be proven by the prosecution at trial on charges of Internet sexual exploitation of a child and Internet luring of a child; the legislature's determination that venue was not an element of a crime and could be waived did not offend any principle so rooted in the traditions or conscience of the citizens as to be ranked "fundamental" when defendant's right to proper venue ncould be vindicated by other means.

People v. Martinez, 2015 COA 33. Where trial court-imposed DOC sentence but suspended it in lieu of YOS placement, court retained jurisdiction over defendant when he violated that YOS placement; trial court could proceed with revocation proceedings even though the YOS placement had expired, as DOC sentence was still valid.

People v. Garcia, 2014 COA 85. State courts may determine whether violation of a particular statute is a "Crime Involving Moral Turpitude" under Immigration and Naturalization Act.

People v. Perez-Hernandez, 2013 COA 160. Although trial court erred when it did not address defendant's jurisdictional motion before trial, error was harmless beyond a reasonable doubt, since record demonstrated defendant's lengthy juvenile record, defense did not dispute the existence/validity of those adjudications, and adjudications supported trial court's determination that defendant was habitual juvenile offender subject to direct filing.

People v. Chase, 2013 COA 27. Colorado had jurisdiction because result of defendant's conduct - threats would cause a reasonable person to fear for his or her safety - occurred, at least in part, in Colorado because he sent his emails to email addresses associated with individuals he knew to reside in Colorado. *Here:* defendant, who lived in Colorado, went to Boston and sent a series of threatening emails to persons who lived in Colorado, but who were on vacation in Maryland when they received/read the emails.

People v. Garcia, 2013 COA 15. Under Crim.P. 5(a)(4)(VII), if a felony complaint is dismissed prior to PH or prior to being bound over, prosecution may still: (1) file a direct information in district court pursuant to Crim.P. 7(c)(4) charging same offense(s); (2) file felony complaint in county court charging the same offense(s); or (3) submit the matter to a grand jury. Physical presence of defendant in court confers jurisdiction over the person. Prosecutor's failure to file statement of good cause is not a jurisdictional defect; it is a procedural defect which defendant waived when he pled guilty.

Wood v. People, 255 P.3d 1136 (Colo. 2011). Trial court's pre-trial denial of immunity from prosecution under §18-1-704.5 (make-my-day statute) does not implicate trial court's subject matter jurisdiction and is not reviewable on direct appeal.

People v. Loveall, 231 P.3d 408 (Colo. 2010). Trial court exceeds its jurisdiction when it acts without general jurisdiction, or when it acts contrary to statute, provided the statute expressly limits the court's jurisdiction. "Written stipulation requirement" in the DJ&S statute is not jurisdictional in nature. Because DJ&S is not a sentence - it is a continuance with probation-like conditions - court does not exceed its jurisdiction by entering DJ&S for a sex offense. SOLSA limits trial court's jurisdiction only in cases where trial court enters a sentence.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). District court had jurisdiction over defendant, despite fact that conspiracy charge alleged conduct which occurred, in part, while he was juvenile, as conspiracy is a continuing crime which was not completed until after defendant became an adult.

People v. Stanley, 170 P.3d 782 (Colo. App. 2007). COA took judicial notice that trial judge completed his oath of office and filed it with State Court Administrator's Office; judge's failure to file oath with Secretary of State as required by Art. XII, § 9 of Colorado Constitution did not affect district court's jurisdiction because of the application of de facto officer doctrine.

People v. Jones, 140 P.3d 325 (Colo. App. 2006). There is no language in Expatriation Act of 1868, Nationality Act of 1940, or Immigration and Nationality Act of 1952 suggesting that Congress intended to immunize expatriated defendants from criminal charges committed in U.S.

People v. Reed, 132 P.3d 347 (Colo. 2006). Severance of multiple counts against defendant by District Court, on the basis that venue as to severed charges was proper in a second county, was subject to reversal, inasmuch as District Court failed to make a proper determination as to whether severed counts were also triable in first county; meaningful review of District Court's order was not possible without adequate factual findings concerning the conduct and circumstances relevant to the situs of the challenged offenses and an explanation of the court's understanding of the applicable law. In §18-1-202, the legislature left little doubt about its intent to expand even the situs of multiple crimes committed as part of the same criminal episode to all counties in which any one of them was committed and would be triable.

People v. Scott, 116 P.3d 1231 (Colo. App. 2004). Colorado Constitution and statute require a DA to file an oath of office and public official's surety bond with secretary of state. DA's failure to file these upon commencement of DA's term does not result in permanent vacation of the office and does not disqualify DA from curing the defect. Any defect in qualification is temporary and is cured when DA subsequently files the oath and bond with secretary of state. DA who proceeds with performing duties of the office while a temporary/technical defect in qualification exists acts as a "de facto officer," whose acts are valid and binding. *Here:* because an information filed by DA acting as a "de facto officer" is valid, defendant's challenge to DA's authority to prosecute based on failure to file an oath of office and surety bond with secretary of state does not raise an issue of subject matter jurisdiction; by pleading guilty, defendant waives any objection to DA's authority to prosecute, and cannot raise the issue in subsequent postconviction motion.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). Under rules of criminal procedure, trial court's jurisdiction is invoked by grand jury indictment that supersedes an earlier-filed complaint.

People v. Johnson, 77 P.3d 845 (Colo. App. 2003). Chief judge's order authorized all county court judges of district to accept guilty pleas and impose sentences in felony cases upon certain conditions as acting district court judges. This procedure does not violate Colorado Const., art. VI, §17, which states that county courts "shall not have jurisdiction of felonies," because designated county court judges were specifically appointed to

act as district court judges. The district court, not the county court, was exercising jurisdiction over the felony case.

People v. Dalton, 70 P.3d 517 (Colo. App. 2002). In balancing policy considerations expressed in Children's Code, prevailing legislative intent is that all charges involving a minor be resolved in adult court when requirements of direct-filing statute are satisfied by any charge. *Here:* since district court had jurisdiction under direct-filing statute over SAOC-PATT count, it had ancillary jurisdiction over SAOC-POT count, which arose from same criminal transaction; this conclusion is supported by the rule of mandatory joinder.

People v. Brown, 70 P.3d 489 (Colo. App. 2002). Criminal jurisdiction over felonies committed in Colorado generally extends to all district courts in the state; trial court has jurisdiction regardless of where in Colorado the information alleged the crimes occurred, even if the county named in information is erroneous.

People v. Torkelson, 971 P.2d 660 (Colo. App. 1998). County court judge can receive district court verdict, but only if there was proper delegation by chief judge of judicial district; without proper delegation, verdict is received coram non judice (in the presence of a person not a judge) and is void for lack of jurisdiction. *Here:* on remand, county judge was not properly appointed to act as a district court judge and judgment of conviction was void. People v. Torkelson, 22 P.3d 560 (Colo. App. 2000).

Subject Matter

People v. Burdette, 2024 COA 38. In a felony DUI case, the COA considers whether an alleged denial of defendant's Sixth Amendment right to counsel in two prior DUI cases divested the convicting courts of subject matter jurisdiction, rendering defendant's collateral attacks timely. COA concludes that a violation of defendant's Sixth Amendment right to counsel does not strip a trial court of its subject matter jurisdiction. Defendant's reliance on an eighty-six-year-old CSC opinion saying that the right to counsel is "jurisdictional" does not comport with the Supreme Court's and Colorado courts' narrower definition of "jurisdiction" today, including subject matter jurisdiction. Therefore, the trial courts entering defendant's prior convictions did not lose subject matter jurisdiction when they allegedly violated the defendant's Sixth Amendment right to counsel, rendering the defendant's collateral attacks untimely. *[Cert Accepted (11/12/24) in case #24SC388: (1) Whether it violates "anew" the right to counsel to transform a misdemeanor into a felony based on a prior conviction obtained in violation of the right to counsel. (AAG Brenna Brackett)]*

People v. Nevelik, 2021 COA 30. State of Colorado lacks jurisdiction over a defendant accused of money laundering in an internet scam when there is no record evidence that he had any contact with the victims in Colorado, either physically or electronically.

People ex rel. P.K., 2015 COA 121. Because petition averred two dates, one of which was beyond its subject matter jurisdiction, court lacked jurisdiction to accept juvenile's admission to petition. Proper remedy is remand with directions to dismiss delinquency petition without prejudice after which prosecution may refile petition which properly invokes juvenile court's jurisdiction. *Here:* delinquency petition had date range for juvenile's alleged offenses, including dates that preceded his 10th birthday; juvenile court did not have subject matter jurisdiction prior to his 10th birthday.

People v. Gardner, 250 P.3d 1262 (Colo. App. 2010). Defendant who pleads guilty admits to all material facts alleged in charge, including those that serve as factual predicate to subject matter jurisdiction. District court has subject matter jurisdiction where charges were brought by felony complaint instead of indictment. There is no guarantee in Colorado Constitution for a grand jury indictment for felony charge. Article II, Section 8, serves only to direct that, criminal proceedings be initiated by indictment and to authorize legislature to provide alternate methods of proceeding – which it did via §16-5-101 (allows criminal action to be commenced by filing felony complaint in county court). District court has subject matter jurisdiction where county court ordered

defendant's case be bound over. County courts have concurrent original jurisdiction with district courts regarding "the issuance of bindover orders." §13-6-106(1)(b).

People v. Rogers, 220 P.3d 931 (Colo. App. 2008), overruled other grounds, Garcia v. People, 2022 CO 6. Where defendant withdrew his guilty plea to added charges and prosecutor failed to formally reinstate original charges, trial court was not deprived of jurisdiction to try defendant on original charges. Condition upon which original charges were dismissed became nullity when defendant withdrew his guilty plea, so dismissal was nullified.

Personal

People v. Drew, 250 P.3d 761 (Colo. App. 2010). Capitalization of defendant's name in court documents did not deprive trial court of jurisdiction over defendant. Fringe on courtroom's flag neither created an "inland admiralty court" nor deprived trial court of jurisdiction over defendant.

Ancillary Jurisdiction

People v. Chavez, 2018 COA 139. Once a valid sentence is imposed, apart from the limited claims described in Crim.P. 35, a criminal court has no further jurisdiction. For these reasons, we decline to follow People v. Hargrave, 179 P.3d 226 (Colo. App. 2007). Here: because a motion for return of property is not authorized by Crim. P. 35, the COA reasoned that criminal courts do not have jurisdiction over such motions made after sentencing.

People v. Hargrave, 179 P.3d 226 (Colo. App. 2007). Ancillary jurisdiction should attach where: (1) ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding would not be frustrated. Disagreed with in People v. Chavez, 2018 COA 139.

Flakes v. People, 153 P.3d 427 (Colo. 2007). Under judicially created doctrine of ancillary jurisdiction, offenses not enumerated by direct file statute may be direct filed together with enumerated offenses where unenumerated offenses arise out of same transaction.

People v. Dalton, 70 P.3d 517 (Colo. App. 2002). In balancing policy considerations expressed in Children's Code, prevailing legislative intent is that all charges involving a minor be resolved in adult court when requirements of direct-filing statute are satisfied by any charge. *Here:* since district court had jurisdiction under direct-filing statute over SAOC-PATT count, it had ancillary jurisdiction over SAOC-POT count, which arose from same criminal transaction; this conclusion is supported by the rule of mandatory joinder.

Preemption: State v. Federal

People ex rel. D.M., 2019 COA 56. Federal Controlled Substances Act does not preempt Colorado's restitution statutes; juvenile court did not err in ordering juvenile adjudicated delinquent to pay restitution equaling the value of the marijuana he stole from a licensed marijuana store.

People v. Fuentes-Espinoza, 2017 CO 98. In determining whether federal statutes preempt state law, court is guided by two cornerstones: (1) Congress's purpose is the ultimate touchstone in every pre-emption case; and (2) a court must presume that historic police powers of the states were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress. USSC has recognized 3 forms of federal preemption-express, field, and conflict preemption. A state law is expressly preempted when Congress withdraws specified powers from the States by enacting a statute containing an express preemption provision.

Under the field preemption doctrine, States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. Congress's intent to preempt a particular field may be inferred from a framework of regulation so pervasive...that Congress left no room for the States to supplement it or where there is a 'federal interest...so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Finally, under the conflict preemption doctrine, state laws are preempted when they conflict with federal law. Such a conflict exists: (1) when compliance with both federal and state law is physically impossible and (2) in those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. With respect to immigration, the Government of the United States has broad, undoubted power. The Immigration Naturalization Act establishes a comprehensive framework for penalizing the transportation, concealment, and inducement of unlawfully present aliens. These provisions evince Congress's intent to maintain a uniform, federally regulated framework for criminalizing and regulating the transportation, concealment, and inducement of unlawfully present aliens, and this framework is so pervasive that it has left no room for the states to supplement it. Therefore, the INA, under field preemption, preempts Colorado's human smuggling law which regulates the transportation of unlawful present aliens. Colorado's human smuggling law is also preempted under conflict preemption. It stands in conflict with Congress's objective by penalizing human smuggling differently than the INA and by criminalizing more conduct. Powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

DOUBLE JEOPARDY: §18-1-408 [1]

Generally

Deutschendorf v. People, 920 P.2d 53 (Colo. 1996). Double jeopardy protects individuals from three separate abuses: (1) a second prosecution for the same offense after acquittal; (2) second prosecution for the same offense after conviction; and (3) multiple punishments for the same crime.

People v. Gingles, 2014 COA 163. Double jeopardy claims of multiplicity are resolved on the basis of: (1) the appropriate unit of prosecution for the offense; and (2) the sufficiency of the evidence supporting a finding of factually distinct offenses, not on the basis of the positions taken by the parties at trial.

People v. Borghesi, 66 P.3d 93 (Colo. 2003). Double jeopardy prohibits putting a person in jeopardy twice for the same offense; it prohibits multiplicity, which occurs when the same offense is charged in multiple counts and results in multiple punishments. Because each person who is subject to force and intimidation constitutes a victim of a separate offense under robbery statutes, charging, convicting, and sentencing a robber on multiple counts of robbery based upon the number of persons in control of the property taken does not offend multiplicity principles; robber may be convicted of more than one count of robbery for a single taking of property from more than one person.

Whiteaker v. People, 2024 CO 25. First degree criminal trespass of a dwelling is a lesser-included offense of second-degree burglary. The CSC confirmed that when a defendant is convicted of both a greater offense and a lesser-included offense in violation of double jeopardy, the remedy on appeal is automatic reversal of the judgment of conviction as to the lesser-included offense and merger of the two offenses, such that only the greater remains. The CSC acknowledged its opinion is in tension with *Scott* and traditional obviousness analysis

[1] This section will include those cases that address double jeopardy principles generally. For published cases specific to particular crimes, please see the Lookit Crimes Section.

but decided not to follow it. CSC also stated it was not adding to structural error but creating a new category of reversal for double jeopardy sentencing errors specifically (confined to these types of errors). Explicitly overruled People v. Garcia, 940 P.2d 357 (Colo. 1997).

Garcia v. People, 2023 CO 41. CSC holds that defendant's Colorado trial was not barred by double jeopardy because §18-1-303 does not prohibit prosecution in Colorado following a prosecution in a foreign country. The court further holds that cooperative law enforcement, without more, is an insufficient ground on which to claim that one sovereign acted as a tool of another. The dual sovereignty exception to double jeopardy thus applied here to permit defendant's prosecution in Colorado. *Here:* defendant was prosecuted in Mexico for a murder that took place in Colorado. To assist Mexican authorities, the Mesa County DA's Office compiled a casebook containing information on defendant and his alleged crime. Defendant was acquitted in Mexico. After returning to Colorado several years later, defendant was charged and convicted of the same murder. He appealed, arguing that §18-1-303, barred his trial in Colorado and that the dual-sovereignty exception to double jeopardy should not apply because the Mesa County DA's collaboration with Mexican authorities was merely a sham to permit duplicative proceedings.

People v. Stackhouse, 2018 CO 60. Double jeopardy prevents government from relitigating an issue that was necessarily decided by jury's acquittal in previous trial. To determine whether that occurred, the entire record must be examined to determine whether "a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration." *Here:* jury's answers to special interrogatory only showed that it could not agree as to which of several charged acts defendant committed, not that it agreed he committed only one; defendant could be retried on all original charged acts.

People v. Thompson, 2018 COA 83, aff'd other grounds, 2020 CO 72. Whether merger applies to criminal offenses is subject to de novo review. Unpreserved double jeopardy claim is subject to plain error review. *Here:* there was no plain error in failing to merge defendant's 2 securities fraud convictions; although counts were multiplicitous, no Colorado case, well-settled legal principle, or statutory command addressed the proper unit of prosecution under Colorado securities law; in the absence of an objection, it cannot be concluded that this would have been obvious to trial court.

People v. Naranjo, 2017 CO 87. If jury convicts defendant of the charged offense and the lesser non-included offense, double jeopardy may not prohibit defendant from being punished for both offenses.

People v. Giem, 2015 COA 176. Successive prosecutions by two states for the same conduct are not constitutionally barred by double jeopardy. But §18-1-303(1)(a) extends statutory double jeopardy protection when another state has prosecuted defendant for same offense. *Here:* California conviction for unlawful taking of vehicle barred subsequent prosecution for aggravated motor vehicle theft in Colorado.

People v. Wentling, 2015 COA 172. Defendant contends he was improperly prosecuted in Colorado in violation of §18-1-303; he argued for first time on appeal that he was previously convicted in Utah for same conduct, and his subsequent Colorado prosecution was barred because Colorado/Utah laws address substantially same harm or evil. No plain error because defendant's conviction was not plainly barred by double jeopardy because whether the Colorado/Utah offenses were intended to prevent substantially different harms or evils would not have been obvious to trial court.

People v. Davis, 2015 CO 36. Although legislature may define multiple offenses and authorize multiple punishments based on the same behavior, defendant may not be punished multiple times for the same conduct if one offense is included in the other. An offense is included in another if proof of the same or less than all the facts required to establish commission of greater offense establishes lesser offense. *Here:* possession of a

controlled substance §18-18-405 is a lesser included offense of distribution under that section when the possession and distribution charges arise out of actions involving a single discrete quantum of drugs.

People v. Rhea, 2014 COA 60. Where defendant is charged and tried on multiplicitous counts, all double jeopardy issues are resolved through post-verdict merger.

People v. Aguilar, 2012 COA 181. Implied acquittal rule bars a retrial only where defendant is charged with greater and lesser offenses, jury finds him guilty of the lesser offense, and jury is silent as to greater charge. *Here:* defendant's jury deadlocked on felony murder and convicted him of lesser included offense first degree burglary; he argued the "implied acquittal rule" prevented his retrial on felony murder; implied acquittal rule did not apply because jury expressly deadlocked on greater charge.

People v. Greer, 262 P.3d 920 (Colo. App. 2011). Under double jeopardy, defendant may be prosecuted for distinct offenses where: (1) the unit of prosecution prescribed by the legislature permits charging multiple offenses, and (2) the evidence supporting each offense justifies the charging of distinct offenses.

People in the Interest of H.W., III, 226 P.3d 1134 (Colo. App. 2009). Where there is insufficient evidence to sustain conviction for a particular offense, but evidence is sufficient to uphold a conviction on lesser included offense, appropriate remedy is to remand case to trial court with directions to enter judgment/sentence on lesser-included offense. *Here:* juvenile was charged as accessory with no base offense; prosecution proved an offense it did not charge; it charged an offense it did not prove; and the proof it provided would not sustain any lesser included offense of charged offense; juvenile must be acquitted.

People v. Pagan, 165 P.3d 724 (Colo. App. 2006). Reconsideration of restitution order did not violate double jeopardy where trial court's restitution order was inconsistent with the statutory scheme outlined by the legislature and constituted an illegal sentence.

People v. Adams, 128 P.3d 260 (Colo. App. 2005). Punishment for criminal offense can be increased without violating double jeopardy when defendant has no legitimate expectation of finality in his/her sentence.

People ex rel. J.G., 97 P.3d 300 (Colo. App. 2004). Double jeopardy does not bar reinstatement of conviction where intermediate appellate court erroneously reverses a judgment of conviction and higher court later reverses the intermediate appellate court. *Here*: no double jeopardy violation where magistrate's delinquency adjudication was erroneously reversed by district court and district court ruling was reversed by COA.

Multiple Prosecutions

Friend v. People, 2018 CO 90. In order to be a lesser-included offense, every alternative way of committing a lesser offense, only one of which is "required," need not be "contained" in the statutory definition of that greater offense. To be a lesser-included offense, it is enough that any particular set of elements sufficient for conviction of that offense be so contained. Here: although child abuse resulting in death required proof of a pattern, because it could be committed in a way that was included in child abuse murder, it constituted a lesser-included offense of child abuse murder.

People v. Wambolt, 2018 COA 88. Defendant was convicted of DARP in his first trial, but the jury hung on whether he committed "aggravated" DARP because it could not come to consensus on whether the underlying offense involved DUI or DWAI. In a second trial, the jury convicted defendant first of DWAI and then found he committed aggravated DARP in a second phase of the proceeding. COA concluded that defendant was unconstitutionally tried twice for the same offense in violation of double jeopardy, under the unique facts of this case, defendant was tried twice for DARP and was not properly tried for aggravated DARP as the jury was not instructed on that offense.

Montoya v. People, 2017 CO 40. A person may be convicted of committing a crime and for being an accessory to that same crime.

People v. Zadra, 2017 CO 18. Under *Reyna-Abarca*, two COA divisions properly reviewed defendants' double jeopardy claims for plain error.

Scott v. People, 2017 CO 16. An unpreserved multiplicity objection is reviewable for plain error only; error is generally not plain when nothing in Colorado statutory or prior case law would have alerted trial court to the error. Here: at time of trial, COA case rejected the precise double jeopardy argument raised by defendant that menacing was lesser included offense of aggravated robbery-menaced the victim; any error was not plain.

Reyna-Abarca v. People, 2017 CO 15. A multiplicity objection need not be raised under requirements of Crim.P. 12(b)(2) because prosecutors are permitted to charge multiple claims arising from same set of facts; claim that multiplicitous convictions violate double jeopardy does not arise until after defendant is convicted of both a greater and lesser included offense.

People v. Beller, 2016 COA 184. Acquittal on aggravated robbery, which along with the uncharged offenses of robbery/attempt to commit both forms of robbery served as predicates for felony murder, did not preclude retrial of felony murder with robbery and a related attempt offense serving as the predicates after the first jury hung on the felony murder charge.

Lewis v. People, 261 P.3d 480 (Colo. 2011). When applied to multiple convictions stemming from a single proceeding, state/federal double jeopardy clause does no more than prevent a sentencing court from prescribing greater punishment than the legislature intended. §18-1-408 describes a statutory merger doctrine, which precludes conviction of a greater and lesser included offense. When comparing two offenses for statutory merger, this section requires a comparison of the elements of offenses, not facts affecting only the sentence for particular crimes. Although this strict elements test parallels federal double jeopardy analysis, it is not a codification of that analysis; rather, it is a rule for interpreting the legislature's intent regarding multiple punishments imposed in a single proceeding. Although the USSC has equated sentence enhancers with elements of offenses for purposes of Sixth Amendment's right to jury trial, the Court has not extended that analysis to the Fifth Amendment's double jeopardy clause, despite dictum in *Sattazahn*. *Here:* under §18-1-408, as interpreted by Colorado courts, sexual assault and second degree kidnapping-sexual assault are separate offenses, such that sexual assault is not included within second degree kidnapping-sexual assault.

People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011). Defendant may not be convicted of both reckless driving (traffic code) and vehicular eluding (criminal code) because the former is a lesser included of the latter in that they both share the mental state reckless even though each statute defines that mental state differently. Defendant may be convicted of both attempting to elude a police officer while operating a motor vehicle (traffic code) and vehicular eluding (criminal code) because the former is not a lesser included offense of the latter.

People v. Greer, 262 P.3d 920 (Colo. App. 2011). Under double jeopardy, defendant may be prosecuted for distinct offenses where: (1) the unit of prosecution prescribed by the legislature permits charging multiple offenses, and (2) the evidence supporting each offense justifies the charging of distinct offenses. SAOC incidents are distinct if: separate criminal acts occurred at different times, were separated by intervening events, resulted from separate volitional events based on a "fresh impulse," were temporally distinct, involved moving or repositioning the victim, involved penetration of different orifices, or involved more than one victim. Separate convictions for SAOC and SAOC-PATT did not violate double jeopardy. *Here:* although the various touchings occurred over a relatively short period of time, the evidence demonstrated that there was temporal break between each touching, and each resulted from separate volitional acts.

People v. Gladney, 250 P.3d 762 (Colo. App. 2010). Prior to murder trial in this case, defendant was indicted, tried, and convicted in federal court of racketeering charges under RICO Act. Federal jury found he committed 7 acts of racketeering, one of which was murder of victim here. *Here:* state murder prosecution was not barred by prior federal prosecution: (1) because under dual sovereignty doctrine, both state and federal governments may prosecute a person for the same offense; (2) state prosecution was not barred by §18-1-303, which specifies when a Colorado prosecution is barred by a prior prosecution in another jurisdiction, because several statutory requirements were not met: (i) offense did not constitute "an offense within the concurrent jurisdiction of this state/federal," because federal murder statute does not proscribe the murder here; (ii) RICO offense "requires proof of a fact not required by" the state murder offense, inasmuch as the RICO statute requires proof of an "interstate commerce" element, an "enterprise" element, and a "pattern of racketeering activity" element, none of which are required by state murder statute; and (iii) RICO statute seeks to prevent a "substantially different harm or evil" than state murder statute.

People v. Barnum, 217 P.3d 908 (Colo. App. 2009). Jeopardy attaches in a habitual criminal proceeding when the first prosecution witness is sworn or when evidence is admitted, not when jury is sworn for trial on the substantive charges.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). Double jeopardy does not bar subsequent prosecution where at least one of the elements of the offense in second prosecution is different from elements of offense in first prosecution. *Here:* defendant's convictions for violation of a restraining order in first prosecution, and for telephone harassment/harassment by stalking in the second, did not violate double jeopardy because each offense contains an element that is not an element of the others.

Melina v. People, 161 P.3d 635 (Colo. 2007). Once defendant was tried and convicted of a single count of solicitation on theory that his multiple requests to various individuals that the victim be killed was a single transaction, retrial for multiple counts of solicitation would be barred by double jeopardy.

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). §18-18-405, concerning possession, distribution of a controlled substance defines a single offense, and defendant may not be convicted twice under that section unless he commits a successive offense. *Here:* factually distinct conduct supported defendant's convictions for possession of a controlled substance/possession of manufacturing chemicals or supplies.

People v. Hoover, 165 P.3d 784 (Colo. App. 2006). General Assembly has authorized separate punishments for violations of COCCA and its predicate offenses; defendant may stand convicted of COCCA and its predicate offenses even where all of his convictions arise from the same conduct. *Here:* defendant properly convicted of COCCA where he was also convicted of multiple counts of securities fraud and theft as predicate offenses.

People v. Flowers, 128 P.3d 285 (Colo. App. 2005). Separate convictions for possession of a controlled substance/distribution of a controlled substance do not violate double jeopardy where they are factually distinct-based upon separate quantities of drugs.

People v. Abiodun, 111 P.3d 462 (Colo. 2005). Two convictions for possession and distribution of a controlled substance on each occasion violated double jeopardy because they were committed as part of the same transaction and merged, and because §18-18-405 defines a single offense.

People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005). Punishments for reckless endangerment/first degree assault with intent to cause SBI violated double jeopardy, because the establishment of every element of first degree assault with intent to cause SBI would necessarily include proving conduct that created a substantial risk of SBI, as required to prove reckless endangerment. Punishments for both first degree assault with intent to cause SBI/attempted reckless manslaughter did not violate double jeopardy because proof that defendant intended to cause SBI as required element of first degree assault, did not necessarily establish that he recklessly

took a substantial step toward causing death of another person, as required element of attempted reckless manslaughter.

People v. Smith, 121 P.3d 243 (Colo. App. 2005). An illegal sentence may be corrected at any time by a sentencing court without violating a defendant's rights against double jeopardy.

Paul v. People, 105 P.3d 628 (Colo. 2005). If a criminal trial is terminated before a verdict, double jeopardy will bar a second trial unless defendant consented to termination, or it was manifestly necessary.

People v. Wilson, 114 P.3d 19 (Colo. App. 2004). Where information charging felony aggravated driving with a revoked license was substantively defective because it failed to allege aggravating offense of driving under the influence, double jeopardy bars retrial for that felony; but defendant may be retried for misdemeanor offense of driving with revoked license, because information sufficiently charged that offense.

People v. Lopez, 97 P.3d 223 (Colo. App. 2004), aff'd other grounds, 113 P.3d 713 (Colo. 2005). Trial court does not violate double jeopardy by using the fact of a subsequent conviction, and the circumstances surrounding that conviction, to justify a discretionary aggravated range sentence for an earlier offense for which DJ&S was revoked. *Here:* defendant committed vehicular homicide (drunk driving) during his DJ&S for possession of controlled substance, causing trial court to revoke the DJ&S.

People v. Bobrik, 87 P.3d 865 (Colo. App. 2003). Defendant pleaded guilty to multiple, identically worded counts describing a single offense. *Here*: no violation of double jeopardy, and merger not required, because the factual basis for the guilty pleas described several separate and distinct repetitions of each charged offense within the time period alleged in the information.

Multiple Punishments & Units of Prosecution

Reyna-Abarca v. People, 2017 CO 15. To determine whether punishments imposed by a court after a defendant's conviction are constitutionally proper, we must determine what punishments the legislature has authorized. If the legislature has not conferred specific authorization for multiple punishments, then double jeopardy principles preclude the imposition of multiple punishments. In this regard, the double jeopardy clauses embody the constitutional principle of separation of powers by ensuring that courts do not exceed their own authority by imposing multiple punishments not authorized by the legislature. Here: the legislature has determined that when defendant's conduct establishes the commission of more than one offense, he/she may be prosecuted for each such offense. If one offense is included in the other, however, then defendant may not be convicted of both. One offense is included in an offense charged in the information when, as pertinent here, "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged."

Woellhaf v. People, 105 P.3d 209 (Colo. 2005). Whether multiple punishments are permissible under a statute which provides for alternate ways of committing the same offense depends on the legislatively prescribed unit of prosecution. The unit of prosecution is the manner in which a criminal statute permits a defendant's conduct to be divided into discrete acts for the purposes of prosecuting multiple offenses. Here: the unit of prosecution of SAOC and SAOC-POT is "any sexual contact." These statutes do not define separate offenses for each type of sexual contact; legislature has not authorized multiple punishments for each and every sexual contact that occurs within one act of SAOC. The sexual contacts, as grouped by the prosecution in this case, constituted 1 factual offense and multiple punishments violated double jeopardy.

Quintano v. People, 105 P.3d 585 (Colo. 2005). Defendant was charged with 5 identically worded counts of SAOC, occurring on the same day. In determining whether an information is multiplicitous (charges the same offense in several counts), a two-tiered analysis is required. The court must consider: (1) whether the unit of prosecution prescribed by the legislature permits the charging of multiple offenses; and (2) whether the evidence in support of each offense justifies the charging of distinct offenses. The "unit of prosecution" refers to the extent to which the relevant statute permits the prosecution to separate the defendant's conduct into discrete acts for purposes of prosecuting multiple offenses. In punishing the crime of SAOC, legislature only authorized a single punishment for all discrete acts of touching that occur within a single incident of SAOC; each act of touching cannot suffice as a separate offense. In determining whether defendant's conduct constitutes factually distinct and separate acts, which justify the charging of distinct offenses, courts may consider a variety of factors, such as temporal proximity; location of the victim (movement or repositioning of the victim); existence of intervening event; sequencing (penetration through different orifices); defendant's intent as indicated by his conduct and utterances; and the number of victims. Reviewing court looks to all the evidence introduced at trial to determine whether the evidence on which the jury relied for conviction was sufficient to support distinct and separate offenses.

People v. Manzanares, 2020 COA 140M. Defendant's solicitation of two separate individuals at different times constituted multiple units of prosecution of solicitation to commit retaliation against witness and solicitation to commit intimidation of witness, and thus charges were not multiplicitous in violation of double jeopardy; there was a clear volitional departure from defendant's efforts enlisting help of one individual and his efforts enlisting help of individual who was his cellmate, starting with indictment and continuing throughout trial, prosecution made it clear it was prosecuting two distinct sets of crimes, and facts presented by prosecution made it clear that defendant had separately solicited individuals.

Yeadon v. People, 2020 CO 38. Late imposition of drug offender surcharge does not violate double jeopardy because imposition of the surcharge is mandatory absent a finding of financial inability to pay, so the sentence lacking that component is illegal and subject to correction. *Here:* because sentencing court did not hold the necessary hearing or make the necessary finding as to whether defendant had financial means to pay any portion of drug offender surcharge, court had no choice but to impose the mandatory surcharge, and consequently, the sentence imposed in open court was not authorized by law and, thus, was subject to correction.

Montoya v. People, 2017 CO 40. Because defendant's convictions for reckless manslaughter and accessory to that crime were based on different evidence, neither merger nor concurrent sentences were required.

People v. Porter, 2015 CO 34. Double jeopardy does not apply to noncapital sentencing proceedings; double jeopardy does not bar retrial of defendant's erroneously dismissed habitual criminal counts. Follows Monge v. California, 524 U.S. 721 (1998); Overrules People v. Quintana, 634 P.2d 413 (Colo. 1981).

People v. Carter, 2015 COA 24. Trial court erred by sentencing defendant on 5 counts of first degree burglary, and remanded the case with instructions to vacate 4 convictions. COA rejected People's argument that separate burglary convictions are allowed because multiple, separate victims were menaced by defendant; COA found a "single entry" for the burglary; COA kept burglary/deadly weapon (COV) count intact as the most serious conviction.

People v. Zweygardt, 2012 COA 119. Under §18-1-405(5) analyzing lesser included offenses, an assessment of whether the greater offense necessarily establishes all the elements of the lesser requires a comparison of the elements of each offense, not the evidence introduced at trial. *Here:* vehicular assault-reckless (VAR) does not necessarily establish all the elements of careless driving (disagreeing with three other cases): (1)VAR requires "operating or driving" a motor vehicle, while careless driving requires only "driving"; (2) appearance of the disjunctive "operate or drive" in VAR signifies a legislative intent that VAR includes ways of committing the offense other than "driving"; moreover, "operate" has been interpreted more broadly than "drive," such that an actor can "operate" a motor vehicle without "driving" it (3) criminal code's definition of "motor vehicle," applicable to VAR, is much broader than the traffic code's definition of "motor vehicle" applicable to careless driving; and (4) careless driving is not a lesser included offense within VAR under §18-1-405(5)(c). Convictions for negligent homicide/careless driving resulting in death, both for a single victim, do not merge, because each offense contains an element the other does not. Convictions for VAR and careless driving resulting in death, both for a single victim, do not merge, because careless driving is not a lesser included offense within VAR.

Lucero v. People, 2012 CO 7. Where a defendant is convicted on multiple theft counts for occurrences that should have been aggregated into a single count under former §18-4-401(4) and *Roberts*, sentences on the extra convictions are vacated as illegal, even though *Roberts* was decided 8 years after the convictions entered, and double jeopardy violation was not preserved.

People v. Aguilar-Ramos, 224 P.3d 402 (Colo. App. 2009). There was no double jeopardy violation where defendant's second degree kidnapping conviction was enhanced because the kidnapped person was a victim of sexual assault even though defendant was acquitted of sexual assault; kidnapping statute only requires that person kidnapped be victim of sexual assault not that kidnapper be the perpetrator of that assault.

People v. Woellhaf, 199 P.3d 27 (Colo. App. 2007), aff'd other grounds, 105 P.3d 209 (Colo. 2005). In reviewing double jeopardy challenge to sentence imposed following appeal, critical factor is whether defendant's aggregate sentence on resentencing is less severe than his original aggregate sentence. When defendant appeals his conviction and the entire sentencing plan, he loses any expectation of finality in his sentences; resentencing following successful appeal does not implicate a double jeopardy. *Here*: defendant was

originally sentenced to total of 48 years for 4 separate SAOC-POT convictions; following his appeal, he was resentenced to 24 years for 1 SAOC-POT conviction; this did not violate double jeopardy.

People v. White, 179 P.3d 58 (Colo. App. 2007). Double jeopardy does not apply to correction of an illegal sentence.

People v. Jackson, 109 P.3d 1017 (Colo. App. 2004). The post-release supervision scheme of §17-22.5-403(a)-(f) does not violate double jeopardy because defendant was on notice that he could be subjected to post-release supervision and reincarceration following the end of the mandatory parole period.

People v. Klausner, 74 P.3d 421 (Colo. App. 2003). Where trial court erred in imposing term of years for sexual assault on at-risk adult when it should have imposed indeterminate sentence under SOLSA, remand for resentencing does not violate double jeopardy.

People v. Valdez, 68 P.3d 484 (Colo. App. 2002). Defendant received suspended DOC sentence on the condition that he complete a YOS sentence; when the administrative panel penalized him with loss of privileges and confinement for violating conditions of his sentence, trial court revoked his YOS sentence and imposed DOC sentence. No double jeopardy violation because legislature intended YOS to be subject to all DOC regulations.

People v. Ovalle, 51 P.3d 1073 (Colo. App. 2002). Defendant served his prison term and was released on parole when his conviction/sentence were vacated due to an error of law; no double jeopardy violation when he was subsequently convicted/resentenced based on same facts because original sentence was not fully discharged at time conviction was vacated.

Patton v. People, 35 P.3d 124 (Colo. 2001). Defendant may attack a guilty plea that was made in violation of double jeopardy-if it imposed multiple punishment for the same conduct. *Here:* neither the charging documents nor the plea agreement established that defendant manufactured a controlled substance/possessed a controlled substance in distinct incidents; necessary to vacate conviction for possession as a lesser-included offense.

People v. Reed, 43 P.3d 644 (Colo. App. 2001). Court may increase a sentence after recessing, but before remanding defendant into custody, without violating double jeopardy.

People v. Chavez, 32 P.3d 613 (Colo. App. 2001). Defendant has no expectation of finality in length of his COMCORs sentence because he is placed on notice by applicable statutes that he could be subject to longer period of restraint upon termination from COMCOR; mandatory parole period imposed upon resentencing from COMCOR does not violate double jeopardy prohibition against increasing an offender's sentence after he has begun serving it.

People v. Coolidge, 953 P.2d 949 (Colo. App. 1997). Seizure of house under public- nuisance forfeiture provisions would not bar later prosecution for kidnapping.

People v. Smith, 944 P.2d 639 (Colo. App. 1997). Surrender of driver's license to court for drug conviction under §18-18-106 does not violate double jeopardy.

COLLATERAL ESTOPPEL: §18-1-301 TO §18-1-303

People v. Morehead, 2019 CO 48. Jeopardy does not bar retrial after reversal of defendant's conviction for legal error, for the reason that defendant is held to be in continuing jeopardy throughout this process, reflecting the reality that until a final judgment on retrial, the criminal proceedings against an accused have not run their full course, and for largely the same reasons—that the judgment of the first trial has never become final—preclusive doctrines related to res judicata and collateral estoppel are similarly inapplicable to a retrial. Where a trial court's ruling on the suppression motion at the first trial has been disapproved, it is for the trial court, except where bound by the ruling of a higher court, to determine the appropriateness of entertaining new and different motions, evidence, arguments, or theories by either party.

People v. Valdez, 2017 COA 41. The doctrine of collateral estoppel (also called issue preclusion) applies in criminal cases. Whether defendant is estopped from relitigating an issue in a second criminal proceeding depends on whether the question was distinctly put in issue and directly determined in the prior criminal prosecution.

People v. Beller, 2016 COA 184. Prosecution may not relitigate any issue that a jury necessarily decided through a not guilty verdict in a prior trial. To determine what a jury necessarily decided, courts examine the record of the prior proceeding, including the pleadings, the evidence, the charge, and other relevant information. An unresolved count is not relevant information. *Here:* the first jury's not guilty verdicts on aggravated robbery did not necessarily include a finding that defendant was not guilty of the second-trial felony-murder predicates of robbery and attempted robbery, where the aggravated robbery acquittals did not necessarily resolve whether defendant attempted to rob victims or whether he knowingly wounded or struck victim with a deadly weapon.

Grynberg v. Arkansas Oklahoma Gas Corp., 116 P.3d 1260 (Colo. App. 2005). To determine whether a party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous proceeding, the following factors are considered: (1) whether the remedies and procedures of the first proceeding are substantially different from the proceeding in which collateral estoppel is asserted, (2) whether the party against whom collateral estoppel is asserted had sufficient incentive to litigate vigorously, and (3) the extent to which the issues are identical.

Union Ins. Co. v. Hottenstein, 83 P.3d 1196 (Colo. App. 2003). Collateral estoppel, or issue preclusion, bars relitigation of an issue if: (1) issue precluded is identical to an issue actually determined in the prior proceeding; (2) party against whom estoppel is asserted was a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Byrd v. People, 58 P.3d 50 (Colo. 2002). Issue preclusion does not apply to bar a criminal trial on an offense which served as a basis of a probation revocation, because at a probation revocation hearing, defendant does not have a full and fair opportunity to litigate the issue.

People v. Richardson, 58 P.3d 1039 (Colo. App. 2002). Verdicts suggested that jury probably found an absence of specific intent; trial court disallowed death penalty aggravators that related to defendant's intent. Ruling disapproved because collateral estoppel bars consideration of an issue only if the issue was "necessarily adjudicated" in defendant's favor. *Here:* issue of intent was not necessarily adjudicated in defendant's favor. Jury could have found: (1) defendant intended to kill the victim, but (2) that he did not form this intent after deliberation.

People v. Smith, 938 P.2d 111 (Colo. 1997). Collateral estoppel does not bar retrial for theft after jury hangs on theft but acquits of burglary; burglary acquittal did not definitively and necessarily decide (in the negative) an element necessary to prove the theft charge.

People v. Allen, 944 P.2d 541 (Colo. App. 1996). Statutory collateral estoppel doctrine, §18-1-302, does not apply if the offense in the later prosecution necessarily requires proof of a fact not required by former prosecution, and law defining each offense is intended to prevent a substantially different harm or evil. *Here*: contempt is directed at conduct in derogation of the court's authority; criminal trespass is a totally separate and distinct crime directed at the security of a person's dwelling.

JOINDER & SEVERANCE[2]

Buell v. People, 2019 CO 27. The "same or similar character" provision of Crim.P. 8 does not require the cross-admissibility of evidence in order for joinder to be proper. *Here:* although the two shopliftings involved some factual differences, the two offenses were sufficiently of the same or similar character to qualify for consolidation. Indeed, to so qualify, it is not essential that the means of committing the other crimes replicate in all respects the manner in which the crime charged was committed. The cases were of the same or similar character because the facts of the respective cases closely mirrored one another.

Bondsteel v. People, 2019 CO 26. A defendant is not required to renew an objection to joinder or a motion to sever at trial in order to preserve those issues for review. *Here:* the trial court properly exercised its discretion in joining the cases at issue because the record supports the court's findings that the joinder of the two cases satisfied the requirements of Crim.P. 8(a)(2) and Crim.P. 13 and the joinder did not prejudice the defendant. Overruled People v. Barker, 501 P.2d 1041 (Colo. 1972); People v. Aalbu, 696 P.2d 796 (Colo. 1985).

People v. Maass, 981 P.2d 177 (Colo. App. 1998). Different standards discussed: (1) mandatory severance under Crim.P. 14: the inquiry centers on evidence that the prosecution will probably present; (2) mandatory severance under §16-7-101: the inquiry contemplates not just the evidence that the prosecutor seeks to introduce, but also the evidence that a co-defendant seeks to introduce. Additionally, the trial court may consider whether the evidence is so inherently prejudicial that a jury could not follow a proper limiting instruction; and (3) discretionary severance: trial court considers, among other factors, whether the defenses are so antagonistic that discretionary severance was required. Here: there was no error in refusing to grant severance before the jury was selected.

Charges

Washington v. People, 2024 CO 26. The improper joinder of charges is a trial error that requires non-constitutional harmless error review. The CSC held that *Norman v. People*, 496 P.2d 1029 (Colo. 1972), did not announce a rule of automatic reversal for erroneous joinder, so it was not overruled by the limitation of automatic reversal described in *Novotny*. Here: the CSC assumed without deciding that the joinder was erroneous but held it was harmless. It held it was harmless, in part, because the evidence of second-degree murder was overwhelming, and it rejected defendant's claim of self-defense because he introduced a gun into a fistfight.

People v. Draper, 2021 COA 120. Joinder of separate charges for murder and attempted extreme indifference murder would have been proper under rule governing permissive joinder, in case arising out of fatal shooting of one victim and subsequent non-fatal shooting of occupants of a vehicle; victim was murdered less than two days

[2] Mandatory joinder = Crim.P. 8(a)(1) and §18-1-408(2). Permissive joinder = Crim.P. 8(a)(2). Joint trial for indictments and informations = Crim.P. 13. Relief from prejudicial joinder = Crim.P. 14. Severance as a matter of right = §16-7-101.

before non-fatal shooting, one of guns defendant had with him at time of non-fatal shooting matched gun that was used to murder victim, both crimes occurred within about ten miles of each other, and most, if not all, of evidence was cross-admissible as direct evidence of guilt, res gestae, or under evidentiary rule governing other crimes character evidence; defendant failed to demonstrate that jury was unable to separate facts and legal principles applicable to each offense, jury convicted defendant of some charges and acquitted him of others, and jury was instructed regarding separate and distinct offenses. People v. Barajas, 2021 COA 98. Trial court did not abuse its discretion in bifurcating defendant's trial rather than trying the charges to separate juries, although counsel was required to make difficult decisions regarding what information to disclose to potential jurors during voir dire; such decisions were strategic in nature and did not render the bifurcation unfair.

People v. Porter, 2019 COA 73. Charges that must be prosecuted in a single case under the compulsory joinder statute cannot qualify as separate convictions for habitual offender purposes.

People v. Williams, 2019 COA 32. Even if we assume that the charges arose out of separate and distinct criminal episodes and therefore could have been tried separately, where, as here, the charges were joined for trial — albeit permissively — and would have been tried together but for defendant's guilty pleas, the plain language of the habitual criminal sentencing statute and CSC precedent require us to consider defendant's convictions for distribution as one conviction under the habitual criminal sentencing statute.

People v. Leverton, 2017 COA 34. Joinder statute did not prohibit the trial court from permitting DA to add possession of drug paraphernalia charge to criminal information, when it arose from the same criminal episode as the original theft by receiving count, and the DA moved to join the offenses prior to defendant's attempt to plead guilty to the paraphernalia charge; irrespective of whether the procedure utilized by the court complied strictly with the mandatory joinder statute, it nevertheless met the statute's purpose of preventing successive prosecutions, and defendant pointed to no unfair prejudice resulting from the procedure used. Trial court did not abuse its discretion in rejecting defendant's guilty plea to possession of drug paraphernalia after the prosecution moved to join that charge with the original theft by receiving count; had the court accepted the plea prior to joining the two offenses, the mandatory joinder statute might have prohibited prosecution on the felony theft charge, and defendant sought to plead guilty to a petty offense for the purpose of preventing prosecution on the felony charge in an attempt to manipulate the criminal justice system.

People v. Raehal, 2017 COA 18. COA reviews a decision concerning the joinder of separate charges for an abuse of discretion. An abuse of discretion occurs when the joinder causes actual prejudice as result of the jury's inability to separate the facts and legal theories applicable to each offense. There is no prejudice where evidence of each offense would be admissible in separate trials.

People v. Curtis, 2014 COA 100. A defendant need not renew a pretrial objection to a joinder motion. *Here:* the trial court did not abuse its discretion in joining the separately-filed charges because evidence of defendant's assaults on each of his daughters would have been admissible in separate trials under both CRE 404(b) and §16-10-301. A defendant is not entitled to separate trials based solely on his desire to testify on fewer than all the charged offenses.

People v. Marshall, 2014 COA 42. Where defendant successfully opposed the prosecution's motion to join two cases, he waived his right to later argue that the cases should have been joined.

People v. Garcia, 2012 COA 79. A court's refusal to sever counts is discretionary, and defendant challenging such a refusal bears the burden of demonstrating: (1) the joinder caused actual prejudice and (2) the trier of fact was unable separate the facts and legal principles applicable to each offense. Here: defendant tried on fifteen counts in a single trial was not able to demonstrate prejudice.

People v. Gregg, 298 P.3d 983 (Colo. App. 2011). To establish grounds for reversal on a claim of improper consolidation, defendant must demonstrate actual prejudice as a result of the jury's inability to separate the facts and legal theories applicable to each offense. The mere fact that evidence of guilt in one charge is more substantial than the other charges, does not establish that defendant was unfairly prejudiced by the consolidation of the trials. A trial court does not abuse its discretion in consolidating charges that are not the same in all respects, so long as the offenses are sufficiently similar to permit the evidence concerning them to be admitted in one consolidated trial. *Here*: while the robberies differed in some respects, given that all occurred within months of each other, involved death threats, and included handwritten notes threatening the tellers' lives; consolidation was permissible because evidence of the three robberies would have been admissible in separate trials.

Roberts v. People, 203 P.3d 513 (Colo. 2009). The theft statute, §18-4-401, does not create a separate and continuing crime of "theft by deception." Rather, theft by deception is simply one of the alternate ways in which theft can be accomplished. As such, the aggregate provision in §18-4-401(4), permits any thefts committed by the same person in a six-month time period to be joined as one felony offense, and no other crime of theft committed by that same person in the same time frame can support a separate conviction for theft.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). Under §18-1-408(2), defendant waives any claim regarding mandatory joinder if, at the time jeopardy attaches with respect to prosecution #1, defendant or defense counsel knows of additional pending prosecutions that the DA is required to charge and the defense does not object to the failure to join the charges. Defendant may also waive a mandatory joinder claim by failing to raise an objection prior to the attachment of jeopardy in prosecution #2. §18-1-408(1) permits prosecution for more than one offense if defendant's conduct establishes multiple offenses. *Here:* defendant waived his joinder claim by failing to object before jeopardy attached in prosecution #2. Defendant pled guilty to misdemeanor charges that spanned a specific period of time. He was ultimately charged with a separate offense that occurred within that time period. Since there was no evidence of any explicit or implied promise in the misdemeanor case not to prosecute defendant for the act at issue, defendant's due process right to enforcement of a plea agreement was not violated.

People v. Robinson, 187 P.3d 1166 (Colo. App. 2008). The trial court did not abuse its discretion when it denied defendant's motion for a separate trial before a different jury on counts pertaining to his possession of a weapon by a previous offender, and instead, allowed a bifurcated trial on those counts before the same jury that had heard his trial on substantive drug counts. Trial court did not impair defendant's right to conduct an adequate voir dire on charges of possession of a weapon by a previous offender when it denied his motion for a separate trial. Defense counsel made a strategic decision not to question the prospective jurors concerning repeat offenders, and the defendant's claim of prejudice was speculative.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). A trial court's pretrial denial of defendant's motion under Crim.P. 14 to sever counts will be reversed only upon a demonstration that the decision was an abuse of discretion. An abuse of discretion will be found where it is demonstrated that the joinder caused actual prejudice to defendant and the trier of fact was not able to separate the facts and legal principles applicable to each offense. Where defendant is charged with a substantive offense and with POWPO, the court should consider all procedural safeguards, including an order for separate trials or a bifurcated procedure. The reason for these measures is to protect defendants from the impermissible inference that they committed the crime charged because they had been previously convicted of other crimes. In a POWPO case, a trial court does not abuse its discretion in denying a motion to sever counts where the jurors are given an instruction limiting the purpose for which they can consider evidence of defendant's prior conviction, and where the jurors would have heard evidence of defendant's possession of a weapon with regard to other charges.

People v. Kendall, 174 P.3d 791 (Colo. App. 2007). Trial court did not abuse its discretion in denying defendant's motion to sever the vehicular eluding count, which occurred two days prior, from the first degree kidnapping count because events were part of a common plan and because defendant was unable to articulate any actual prejudice from the joinder.

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). Defendant need not renew his pretrial motion to sever during trial to preserve claim for review. Denial of motion to sever is not an abuse of discretion where same act resulted in both charges and defendant did not establish prejudice.

People v. Dalton, 70 P.3d 517 (Colo. App. 2002). Since the trial court had jurisdiction under the direct-filing statute over count two (SAOC-PATT) it had ancillary jurisdiction over count one (SAOC-POT), which arose from the same criminal transaction. This conclusion is also supported by the rule of mandatory joinder. In balancing the policy considerations expressed in the Children's Code, the prevailing legislative intent is that all charges involving a minor be resolved in adult court when the requirements of the direct-filing statute are satisfied by any charge.

People v. Gross, 39 P.3d 1279 (Colo. App. 2001). Defendant's opposition to prosecution's pretrial consolidation motion was sufficient to preserve the issue of improper consolidation for appellate review. Cases may be consolidated when the offenses in each could have been joined in a single information. Consolidation is permissible if all of the offenses are of the same or similar character or are based on two or more acts or transactions that are connected together or are part of a single scheme and plan. A decision to consolidate is within the trial court's discretion. A defendant may demonstrate an abuse of discretion by showing that consolidation caused actual prejudice and that the jury was not able to separate the facts and legal principles applicable to each case. There is no prejudice where evidence of each transaction would be admissible in separate trials.

Defendants

People v. Black, 2022 COA 127. Crim.P. 13 provides in pertinent part that, subject to Crim.P. 14, a trial court may order two complaints to be tried together if the offenses, and defendants ... could have been joined in a single complaint. Crim.P. 8(2)(b) allows two or more defendants to be charged in the same ... complaint if they are alleged to have participated in the same act or series of acts arising from the same criminal episode. Under Crim.P. 14, if the court has properly joined two defendants' cases, then neither is entitled to severance as a matter of right unless: (1) material evidence is admissible against one but not both defendants; and (2) admission of that evidence is prejudicial to the party against whom the evidence is not admissible. If a defendant is not entitled to severance as a matter of right, then the trial court has discretion as to whether to grant the motion for severance, and its decision will be affirmed absent a showing of abuse of discretion and actual prejudice to the moving party. In considering whether actual prejudice resulted from the denial of a motion to sever, reviewing court considers: (1) whether the number of defendants or the complexity of evidence is such that the jury will confuse the evidence and the law applicable to each defendant; (2) whether, despite admonitory instructions, evidence admissible against one defendant will improperly be considered against another; and (3) whether the defenses are antagonistic. *Here:* trial court made adequate findings to support its conclusion that there was good cause for not severing cases of defendant and co-defendant, and thus defendant's speedy-trial rights were not violated when it granted co-defendant's request for a continuance past defendant's speedy-trial deadline; trial court's finding of good cause was based on enormity of the amount of witnesses and exhibits, as well as the need to call a special panel of 250 potential jurors.

People v. Gutierrez, 2021 COA 110. Factors that a court may consider when ruling on a motion to sever that does not trigger mandatory severance include: (1) whether the number of defendants or the complexity of the evidence will cause the jury to confuse the evidence and law applicable to each defendant; (2) whether, despite

limiting instructions, evidence admissible against one defendant will improperly be considered against another; and (3) whether the defenses presented are antagonistic. Defenses are not antagonistic so as to require separate trials when one defendant does not base their assertion of innocence on the guilt of the other. Mutually exclusive or irreconcilable defenses could require severance; that is, the acceptance of one defense would tend to preclude the acquittal of the other defendant. *Here:* defendant's defense was antagonistic to co-defendant's defense because the defenses contradicted each other and to believe one defense meant that jury would have to disbelieve the other, at trial for first degree murder and conspiracy to commit murder; defendant argued that co-defendant was sole shooter and presented two eyewitnesses who identified co-defendant as one who shot victim, co-defendant similarly denied being shooter and accused defendant, and fact that prosecution charged defendant with conspiracy in addition to first degree murder, and that one defendant could be complicit with actions of another, did not preclude conclusion that defenses were antagonistic.

People v. Johnson, 30 P.3d 718 (Colo. App. 2000). A joint trial allowed the jury to hear a police officer's testimony about certain statements made by the co-defendant. Mandatory severance was not required because the jury could limit this evidence to its proper purpose and discretionary severance was not required, because the trial evidence was not terribly complex, and the trial defenses were not truly antagonistic.

People v. Backus, 952 P.2d 846 (Colo. App. 1998). The trial court properly denied defendant's request for severance based on a civil suit between his co-defendant and the murder victim. Evidence of the suit was admissible against defendant; his defense was not antagonistic to his accomplice's; the jury was unlikely to confuse the evidence or the law as to each defendant; any evidence inadmissible as to him could be presented with appropriate limiting instructions.

People v. Carrillo, 946 P.2d 544 (Colo. App. 1997), aff'd other grounds, 974 P.2d 478 (Colo. 1999). Defendant cannot assert error based on mandatory or discretionary severance when the arguable evidence was not prejudicial to defendant, and the number of defendants and amount of evidence was not so complex that jury would necessarily be confused.

Pappadiakis v. People, 728 P.2d 1271 (Colo. 1986). Motions for severance are addressed to the sound discretion of the trial court. Factors: (1) whether the number of defendants or the complexity of the case suggests that the jury will confuse the evidence and the law applicable to each defendant; (2) whether, despite admonitory instructions, evidence admissible against one defendant will improperly be considered against another; and (3) whether the defenses are antagonistic.

STATUTE OF LIMITATIONS (SOL): §16-5-401

Hunsaker v. People, 2021 CO 83. Word "conviction," within meaning of SOL for filing motions for postconviction relief, refers to a conviction after defendant's appeal is exhausted.

People v. Grosko, 2021 COA 28. As a matter of first impression, pimping was a continuing offense, and thus defendant's last act in series of acts that constituted pimping fell within the SOL.

People v. Lopez, 2020 COA 119. Colorado case law is clear: a claimed SOL violation in a criminal case implicates the court's subject matter jurisdiction. *Here:* because the SOL period had expired before the prosecutor filed the initial charge against defendant in 2014, the court did not have subject matter jurisdiction over the charge. If defendant is convicted of indecent exposure upon retrial, the 2014 conviction cannot be used to enhance the current conviction to a felony.

Gonzales v. Arapahoe County, 2020 COA 104. The purpose of a SOL is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Criminal SOLs are designed to protect individuals from having to defend themselves against charges when the facts have been obscured by the passage of time, to minimize the danger

of punishment for acts in the far-distant past, and to encourage law enforcement to promptly investigate suspected criminal activity. For these reasons, criminal statutes of limitation are to be liberally construed in a favor of the defendant. A SOL typically begins to run when the crime is complete. In certain circumstances, however, a crime continues beyond the first moment when all its substantive elements are satisfied. With a continuing offense, the SOL does not begin to run so long as the illegal conduct continues. Because there is a tension between the purpose of a SOL and the continuing offense doctrine, the doctrine should only be applied in limited circumstances. A criminal offense should be considered continuing, so as to delay running of the SOL, only if: (1) the explicit language of the substantive criminal statute compels such a conclusion; or (2) the nature of the crime involved is such that the Legislature must assuredly have intended that it be treated as a continuing one. *Here:* failure to report alleged sexual abuse of student by teacher did not constitute a continuing offense under the Child Protection Act, and SOL began to run when principal initially failed to make a report after receiving information that gave him reasonable cause to suspect abuse, warranting dismissal of principal's indictment for failure to report.

People v. Market, 2020 COA 90. Defendant's claim that SOL applicable to offense of sexual assault on a child by use of force had expired before he was charged with the offense raised an issue of trial court's jurisdiction and, thus, could be raised for the first time on appeal. Statute establishing a ten-year limitations period for sexual offenses, and providing for tolling of that period for up to five years based on the offender's absence from the state, rather than separate statute establishing a ten-year limitations period for sexual offenses that did not contain any tolling provisions, applied to offense of sexual assault on a child by force committed by defendant who subsequently left the state; legislative history demonstrated legislature's intent that statute without a tolling provision align with, rather than supplant, statute with a tolling provision, and statute without tolling provision was subsequently amended to clarify that statute with a tolling provision supplied the SOL in the case of conflict between the two.

People v. Sims, 2019 COA 66. Trial court properly applied §16-5-401(8)(a.5) to eliminate SOL where defendant’s identity is determined “in whole or in part” through DNA evidence. “Determine” is defined as “to fix conclusively or authoritatively,” or “to settle a question or controversy about.” When combined with the phrase “in whole or in part,” COA construes the provision to require only that the DNA evidence contribute in some way to “settling” the question of the perpetrator's identity; provision applies whenever DNA evidence plays some role in establishing defendant’s participation in crimes at issue.

People v. Washam, 2018 CO 19. Trial amendments under Crim.P. 7(e) can be used to correct SOL issues where amendment merely narrowed date range and did not prejudice defendant.

People v. Butler, 2017 COA 117. “Absence” tolling provision in §16-5-401(2), is defined by physical absence from Colorado; provision tolls SOL when defendant serves Colorado prison sentence at out-of-state facility; because SOL is not an element of offense, such tolling issues may be decided by trial court if based on undisputed evidence.

People v. Thompson, 2017 COA 56. Defendant made several false reports to police, the first fell outside applicable SOL; because he was not charged with the initial false report and made several other misrepresentations within SOL, charges were timely.

People v. Shores, 2016 COA 129. §16-5-401(8)(a.5) provides there is no limit on period of time during which person may be prosecuted after commission of offense if defendant’s identity is determined, in whole or in part, by patterned chemical structure of genetic information, and offense has been reported to law enforcement agency within 10 years after its commission. Language of relevant portion of statute - that “offense has been reported to law enforcement agency”- does not require that victim be person who reported offense; it only requires offense has been reported.

People In Interest of K.W., 2012 COA 151. Allowing juvenile to enter DJ&S tolls SOL for filing charges. Diversion programs, defined in §19-2-704 and §19-1-103(44), fall under SOL exception defined in §16-5-401(12), in that they are "brought to facilitate the disposition of a case." Legislature's clear intent was to offer diversion programs to facilitate dispositions.

People v. Davis, 2012 COA 56. If one predicate act falls within its respective SOL period, other predicate acts occurring within10 years before that act can be used as evidence of racketeering activity for COCCA even if they could not be prosecuted separately because their SOL have expired.

People v. Sowell, 327 P.3d 273 (Colo. App. 2011). Amendment to sex offender registration statute eliminating possibility of petitioning for removal from sex offender registry for persons convicted of SAOC-POT applies to defendant who committed his crime before the amendment was enacted. *Here:* defendant failed to show he detrimentally relied on the provision of original statute when he entered his plea agreement; he was not entitled to relief.

People v. Hicks, 262 P.3d 916 (Colo. App. 2011). There is no longer a time limit for prosecution of sexual assaults committed after 7/1/91, where: (1) defendant's identity is determined in whole or in part by his DNA, and (2) offense is reported to law enforcement within 10 years after commission of offense. 10-year SOL in §16-5-401(8)(a) remains in effect for any sexual assault committed between 7/1/84 and 7/1/91, and for sexual assaults committed after 7/1/91 that do not satisfy criteria in §16-5-401(8)(a.5). Prosecution need not file an indictment, information, or complaint against the DNA recovered from scene of crime within 10 years in order to take advantage of indefinite SOL in §16-5-401(8)(a.5).

People v. Summers, 208 P.3d 251 (Colo. 2009). 2002 amendment to SOAC statute extended SOL for prosecutions to 10 years after victim reaches age of 18. Although text of statute indicated that this change was to apply to all cases that could have been prosecuted at the time of the change, the enacting clause in the new law limited its applicability to offenses committed on or after date the bill became law. Where statute contains conflicting SOLs and court cannot determine legislative intent behind statute, rule of lenity applies; SOL in effect at time crime was committed controls.

People v. Lowry, 160 P.3d 396 (Colo. App. 2007). Defendant's request for lesser non-included offense waives SOL under §16-5-401(12).

People v. McKinney, 99 P.3d 1038 (Colo. 2004), rev'd in part 80 P.3d 823 (Colo. App. 2003). Criminal SOL serve three purposes: (1) to protect individuals from defending themselves against stale charges; (2) to prevent punishment for acts committed in the remote past; and (3) to insure that accused are informed of the decision to prosecute and the general nature of the charges with sufficient promptness to allow them to prepare their defenses before evidence of their innocence is weakened by age. SOL for criminal actions contains a discovery tolling provision, §16-5-401(4.5), stating that period within which prosecution must be commenced begins to run upon discovery of criminal act. *Here*: purpose of the discovery tolling provision is to extend SOL for crimes that are susceptible to remaining undetected for long periods of time, so prosecution of such crimes will not be foreclosed as a result of concealment. Without the discovery tolling provision, Criminal Code would provide surreptitious defendants a windfall for successfully concealing criminal conduct from their victims. Because the discovery tolling provision of SOL specifically applies to crime of theft, discovery tolling provision also applies to crime of theft against an at-risk adult; prosecution for theft against an at-risk adult must be commenced within 3 years of discovery of offense. To hold otherwise would defeat legislature's intent to protect this vulnerable group of citizens against concealed crimes.

People v. Thoro Products, 70 P.3d 1188 (Colo. 2003). Specific SOL, §25-15-308(4), requires prosecution of hazardous waste violations within 5 years of commission or 2 years of discovery, whichever is earlier. Under

statute, defendants could not be prosecuted in 1997 for spills that last occurred in mid-1980s. Although unlawful "disposal" includes a "leak" of hazardous waste, and some courts have construed "leak" to include ongoing migration of hazardous waste into groundwater, such a reading would nullify the SOL and violate the rule of lenity.

People v. Ware, 39 P.3d 1277 (Colo. App. 2001). Defendant was charged as an adult, based, in part, on false information that he provided to police; after defendant failed to appear, his charges remained pending for several years; when defendant was apprehended, police learned he was a juvenile at time of the offense; prosecution filed juvenile charges, but these were dismissed under the SOL. *Here* charges properly dismissed because SOL was not tolled during pendency of original charges, because those charges had not been filed in "court of competent jurisdiction." Because SOL is jurisdictional, defendant did not waive his claim when he gave false information to police.

SPEEDY TRIAL
Statutory: §18-1-405

People in the Interest of CMWR, 2024 COA 4. As a matter of first impression, trial court must consider the factors set forth in §18-1-405(6)(g), which addresses continuances in trials of adult defendants, when ruling on a prosecutor's request to continue the trial in a juvenile adjudicatory action past the speedy trial deadline, without the juvenile's consent.

People Int. of G.S.S., 2020 CO 32. Provision of Children's Code, §19-2-509, laying out a juvenile's eligibility for bail in delinquency proceedings and requiring that a detained juvenile be tried within 60 days of an order denying, revoking, or increasing bail is a bail statute rather than a speedy trial statute, and it has the accompanying remedy of immediately holding a bail hearing and ordering the juvenile's release.

People v. Jompp, 2018 COA 128. To extend speedy trial deadline an additional 6 months over defendant's objection, prosecution need only show that "there are reasonable grounds to believe that evidence will be available at the later date." §18-1-405(6)(g)(I). *Here:* prosecution's offer of proof as to their attempts to secure crucial out-of-state witness was sufficient to show there was reasonable possibility that witness would be available to testify. COA found that under the *Barker* factors used to assess constitutional speedy trial, trial court did not plainly err in granting prosecution's continuance.

Delacruz v. People, 2017 CO 21. Following Mosley v. People, 2017 CO 20, Court held "exclusions in subsection (6) of speedy trial statute apply to speedy trial calculation of a new trial following reversal of defendant's conviction on appeal." Appellate courts review trial court's grant of continuance under subsection (6) of speedy trial statute abuse of discretion.

Mosley v. People, 2017 CO 20. Periods of time excluded from 6-month speedy trial period under §18-1-405(6) apply to retrials held after defendant's convictions were reversed.

Nagi v. People, 2017 CO 12. Because §18-1-405, does not condition tolling during competency evaluations on whether the order for such an evaluation was proper, tolling applies provided simply that the order was not entered in bad faith or to circumvent speedy trial mandate.

People v. Nelson, 2014 COA 165. Because prosecution did not act in bad faith in dismissing and refiling charges, statutory speedy trial period began anew when defendant was arraigned on refiled charges.

People v. Trujillo, 2014 COA 72. Pursuant to §18-1-405(6)(g)(I), prosecution must make a sufficient record that all three elements of this section have been met, and court must evaluate prosecution's statements and weigh competing interests to determine whether prosecution's unavailable witness warrants a continuance.

People v. Desantiago, 2014 COA 66. Plain language of speedy trial statute which says defendant must move for dismissal prior to commencement of trial and prior to any pretrial motions which are set for hearing immediately before trial, means defendant can move for dismissal up until day of trial, so long as his motion was filed prior to any motions hearing held on that same day.

People v. Curren, 2014 COA 59. Prosecution's appeal of order granting defendant a new trial is interlocutory in nature for purposes of tolling statutory speedy trial period under §18-1-405(6)(b).

People v. Green, 2012 COA 68M. Habitual criminal charges are not subject to §18-1-405(1)'s speedy trial deadline because they are sentence enhancers affecting the degree of punishment imposed, rather than substantive offenses for which punishment is imposed; they are not offenses, and are not issues raised by complaint, information, or indictment within the meaning of §18-1-405(1).

People v. Mosley, 397 P.3d 1122 (Colo. App. 2011). Where a case is reversed/remanded for new trial, all of time-exclusion provisions of §18-1-405(6) apply to remanded case, regardless of whether delay on retrial is caused by actions of defendant or needs of DA.

People v. Walker, 252 P.3d 551 (Colo. App. 2011). Refiling of charges dismissed without prejudice within original speedy trial period is not a violation of defendant's speedy trial rights unless defendant affirmatively establishes that prosecution indiscriminately dismissed/refiled in order to avoid statutory speedy trial mandate. *Here:* defendant's original case was dismissed over DA's strenuous objections when complaining witness FTA'd for trial; DA refiled 8 months later when witness was arrested on FTA warrant; a different judge dismissed the new case, finding violation of defendant's speedy trial. COA reversed.

People v. Munoz, 240 P.3d 311 (Colo. App. 2009). Defendant cannot complain of violation of his statutory/constitutional right to speedy trial unless he moved to dismiss before trial; because defendant failed to do so, his claim is waived.

People v. Abdu, 215 P.3d 1265 (Colo. App. 2009). Statutory speedy trial challenge is barred on appeal where defendant failed to argue issue in trial court.

People v. Platt, 170 P.3d 802 (Colo. App. 2007), aff'd other grounds, 201 P.3d 545 (Colo. 2009). For purposes of §18-1-405(6)(b), the excludable period for an interlocutory appeal is determined by date the notice of appeal was filed and date the mandate issued. *Here:* it was reasonable to exclude the full 3-month period authorized by §18-1-405(6)(b) from the speedy trial calculation where attorneys, arresting officer, and court were unavailable.

People v. Roberts, 146 P.3d 589 (Colo. 2006). Trial court may rely on prosecutor's offer of proof to determine whether an unavailable witness is material for purposes of speedy trial exception in §18-1-405(6)(g)(I). "Material" evidence means more than mere relevance-it is evidence of consequence to state's case such that prejudice caused by absence of evidence is sufficient to overcome prejudice caused to defendant by extending speedy trial deadline. Prosecutor's offer of proof regarding whether unavailable witness is material is sufficient, and record is sufficient for review on appeal, if trial court has enough information to exercise its independent judgment when ruling on People's motion to continue. *Here:* offer of proof was sufficient because prosecutor stated unavailable pregnant witness would testify to inconsistent/inculpatory statements made by defendant.

People v. McMurtry, 122 P.3d 237 (Colo. 2005); People v. Owen, 122 P.3d 1006 (Colo. App. 2005). Violation of defendant's statutory right to speedy trial does not deprive trial court of subject matter jurisdiction over defendant's case where there is a validly entered unconditional guilty plea.

People v. Zedack, 93 P.3d 629 (Colo. App. 2004). Trial court's summary denial of defendant's suppression motion was reversed on appeal; on remand defendant was entitled to an evidentiary hearing; conditional remand stated defendant was entitled to new trial only if suppression motion were granted after the hearing; suppression

hearing was set more than 6 months after mandate issued; trial court dismissed the case on defendant's motion. Dismissal was proper because although defendant's right to a new trial was conditional, §18-1-405(2) required that a new trial commence within 6 months after mandate issued and it was the "shared responsibility of the trial court and the prosecution to schedule the suppression hearing" for a date within that 6-month speedy trial period so that, if the motion were granted, a new trial could commence on or before the speedy trial deadline.

People in the Interest of T.A., 91 P.3d 473 (Colo. App. 2004). Speedy trial period in §19-2-509(4)(b) applies only to juvenile who remains in custody/detention during pendency of the proceedings; when juvenile does not remain in custody §19-2-508(3)(a)(IV)(D) governs the speedy trial calculation.

People v. Daley, 97 P.3d 295 (Colo. App. 2004). When case was called for trial, prosecution informed the court that, as a result of discovery sanctions imposed, it had insufficient witnesses/evidence to proceed to trial; defendant moved to dismiss because speedy trial would expire if trial did not begin that day; court granted the motion. Because case was effectively dismissed on defendant's motion, her speedy trial right was tolled during prosecution's direct appeal, and prosecution was entitled to reasonable time within which to reschedule case for trial.

People v. Yascavage, 80 P.3d 899 (Colo. App. 2003), aff'd other grounds, 101 P.3d 1090 (Colo. 2004). Delay in proceedings due to defendant's request for new counsel extends speedy trial period.

People v. Franco, 74 P.3d 357 (Colo. App. 2002). Trial court did not err in finding a waiver of defendant's right to speedy trial where trial date was set in an off-the-record proceeding without defense counsel being present because defense counsel had notice of setting and did not object.

People v. Cass, 68 P.3d 537 (Colo. App. 2002). New 6-month speedy trial begins to run if trial court grants defendant's motion to withdraw his guilty plea.

People v. Duncan, 31 P.3d 874 (Colo. 2001). Under §18-1-405(3), any defense request for continuance triggers a new 6-month speedy trial period, regardless of counsel's reasons for the request, or defendant's personal objection, except upon a finding of prosecutorial bad faith.

People v. Fennell, 32 P.3d 1092 (Colo. App. 2000). If trial results in a conviction that is reversed on appeal, any new trial must begin within 6 months after receipt of the mandate. If conviction was obtained by guilty plea and is reversed on appeal, speedy trial is calculated from date defendant enters a new plea of "not guilty."

Mason v. People, 932 P.2d 1377 (Colo. 1997). Statute does not require trial to be held within 3 months of mistrial; it creates a period of exclusion, not a new time period within which defendant must be tried.

Constitutional[3]

People v. Cox, 2023 COA 1. Where defendant did not raise constitutional speedy trial claim in trial court, it is reviewed for plain error only. A defendant has a federal and state constitutional right to a speedy trial. To determine whether that right has been violated, courts consider four factors: (1) the length of the delay, (2) the reason for the delay, (3) defendant's assertion of the right, and (4) prejudice to defendant. But if the length of delay is not "presumptively prejudicial," courts need not consider the other three factors. Here: defendant argues the delay should be measured from May 2003, when the charge was initially filed against him. The People argue the delay should be measured from April 2019, when defendant's conviction was vacated and the charge

[3] Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972) provides the factors the trial court must address when considering a constitutional speedy trial issue.

was reinstated. COA agreed with the People and found there was no constitutional speedy trial violation where defendant was tried five months after his fifteen-year-old conviction was vacated.

People v. Nelson, 2014 COA 165. Absent bad faith, the period between dismissal and refiling of charges is excluded from the constitutional speedy trial calculation.

People v. Curren, 2014 COA 59. A 2-year delay between a grant of new trial and start of new trial does not necessarily rise to a level sufficient to presumptively trigger an inquiry into the other *Barker* factors. *Here:* assuming it does, prosecution's appeal of new-trial order was not frivolous, defendant's assertion of his constitutional speedy-trial right was ambiguous, and most importantly, defendant was not prejudiced by delay.

People v. Sandoval-Candelaria, 2014 CO 21. A 6-month and 7-day delay in sentencing was not presumptively prejudicial; defendant's constitutional speedy sentencing claim was denied without further inquiry into remaining *Barker* factors.

People v. Glaser, 250 P.3d 632 (Colo. App. 2010). For purposes of constitutional speedy trial analysis, delays caused by court-appointed defense counsel are attributable to defendant, not the state. Determination of constitutional speedy trial claim is based on ad hoc balancing of 4-factors: length of delay, reasons for delay, defendant's assertion or demand for speedy trial, and prejudice to defendant.

People v. Smith, 183 P.3d 726 (Colo. App. 2008). Defendant has constitutional due process right to speedy resolution of his probation revocation complaint; reasonableness of any delay in adjudicating complaint is evaluated using 4-factor *Barker* balancing test. *Here*: although 6 years elapsed between probation violation and revocation hearing, defendant's incarceration in federal prison excused delay.

People v. Cass, 68 P.3d 537 (Colo. App. 2002). COA will not address constitutional speedy trial claim raised for first time on appeal.

People v. Scialabba, 55 P.3d 207 (Colo. App. 2002). At trial, defendant based his speedy trial objection solely on his statutory right; appellate court will not consider a constitutional speedy trial violation not raised below.

People v. Fennell, 32 P.3d 1092 (Colo. App. 2000). Because delay between receipt of mandate and final disposition of case was due in part to defendant's concerns about his representation, and because defendant asserted no specific prejudice resulting from delay, there was no constitutional speedy trial violation; fact that defendant was incarcerated is given slight weight absent showing that his ability to present a defense was impaired.

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). 18-year delay between crime and filing of charges is not speedy trial problem, because right to speedy trial is triggered by formal arrest or charging. Pre-arrest/pre-filing delay is a question of due process.

Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993). Constitutional right to speedy trial attaches when defendant is formally charged by complaint, information, or indictment. Defendant bears burden of showing a violation of his constitutional speedy trial right; court must apply the following ad hoc balancing test: (1) the length of the delay; (2) the reasons for the delay; (3) defendant's assertion of the right; and (4) prejudice to defendant.

COVID-19

People v. Young, 2024 COA 1. In felony DUI case, COVID-19 pandemic constituted an "extraordinary circumstance," under §42-4-1301.1(2)(a.5)(I), sufficient to warrant an officer to require defendant to submit to a blood test in lieu of a breath test.

In re People v. Sherwood, 2021 CO 61. Interpreting Crim.P. 24(c)(4)--which allows the court to grant a mistrial based on a public health crisis like COVID-19, CSC holds that a mistrial triggers a tolling, not an extension, of

the speedy trial period. It further holds that when a trial court declares a mistrial, §18-1-405(6)(e) requires only reasonable delays attributable to the mistrial, not to exceed 3 months, to be excluded from the computation of time within which defendant must be brought to trial. Here: trial court believed that its March 1, 2021 mistrial declaration pursuant to Rule 24(c)(4) automatically extended the 6-month statutory speedy trial period by 3 months from the date of the mistrial, until June 1st. CSC concludes the mistrial merely tolled the 6-month speedy trial period for up to 3 months from the mistrial date. Because the delay between the date of the mistrial (March 1) and the new trial date (April 26) was reasonable, attributable to the mistrial, and not in excess of 3 months, it must be excluded in its entirety from the speedy trial period-tolled between March 1st and April 26th. Since there were 8 days left in the speedy trial period on March 1st, there would have been 8 days left in the speedy trial period on April 26th, which would have made the new speedy trial deadline May 4th (April 26th + 8 days). Because the April 26th trial date landed within the speedy trial period, the rule to show cause issued in response to the People's C.A.R. 21 petition is discharged.

DELAYED PROSECUTIONS

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). 18-year delay between crime and filing of charges is not speedy trial problem, because right to speedy trial is triggered by formal arrest or charging. Pre-arrest/pre-filing delay is a question of due process. In determining whether a delayed prosecution has resulted in a denial of due process, a court must examine certain key factors as outlined in People v. Hall, 729 P.2d 373 (Colo. 1986), including: (1) loss of defense witnesses; (2) whether the delay was purposeful and intended to prejudice the defendant; (3) the kind and quantum of evidence available to the prosecution; and (4) general considerations of justice and fair play. *Here:* no due process violation because delay was not "purposeful or intended to prejudice defendant" since it resulted from state's desire to find victim's body and believed they could not convict without it.

IDENTIFICATION PROCEDURES (PHOTO ARRAYS, SHOW-UPS)

People v. Borghesi, 66 P.3d 93 (Colo. 2003); Bernal v. People, 44 P.3d 184 (Colo. 2002). There is 2-part test for determining admissibility of out-of-court photographic identification: (1) defendant has burden of proving that photo array was impermissibly suggestive – relevant factors can include size of the array; manner of presentation by officers, and details of photos themselves. If trial court determines that defendant has met his burden, burden shifts to DA to show that, despite suggestiveness, ID was nevertheless reliable under totality of the circumstances – relevant factors include opportunity of witness to view criminal at time of crime; witness' degree of attention; accuracy of prior description of criminal; level of certainty demonstrated by witness at the confrontation; and time between crime and confrontation. These two steps must be completed separately. It is only necessary to reach second step if trial court first determines that array was impermissibly suggestive. Only then must court evaluate totality of circumstances by balancing suggestiveness of procedures against indicia of reliability. ID is suppressed only if court finds that totality of circumstances indicates a very substantial likelihood of irreparable misidentification. *Borghesi:* Lineups are proper if defendant's appearance is reasonably matched by race, approximate age, hair type, and other characteristics. *Bernal:* While show-ups tend to be suggestive, they do not necessarily violate due process. In some circumstances, they allow police to determine quickly whether they have right suspect, or whether they should release person and resume searching.

People v. Walker, 666 P.2d 113 (Colo. 1983). If the procedure was unnecessarily suggestive, the identification is nevertheless admissible if the People show by clear and convincing evidence that it is based on the witness's independent observations. Weigh the "corrupting effect" of the procedure against these factors: (1) the opportunity of the witness to view the criminal at the scene of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification procedure; (5) the time between the crime and the confrontation.

People v. Poot-Baca, 2023 COA 112. Defendant challenged an in-court identification procedure arguing that the trial court erred by: (1) denying his request to waive his presence at the deposition of one eyewitness; (2) admitting the eyewitness' pretrial identification of him following the deposition because it was unreliable under the circumstances; and (3) admitting the eyewitness' subsequent in-court identification. COA denied the claim finding that, even if true, any errors were harmless beyond a reasonable doubt based on the admission of other identity evidence admitted at trial and not challenged on appeal-defendant's DNA evidence from the only Coke can found at the bus stop. Additionally, defendant addressed the issues he had as to the reliability of the procedures used in cross-examination.

People v. McCants, 2021 COA 138. At trial, defendant challenged the reliability of a police officer's out-of-court identification of him based on what he contends was an impermissibly suggestive photo array. Relying on *Howard*, the trial court concluded that a police officer's identification is per se reliable and, therefore, exempt from a reliability analysis as otherwise required by Neil v. Biggers, 409 U.S. 188, 196 (1972), and Bernal v. People, 44 P.3d 184, 191 (Colo. 2002). COA rejects the proposition that a different analytical framework applies when the reliability of a police officer's identification of a suspect from an allegedly suggestive photo array is challenged, and, to the extent this conclusion conflicts with *Howard*, the COA declines to follow it. Instead, the COA concludes that the trial court erred by failing to engage in the analysis and make the findings required by *Biggers*, *Bernal*, and their progeny. COA remanded the case to the trial court for findings related to the suggestiveness and reliability of officer's out-of-court identification of the defendant. Disagreed with People

v. Howard, 215 P.3d 1134 (Colo. App. 2008).

Garner v. People, 2019 CO 19. Where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond inherent suggestiveness of ordinary courtroom setting made in-court identification itself constitutionally suspect, due process does not require trial court to prescreen identification for reliability. *Here:* defendant challenged eyewitnesses' identification of him, in courtroom at trial, as the perpetrator of the crime. Witnesses were unable to identify him in photographic array before trial, and several years had elapsed between crime and trial. Defendant alleged no impropriety regarding pretrial photographic arrays, and record reveals nothing unusually suggestive about circumstances of witnesses' in-court identifications. In-court identifications did not violate due process.

People v. Godinez, 2018 COA 170. While victim was unable to identify defendant in pretrial photo line-up and parties stipulated to that failed identification, victim's in-trial identification was sufficiently reliable, spontaneous, and not impermissibility suggestive.

People v. Jaquez, 2018 COA 76. One-on-one voice-identification procedure conducted when defendant handcuffed in back of police car, with multiple officers surrounding car, was an impermissibly suggestive identification procedure; victim's identification may still be admissible if it is reliable under the *Bernal* factors.

People v. Palacios, 2018 COA 6. Police's placement of suspect's photograph in particular position in photo array, after witness selected a photograph in that position from different photo array, does not render identification procedure unduly suggestive.

People v. Campbell, 2018 COA 5. Although show-up procedure was impermissibly suggestive, burglary victim's identification was reliable because victim saw defendant for one or two seconds in well-lit area when they were about 10 feet away from one another, victim was startled, which heightened his degree of attention, and while victim's description of burglar was somewhat generic, victim's confidence in identification was high, and time between crime and identification was extremely brief.

People v. Folsom, 2017 COA 146. When an out-of-court show-up identification is highly suggestive, the court must consider whether the identification was nonetheless sufficiently reliable under the totality of the circumstances to meet the requirements of due process. *Here:* although the discrepancies between the victim's description of the man she saw at her window and defendant's physical appearance when he was detained by police only minutes later are very troubling, including misidentifying his race, the other factors supported the trial court's determination that the victim's out-of-court identification was so impermissibly suggestive and unreliable as to violate the defendant's due process rights.

People v. Garner, 2015 COA 175. One-on-one show-ups are not per se violations of due process, and Neil v. Biggers, 409 U.S. 188 (1972), does not apply to in-court identifications. *Here:* victims were unable to identify defendant in photo lineup but positively identified him for first time at trial. While their inability to make pretrial identification was relevant and ripe for cross-examination, it did not, as a matter of law, preclude them from making identification upon seeing defendant in court. Instead, previous inability to identify goes to weight of identification testimony not its admissibility. In considering totality of circumstances trial court should review 5 *Biggers* factors to gauge likelihood of misidentification and apply exclusionary rule: (1) opportunity of witness to view accused; (2) witness's degree of attention; (3) accuracy of witness's prior description; (4) level of certainty demonstrated by witness at confrontation; and (5) length of time between crime and confrontation. This analysis deals with exclusion of impermissible pretrial identifications and in-court identifications that follow them.

People v. Bondsteel, 2015 COA 165, overruled other grounds, Garcia v. People, 2022 CO 6. Disparity in eye color does not render a live/voice line-up unnecessarily suggestive.

People v. Ortega, 2015 COA 38. No due process violation where defendant required by court to read a neutral statement to the jury; voice exemplar is not an improper identification procedure; procedures where jury observes a physical characteristic of defendant to identify defendant have been uniformly upheld.

People v. Martinez, 2015 COA 37. Police conducted one-on-one show-up after homeowner saw defendant at a second-story window and reported possible burglary in progress; defendant fell off roof and was found injured at scene; although trial court did not consider all *Biggers* factors, it did consider several, and record discloses evidence that supports others; any error was harmless beyond a reasonable doubt.

People v. Theus-Roberts, 2015 COA 32. CSC has consistently held that it is not error for trial court to refuse tendered *Telfaire* instructions when jury receives a general instruction on witness credibility. *Here:* defendant tendered 3 *Telfaire* instructions that would have provided guidance on evaluating the reliability of eyewitness identification testimony; trial court did not err in refusing to give the instructions. In special concurrence, Judge Berger wrote to express his concerns about the use of eyewitness identification evidence because much of the relevant scientific data and judicial thinking concerning eyewitness identification has been accumulated after the CSC last addressed this issue.

People v. Plancarte, 232 P.3d 186 (Colo. App. 2009). Disparity in facial hair is a factor to be considered when determining whether array is impermissibly suggestive, but it does not necessarily render array impermissibly suggestive.

People v. Howard, 215 P.3d 1134 (Colo. App. 2008). Two-part *Biggers* test for admissibility of lay victim/witness identifications does not apply to police officers involved in ongoing investigations. *Here:* police officer, who observed defendant driving stolen vehicle and pursued him, provided an on-scene identification after defendant was apprehended by other officers; court properly declined to suppress show-up. Disagreed with in People v. McCants, 2021 COA 138.

People v. Reed, 216 P.3d 55 (Colo. App. 2008). Procedures used for evaluating suggestiveness of pretrial identification of suspect do not apply to inanimate objects (car).

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). Photo array was not impermissibly suggestive where 6 suspects were matched by race, approximate age, facial hair and other characteristics, and manner of array presentation was not impermissibly suggestive where witnesses were given advisement form that instructed them not to assume that guilty person had been caught and that it was not necessary to identify anyone. Same constitutionally prescribed procedures for identifying suspects do not apply to inanimate objects (gun).

People v. Wilford, 111 P.3d 512 (Colo. App. 2004). Pretrial photo identification procedure was not unnecessarily suggestive where photos in 6-person array were matched by common characteristics and defendant's photo was not unique in any manner directly related to an important identification factor; degree of variation among hairstyles in photographs was not so great as to make defendant stand out. Trial court did not err in refusing to allow defendant to call victim to testify at id procedure suppression hearing because testimony sought to be elicited would not have affected suggestiveness of identification.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Where witness's out of court identification of defendant consists of fortuitous viewing of defendant in newspaper photo without police involvement, it is not result of impermissibly suggestive procedure.

People v. Carrasco, 85 P.3d 580 (Colo. App. 2003). Although exposure in defendant's photo was darker than that in other 5 photos, the similarity of men in photos, and fact that witnesses using array already knew defendant, compensated for any difference in this regard.

CHARGING

Grand Jury ("GJ") Indictments: Crim.P. 7(e), §16-5-201

People v. Tucker, 631 P.2d 162 (Colo. 1981). GJ indictment must answer the questions of "who, what, where, and how." This includes a statement of the essential facts that constitute offense.

People v. Gallegos, 260 P.3d 15 (Colo. App. 2010). Ultimate test of sufficiency of indictment is whether it provides defendant with sufficient notice of charged offense and facts to allow adequate trial preparation and protect defendant from subsequent prosecution for same offense. Substantive defect in an indictment may be raised at any time because it is jurisdictional in nature. Indictment that sets forth multiple factual allegations, only some of which properly constitute a factual predicate for an embezzlement charge, is legally sufficient when it accurately recites law and provides at least one factual basis to support the charge. Indictment must be dismissed when record is insufficient to support charges. *Here:* extortion indictment was insufficient because it did not allege a necessary factual element of the crime charged.

People v. Sims, 2019 COA 66. GJ's partially-superseding indictment regarding one count did not impact remaining counts from original indictment; court had jurisdiction over a trial on all counts, particularly because each count is properly treated as a separate indictment.

People v. Flores-Rosales, 2018 COA 118; People v. Yoel Soto-Campos, 2018 COA 118. Under §16-5-204(4)(k), district court may dismiss any count in indictment where record does not support GJ's probable cause finding; it does not matter that the count charges substantive offense or "stand-alone" sentence enhancer.

People v. Tee, 2018 COA 84. GJ indictment was valid where foreman's signatures were sealed to protect his identity; this procedure is proper, and no jurisdictional problems arose from trial court withholding signature pages when transferring case to another venue for trial.

People v. Nozolino, 2014 COA 95. Error during GJ proceedings does not necessarily warrant reversal of conviction. Any error is rendered harmless once a petit jury has reached a guilty verdict; once defendant is found guilty, dismissal of the indictment/reversal of a conviction is appropriate only where structural protections of GJ have been so compromised as to render proceedings fundamentally unfair. USSC has recognized only two categories of structural error in the GJ context – racial and gender discrimination in selection of grand jurors.

People v. Seader, 2012 COA 184. Writ to transport an inmate from one jail to another prior to inmate's testimony before GJ is not functional equivalent of a subpoena to testify before GJ.

People v. Thompson, 181 P.3d 1143 (Colo. 2008). Because indictment is a record of official action under Colorado Criminal Justice Records Act, it must be released for public inspection in its entirety (including factual allegations), subject only to the deletion of identifying information of any alleged sexual assault victims.

In re 2003-2004 Term of State Grand Jury, 148 P.3d 440 (Colo. App. 2006). State GJ was investigating allegations surrounding University of Colorado's football program, including recruiting practices, financial transactions of football team, and whether a member of University's athletic department provided prostitutes to football recruits. GJ indicted 1 person under investigation and provided trial court with report detailing its findings regarding investigation in general. Relying on §16-5-205.5, which provides that a report can be issued

only when GJ does not return an indictment from an investigation, trial court refused to release the report. AG appealed, arguing the report and indictment stemmed from separate investigations conducted under same general subject area. For purposes of this statute, "case" and "investigation" are synonymous, and report could not be released.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). Proceeding on GJ indictment charging felony murder and other offenses against defendant, against whom information had already been filed, did not violate defendant's right to counsel and to cross-examine witnesses at PH; prosecution on indictment superseded earlier filed charges.

In re 2000-2001 District Grand Jury, 22 P.3d 922 (Colo. 2001). GJ report regarding allegations of election code violations by officials who successfully blocked a land annexation plan could properly be released, despite GJ's failure to return an indictment, because the report concerned matters within statutory definition of "public interest."

People v. Edebohls, 944 P.2d 552 (Colo. App. 1996). When statute describes offense in general terms, prosecution cannot merely repeat statutory language in indictment; it must allege acts/conduct which it believes have violated the statute. *Here:* repeating statutory language, plus insertion of proper predicate crimes, plus 36-paragraph enumeration of underlying facts was sufficient to put defendant on notice and to protect him from further prosecution.

People v. Valdez, 928 P.2d 1387 (Colo. App. 1996). AG can invoke state GJ as a law enforcement tool to investigate crimes respecting election fraud; governor executive order is unnecessary. State GJ had jurisdiction to return indictment concerning criminal conduct that occurred in more than one county because investigation could not be "effectively handled" by a county or judicial district GJ, as required by §13-73-101. Chief judge who supervises the state GJ can assign the matter to a competent court in any county where alleged criminal conduct occurred. *Here*: OK to fix venue for Costilla County election fraud case in El Paso County; defendant cannot claim error in "amending the indictment" when this happens because of his plea bargain; he waives any violation of Crim.P. 6.8 by entering the agreement.

People v. Ager, 928 P.2d 784 (Colo. App. 1996). Absence of some grand jurors during the presentation of evidence was not a structural defect that required dismissal of an indictment.

Complaint: Crim.P. 3 & Information: Crim.P. 7, §16-5-202

People v. Melillo, 25 P.3d 769 (Colo. 2001). Information is sufficient if: (1) it can be understood that person who signed it was authorized to prosecute the offense; (2) defendant is named or described; (3) offense can be tried in court's jurisdiction; and (4) charged offense is described in enough detail to enable court to enter judgment of conviction.

People v. Williams, 984 P.2d 56 (Colo. 1999). Offense is sufficiently described if charging language tracks statutory language and contains every element of offense; failure to charge an essential element is a defect of substance.

People v. Madison, 176 P.3d 793 (Colo. App. 2007). While objections to form of information are waived if not raised before trial, substantive defects may be raised at any time; substantive defect occurs where an information fails to advised defendant of the charges, to give him a fair and adequate opportunity to prepare his defense, and to ensure that he is not taken by surprise at trial by prosecution's evidence; information is sufficient if within its four corners it alleges or incorporates by reference essential elements of a crime.

People v. Gregory, 2020 COA 162. Legislation creating a new offense is ameliorative under People v. Stellabotte, 2018 CO 66 and §18-1-410 where: (1) the new offense covers identical conduct as an existing offense; and (2) the new offense is a lesser class of offense. *Here:* where defendant was alleged to have removed his ankle monitor while on ISP parole, he was entitled to the ameliorative benefit of the new crime of "unauthorized absence," and the trial court properly dismissed the felony escape charge.

Esquivel-Castillo v. People, 2016 CO 7. Because one count of information is not circumscribed by another count of that information unless the latter is incorporated in the former by clear and specific reference, crime of kidnapping alleged more generally as an element of felony murder was not limited to specific alternative act of kidnapping alleged in separate kidnapping count; instructing jury concerning all forms of kidnapping supported by evidence did not constructively amend the felony murder charge.

People v. Cook, 2014 COA 33. Additional charges can be filed after successful appeal where charges are based on new information not known to DA at first trial. *Here:* victim interviews after case was remanded for new trial revealed that victim was sexually assaulted by defendant; victim explained she did not disclose crimes previously because she was afraid of defendant; new information pulled from defendant's computer because of advances in technology could be basis for additional charges at second trial.

People v. Strock, 252 P.3d 1148 (Colo. App. 2010). Where defendant claims that habitual criminal counts are insufficient: DA has burden to prove beyond a reasonable doubt that defendant was previously convicted as charged; sufficiency of information is reviewed for whether it "serves the fundamental objectives" rather than "technical pleading requirements;" when the defect is one of form, defendant must show prejudice from the lack of specificity; reversal is unwarranted if defendant had adequate notice of underlying offense. *Here:* information included correct case numbers but incorrectly identified offenses as "Habitual Traffic Offender" instead of "aggravated driving after revocation" and "driving after revocation prohibited;" no reversible error because defendant failed to show that he was prejudiced or lacked adequate notice of underlying offenses to enable him to prepare a defense; information incorrectly listed date of defendant's plea (instead of sentencing) in one count and contained an incorrect date in another count; defendant failed to show he was prejudiced by these errors.

People v. Vigil, 251 P.3d 442 (Colo. App. 2010). Information charging defendant with several counts of offering a false instrument for recording did not identify the particular statements or assertions alleged to be false. Charges were not fatally deficient because defendant was able to prepare a defense, did not object to sufficiency of information or request a bill of particulars, and he did not demonstrate, let alone allege, prejudice. Distinguishing People v. Tucker, 631 P.2d 162 (Colo. 1981); People v. Donachy, 586 P.2d 14 (Colo. 1978); People v. Broncucia, 540 P.2d 1101 (Colo. 1975); People v. Westendorf, 542 P.2d 1300 (Colo. App. 1975).

People v. Flockhart, 310 P.3d 66 (Colo. App. 2009), r'vd other grounds, 304 P.3d 227 (Colo. 2013). Appellate court reviews de novo the sufficiency of a charge in an information, and a jurisdictional challenge to the information need not have been preserved for review. Not necessary that information include every element of the offense that must be proved at trial. *Here*: information provided sufficient notice for trial preparation and was adequate to bar further prosecution for same offense; information sufficient to vest jurisdiction over charged offense.

People v. Campbell, 174 P.3d 860 (Colo. App. 2007). Accepting defendant's plea when complaint did not include annotation indicating that underlying factual basis for the charges involved an act of DV or without requiring DA to represent that he could not make a prima facie case on original charge that defendant/victim were in an intimate relationship was technical violation of §18-6-801(3). §18-6-801(2) does not provide that absence of DV designation in complaint divests court of jurisdiction; when defendant does not object to form of

complaint and has not shown prejudice, technical defect can be corrected by remanding case to trial court to allow prosecution to amend complaint to reflect that underlying facts involved DV; when there is no dispute that underlying factual basis was act of DV and defendant is advised concerning nature/consequences of plea such that placement of a DV designation on the complaint will not alter defendant's understanding of agreement, appropriate remedy for technical violation of §18-6-801(3) is to remand case for amendment of information.

People v. McIntier, 134 P.3d 467 (Colo. App. 2005). Information charging retaliation against a witness was sufficient because it tracked language of §18-8-706(1) even though statutory language does not identify requisite "specific intent" mens rea for offense.

People v. Madden, 111 P.3d 452 (Colo. 2005). Information charged defendant with attempted third degree sexual assault -- inducing child to expose intimate parts, *with or without* sexual contact, jury was instructed on a different form of attempted third degree sexual assault -- subjecting a person to any sexual contact. Because prosecution was only required to prove a substantial step, information provided adequate notice prosecution might present evidence that substantial step was some form of sexual contact.

People v. Scott, 116 P.3d 1231 (Colo. App. 2004). Because information filed by DA acting as a "de facto officer" is valid, defendant's challenge to DA's authority to prosecute based on DA's failure to file an oath of office and surety bond with secretary of state does not raise an issue of subject matter jurisdiction; by pleading guilty, defendant waives any objection to DA's authority to prosecute, and cannot raise issue in a subsequent postconviction motion.

People v. Wilson, 114 P.3d 19 (Colo. App. 2004). Failure to allege "essential element" of DUI in count 1 rendered it substantively defective; count 1 was insufficient to notify defendant as to which aggravating offense the state intended to prove to convict him of this felony.

People v. Bobrik, 87 P.3d 865 (Colo. App. 2003). Counts which (1) alleged sexual assault on a child; (2) alleged that offense was committed as part of a pattern of sexual abuse; and (3) cited both the statute defining the substantive offense and the pattern enhancer, were sufficient to support imposition of enhanced sentence. Follows People v. Melillo, 25 P.3d 769 (Colo. 2001).

People v. Palmer, 87 P.3d 137 (Colo. App. 2003). Felony murder count, which described underlying felony as "burglary" rather than a specific kind of burglary, was substantively sufficient; defect was of form only, and because defendant failed to object in trial court or show substantial prejudice, it does not require reversal.

People v. Borghesi, 66 P.3d 93 (Colo. 2003). Because each person who is subject to force/intimidation constitutes a victim of separate offense under robbery statute, charging, convicting, sentencing defendant on multiple counts of robbery based upon number of persons in control of property taken does not offend multiplicity.

People v. Salyer, 80 P.3d 831 (Colo. App. 2003). When information specifies date of offense as "on and before" a particular date, and defendant became an adult only 9 months before that date, information did not encompass a period when defendant was juvenile and it was sufficient to invoke trial court's jurisdiction; also sufficient to provide defendant with adequate notice of charged offense, since a specific date is not an element of crime charged.

People v. Andracki, 68 P.3d 526 (Colo. App. 2002). Defendant had adequate notice that her sentence would be enhanced upon conviction by allegation in substantive count that she "was an escapee from a criminal institution" at the time of her offense, a mandatory sentence aggravator.

People v. Auman, 67 P.3d 741 (Colo. App. 2002), rev'd other grounds, 109 P.3d 647 (Colo. 2005). Although objections to form of information must generally be made before trial or be deemed waived, defect in form may render a conviction void if it substantially prejudices defendant's rights.

People v. Brown, 70 P.3d 489 (Colo. App. 2002). Defendant was charged and tried in Arapahoe County, but evidence showed that he committed sexual assaults in Denver. *Here:* harmless error because defendant was aware of mistake early on, was not prejudiced by it, and could have moved for change of venue under §18-1-202(11); information was sufficient because it gave defendant notice of facts and alleged crimes occurred in Colorado.

People v. Martinez, 36 P.3d 201 (Colo. App. 2001). Due process is satisfied when a mandatory sentencing circumstance is charged in the information and the fact-finder determines existence of the circumstance beyond a reasonable doubt.

People v. Melillo, 25 P.3d 769 (Colo. 2001). Count alleged SAOC elements and cited statute; it also alleged that the act was committed as part of pattern of sexual abuse and cited pattern statute. *Here:* count alleged a substantive offense independent of other counts and alleged that offense was enhanced by existence of pattern.

People v. Russell, 36 P.3d 92 (Colo. App. 2001). Information failed to state that criminal attempt must be committed "with the kind of culpability otherwise required for commission of an offense." This was defect of form, not substance, because information also stated that ulterior crime was first-degree murder, and it provided statutory references for both ulterior crime and criminal attempt - nature of charged offense could be readily understood.

People v. Williams, 984 P.2d 56 (Colo. 1999). DA charged defendant with criminal trespass with intent to commit a crime therein. DA did not specify an ulterior crime. *Here*: defect of form, not substance - although prior trespass decisions require DA to charge a specific ulterior crime, new statute changes the element to "a crime." No prejudice because defendant did not request bill of particulars or complain about sufficiency of information.

People v. Fueston, 749 P.2d 952 (Colo. 1988); People v. Wilson, 114 P.3d 19 (Colo. App. 2004). If information is insufficient to sustain conviction, court is deprived of jurisdiction and double jeopardy does not attach.

Constructive Amendment v. Simple Variance - Crim.P. 7(e)

People v. Vigil, 2015 COA 88M, aff'd other grounds, 2019 CO 105; People v. Carlson, 72 P.3d 411 (Colo. App. 2003). Two types of variances from the charging instrument are possible: a constructive amendment and a simple variance. A *constructive amendment* occurs when jury instructions change an element of charged offense to the extent the amendment effectively subjects defendant to risk of conviction for an offense that was not originally charged. A *simple variance* occurs when the elements of charged crime remain unchanged, but the evidence presented at trial proves facts materially different from those alleged in the indictment. Although a constructive amendment is per se reversible, a simple variance warrants reversal only if it prejudices a defendant's substantial rights.

Bock v. People, 24 CO 61. Constructive amendments are reviewed for plain error not structural error. Here: defendant charged with thefts between November 2014 and November 2016, under a provision that punishes single acts of theft. Although proof of aggregation is only required under a different portion of the theft statute, the trial court instructed the jury that defendant could not be convicted of four of those counts unless the prosecution proved that multiple acts of theft had been committed within six months of each other. Defendant

argued this was a constructive amendment creating structural error and requiring reversal. CSC disagreed and found the error was not plain because it did not undermine the trial's fundamental fairness.

People v. Martinez, 2024 COA 34. The due process clause prohibits the trial court from relying on the jury's answer to the verdict question/interrogatory to enter a conviction on an uncharged lesser nonincluded offense even where defendant was on notice of that fact. *Here:* trial court erred by relying on the jury's answer to an at-risk-person interrogatory to enter a conviction for the uncharged lesser nonincluded offense of criminal negligence resulting in the death of an at-risk person. This amounted to a constructive amendment and resulted in a violation of the defendant's due process rights. Because the constructive amendment was not harmless under any standard of review, the COA reversed the conviction for criminal negligence resulting in the death of an at-risk person and remanded the case for the trial court to enter a conviction for criminally negligent homicide.

People v. Garcia, 2023 COA 58. The first issue is whether, pursuant to Stackhouse v. People, 2015 CO 48, defendant waived his right to a public trial by failing to object to a known closure. The second issue is whether, pursuant to People v. Rediger, 2018 CO 32, defendant waived his right to be tried in conformity with the charging instrument by failing to object to a constructive amendment. Reconciling *Stackhouse* and *Rediger*, the division concludes defendant waived the first right and forfeited the second. While several published COA opinions have negotiated the guidance in *Stackhouse* and *Rediger*, this appears to be the first published opinion to simultaneously resolve waiver issues in each context.

People v. Rodriguez-Morelos, 2022 COA 107. Mid-trial amendment to 3 felony theft counts was one of form and did not prejudice defendant's substantial rights; amendment removed any victims from respective count who had not testified or whose testimony had addressed events outside time period for offenses as described in information and in bill of particulars, amendment did not add an additional element or a different offense to charges and did not deprive defendant of adequate notice of what charges against him were, defendant had opportunity to cross-examine every victim whose name remained on verdict forms, and amendment modified originally charged class 5 felony to a class 6 felony, reducing potential sentence that defendant faced if convicted. *[Cert Accepted (9/25/23) in case #22SC982: (1) Whether the COA erred in holding that the crime of identity theft does not apply to a business entity's personal identifying information and applies only to information concerning single, identified human beings. (SAAG Christine Brady)]*

People v. Tun, 2021 COA 34. A "constructive amendment" is a variance between the charge contained in the information and the charge of which a defendant is convicted that changes an essential element of the charged offense and thereby alters the substance of the information. *Here:* constructive amendment, also known as a variance, of defendant's charge of failure to display proof of insurance to operating a motor vehicle without insurance in jury instructions was plain error, and thus warranted reversal; challenged instruction's departure from crime charged in the information was both obvious and substantial, neither of the elements altered by the amendment was a subset of the other, and proof required was materially different, all of which triggered a different analysis and concerned issues of lack of notice to defendant.

People v. Carter, 2021 COA 29. COA holds that a constructive amendment to a criminal charge is not structural error, rejecting a COA line of cases holding that such an amendment is "per se reversible." If not waived, the COA first reviews de novo whether a constructive amendment occurred; if it did, the court must then determine whether the constructive amendment requires reversal. *Here:* defendant waived contention that the court erred by constructively amending charge of failure to present proof of insurance to charge of operating a vehicle without insurance; counsel did not object to jury instruction setting forth the elements of operating a motor vehicle without insurance rather than failure to present proof of insurance, which labeled the offense as operation without insurance, to the verdict form which labeled the charge as operating a motor vehicle without

insurance, and to colloquy on instruction, and counsel twice referred to the charge as driving without insurance, and counsel was aware that unrebutted and unchallenged evidence supported the charge of failure to present proof of insurance but that evidence did not support the charge of driving without insurance.

Fisher v. People, 2020 CO 70. Prosecution's amendment of information charging defendant with five counts of sexual assault on child to expand date range of charged offenses prejudiced defendant's substantial right to prepare and present defense, and trial court abused its discretion in permitting amendment on third day of trial, even if defendant was still able to present his partial alibi, and amendment did not totally destroy defense, where defendant's alibi placed him out of state for first alleged assault, amendment changed date range to one where first assault fell partly outside alibi timeline, and defendant was unable to marshal evidence to dispute expanded timeframe or to cross-examine prosecution's witnesses.

People v. A.C.E.-D., 2018 COA 157. Defendant waived his right to appeal trial court's amendment to information because objections based on defects in form of summons/complaint must be raised by motion before trial, and amendment to date range here was one of form/not substance.

People v. Palmer, 2018 COA 38. Adding a COV count was a substantive amendment under Crim.P. 7(e), which prevented trial court from amending information to include it once trial began.

People v. Washam, 2018 CO 19. Trial amendments under Crim.P. 7(e) can be used to correct statute of limitations issues where amendment merely narrowed date range and did not prejudice defendant.

People v. Hoggard, 2017 COA 88. Second degree forgery is a lesser-included offense of felony forgery; instructing jury on greater offense did not result in constructive amendment/reversible instructional error.

Esquivel-Castillo v. People, 2016 CO 7. Because one count of information is not circumscribed by another count of that information unless the latter is incorporated in the former by clear and specific reference, crime of kidnapping alleged more generally as an element of felony murder was not limited to specific alternative act of kidnapping alleged in the separate kidnapping count; instructing jury concerning all forms of kidnapping supported by evidence did not constructively amend felony murder charge.

People v. Riley, 2015 COA 152. Second degree forgery is not a lesser included offense of first degree forgery; prosecution constructively amended charge by submitting jury instruction for first degree forgery where defendant had been charged/convicted of second degree offense.

People v. Vigil, 2015 COA 88M, People v. Foster, 971 P.2d 1082 (Colo. App. 1998) as to automatic reversal versus plain error review.

People v. Poindexter, 2013 COA 93. In habitual criminal proceedings, variance between date alleged and date proved for prior conviction is not fatal, absent a showing that it prejudiced defense or defendant's ability to plead the judgment as a bar to a subsequent proceeding. *Here*: where information alleged that a prior conviction entered on 1/15/99, and evidence showed a guilty plea was entered 1/26/99, and judgment entered 1/27/99 *nunc pro tunc* 1/15/99, any variance not prejudicial.

People v. Duran, 272 P.3d 1084 (Colo. App. 2011). Attempted first-degree murder - extreme indifference is a lesser-included offense of first-degree murder - extreme indifference; where defendant is charged with greater offense, instruction on lesser attempt cannot constitute a constructive amendment.

People v. Price, 240 P.3d 557 (Colo. App. 2010). Variance between date ranges in original and amended charging documents with evidence presented at trial is not fatal where evidence presented to jury fell within date range of original and amended charging documents.

People v. Gallegos, 260 P.3d 15 (Colo. App. 2010). Ultimate test of sufficiency of indictment is whether it provides sufficient notice of charged offense and facts to allow adequate trial preparation/protect from subsequent prosecution for same offense. Substantive defect in an indictment may be raised at any time because it is jurisdictional in nature. Indictment that sets forth multiple factual allegations, only some of which properly constitute a factual predicate for an embezzlement charge, is legally sufficient when it accurately recites the law and provides at least one factual basis to support the charge. Indictment must be dismissed when record is insufficient to support charges. *Here:* extortion indictment was insufficient because it did not allege a necessary factual element of the crime charged. Prosecution's introduction of a new factual theory did not constitute a constructive amendment of indictment because there was no change in essential element of embezzlement offense between indictment and instructions, and simple variance did not occur because evidence did not prove facts materially different from those alleged in indictment.

People in the Interest of H.W., III, 226 P.3d 1134 (Colo. App. 2009). People's petition alleged that, under §18-8-105(3), juvenile had rendered assistance to his co-defendant while knowing co-defendant was charged with a F1 or F2. People's theory and evidence at trial established that juvenile knew his co-defendant committed a crime when juvenile assisted him. Charged versus committed crime altered an essential component of charge and was a constructive amendment.

People v. Pahl, 169 P.3d 169 (Colo. App. 2006). Definitional jury instruction for the term "security" included other components of the statutory definition of "security" that had not been listed in indictment; instruction did not change the elements of offense, as prosecution still had to prove defendant engaged in specified conduct in connection with a security; difference between indictment and instructions was a simple variance and did not prejudice defendant.

People v. Lopez, 140 P.3d 106 (Colo. App. 2005). Where defendant was charged with failure to register as a sex offender on or about a given day, evidence that he failed to register at other relevant times was a variance from the charge. Generally, a variance does not require reversal; a variance is reversible error if defendant's ability to defend against charge was impaired.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). Prosecutor argued for the first time in closing argument that defendant was a complicitor; no constructive amendment; remark was a "simple variance" that related only to dates of participation, and defendant knew of evidence well in advance of trial.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). No plain error in the failure to charge complicity, and then relying on it at trial; no plain error in arguing that victim was beaten with objects other than those charged in information; evidence showed defendant hit victim with a baseball bat; it was a "simple variance" of offense listed in information and not a basis for reversal.

People v. Martinez, 18 P.3d 831 (Colo. App. 2000). Trial court granted prosecutor's motion to amend grand jury indictment by adding habitual criminal charges; because habitual criminal statute does not create a substantive offense, this change did not constitute an amendment "as to the substance of the offense charged" within the meaning of Crim.P. 6.8; habitual criminal statutes impose no additional requirements about procedures to be followed in amending charging documents.

People v. Valdez, 928 P.2d 1387 (Colo. App. 1996). Defendant cannot claim error in "amending an indictment" when this occurs as result of plea bargain; he waives any violation of Crim.P. 6.8 by entering agreement.

Bill of Particulars (BOP): Crim.P. 7(g)

Esquivel-Castillo v. People, 2016 CO 7. Defendant is entitled to seek greater specificity of even an adequate charge by moving for BOP within 14 days of arraignment or as permitted by the court, Crim. P. 7(g).

People v. Williams, 984 P.2d 56 (Colo. 1999). BOP cannot cure a fundamental error in a charging document; but it can remedy a defect of form resulting from indefiniteness/lack of specificity; it enables defendant to prepare his defense when charging document, although sufficient to advise of charges, is so indefinite that it does not afford defendant a fair opportunity to procure witnesses/prepare for trial.

Erickson v. People, 951 P.2d 919 (Colo. 1998). BOP forecasts the facts that DA intends to prove and limits proof at trial to those areas described; although BOP is intended to define charged offense more specifically, it need not disclose in detail evidence on which DA expects to rely; when time is not a material element, precise dates/times are unnecessary.

People v. Quintano, 81 P.3d 1093 (Colo. App. 2003), aff'd other grounds, 105 P.3d 585 (Colo. 2005). In ruling on BOP request, trial court should consider whether requested information is necessary for defendant to prepare his defense/protect against subsequent prosecution. *Here:* trial court acted within its discretion in denying defendant's BOP motion, since preliminary hearing, charging document, discovery and probable cause affidavit put defendant on notice of incidents supporting charges.

People v. Lawrence, 55 P.3d 155 (Colo. App. 2001). *Here:* through discovery/charging document, defendant was adequately placed on notice of 34 animals he was charged with willfully destroying; no BOPO necessary.

People v. Pineda, 40 P.3d 60 (Colo. App. 2001). *Here:* Defendant had access to almost entire prosecution case prior to trial, and only issue in dispute was whether she knew victims were being abused.

People v. Ramirez, 30 P.3d 807 (Colo. App. 2001). Assuming that trial court erred in denying defendant's BOP motion and election of specific incidents, proper remedy is new trial, not entry of judgment of acquittal.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). Defendant was charged with felony murder, predicated on burglary of victim's home. DA's BOP indicated that, as a predicate offense for burglary, defendant/his companions broke into home with intent to commit theft. *Here:* (1) it was unnecessary for BOP to specify items defendant intended to steal; (2) BOP did not identify a particular manner of committing theft, but defendant waived this claim by his failure to object when BOP received.

Erickson v. People, 951 P.2d 919 (Colo. 1998). BOP did not create plain error: (1) it listed 30-40 sex acts, occurring over 7-year period; (2) it reflected general nature of the prosecution's evidence; (3) it put defense on notice that trial would essentially come down to credibility determination; and (4) defendant was not surprised at trial by evidence of greater specificity.

Juvenile Filings

People v. Mitchell, 2024 COA 7. Defendant claimed the trial court erred by denying his motion for a reverse transfer to juvenile court because it misapplied two of the statutory factors in §19-2.5-801(4)(b)(IV), (VII) it was required to consider: juvenile's maturity and likelihood of his rehabilitation. The COA disagreed and found that the trial court, in its oral ruling on defendant's reverse-transfer motion, discussed all 11 statutory factors and the evidence relevant to each. COA affirmed. *[Cert Accepted (11/4/24) in case #24SC122: (1) Whether the court of appeals erred in affirming the trial court's denial of petitioner's motion to dismiss for selective prosecution in a case in which the petitioner, who is Black, and his three codefendants were all charged with*

felony murder but only the two non-Black defendants received a plea bargain offer that allowed them to be tried in juvenile court in exchange for their cooperation with law enforcement (AAG Brenna A. Brackett)].

Selective Prosecution

People v. Mitchell, 2024 COA 7. Selective prosecution is a claim that the prosecutor has brought a criminal charge for a forbidden reason, such as race or religion, that violates equal protection. Defendant has the burden of establishing that the selective prosecution had a discriminatory effect and was motivated by a discriminatory purpose. To obtain discovery on a selective prosecution claim, defendant must provide some credible evidence tending to show the existence of both discriminatory effect and discriminatory intent. Charging codefendants with the same offense does not, by itself make them similarly situated for purposes of a selective prosecution claim. Rather, the People may make different prosecutorial decisions with respect to codefendants who share a charge based on their different conduct. *Here:* defendant, who was black, argued that by continuing to prosecute him as an adult while treating the two non-black codefendants as juveniles, the People engaged in selective prosecution based on race because all four codefendants were similarly situated at the outset of the case because the People filed the same charges against all of them (felony murder). *[Cert Accepted (11/4/24) in case #24SC122: (1) Whether the court of appeals erred in affirming the trial court's denial of petitioner's motion to dismiss for selective prosecution in a case in which the petitioner, who is Black, and his three codefendants were all charged with felony murder but only the two non-Black defendants received a plea bargain offer that allowed them to be tried in juvenile court in exchange for their cooperation with law enforcement (AAG Brenna A. Brackett)].*

PRELIMINARY HEARING (PH): CRIM.P. 5, CRIM.P. 7(H), §16-5-301

People v. Fry, 92 P.3d 970 (Colo. 2004). PH scope is limited to probable cause determination: (1) evidentiary and procedural rules are relaxed; (2) defendant's rights to cross-examine witnesses/introduce evidence are restricted to question of probable cause; and (3) only allowable credibility determination is whether evidence is incredible as a matter of law; PH testimony of an unavailable witness is not admissible at trial.

People v. Hall, 999 P.2d 207 (Colo. 2000). Purpose of PH is to determine whether there is probable cause to believe that a crime was committed, and that defendant committed it.

People v. Gallegos, 946 P.2d 946 (Colo. 1997). Prosecution may appeal dismissal of one or more counts at PH §16-12-102; any delay caused by such appeal is excluded from speedy trial calculations.

People v. Thornton, 929 P.2d 729 (Colo. 1996). A PH is a screening device, not a mini-trial; evidence need not be sufficient to sustain a conviction; it must be viewed in the light most favorable to the People; it is unnecessary for prosecution to show guilt beyond a reasonable doubt, or even a probability of conviction; judge may not consider credibility of witnesses unless, as a matter of law, testimony is implausible/incredible.

Felts v. County Court, 725 P.2d 61 (Colo. App. 1986). PH is limited to substantive offenses; does not apply to sentence enhancers.

People v. Schliesser, 799 P.2d 418 (Colo. App. 1990). Failure to object to a PH setting outside 30-day limit forfeits any error.

People v. Whittington, 2024 CO 65. The county court abused its discretion by excluding late-disclosed evidence from a preliminary hearing as a Rule 16 violation sanction; because the court did not find the late disclosures

were willful violations or that there was a pattern of violations, the punitive/deterrent sanction of exclusion of evidence was inappropriate where a continuance would have sufficed to cure any prejudice.

People v. Allen, 2024 COA 43. A defendant who has an active warrant for his arrest on a particular offense, but who has not yet been arrested on that warrant, is not "in custody" for that offense for the purposes of determining entitlement to a preliminary hearing under §16-5-301(1)(b)(II), even though he is incarcerated in another state for an unrelated crime.

People v. Maes, 2024 CO 15. In this Rule 21, the CSC held that a magistrate's probable-cause finding after a PH is a "final order or judgment" under the Colorado Rules for Magistrates and is reviewable by a district court. The time limit for petitioning for district court review runs from the time the magistrate memorializes that probable-cause determination in writing.

People v. Platteel, 2023 CO 18. In this Rule 21, the CSC held that the defense may not compel a victim - as "victim" is defined in the Victim Rights Act - to testify during a PH without a subpoena. Defense counsel may not call to the witness stand an unsubpoenaed victim who happens to be at the PH. This opinion in no way vests a victim with immunity from testifying at a PH. However, if the defense wishes to call a victim to testify, it must properly issue and serve the victim with a subpoena. If the People move to quash the victim's subpoena, the trial court must exercise its discretion to determine how to proceed. The county court erred by relying on *McDonald* because it proceeded the VRA. Overruled McDonald v. District Court, 576 P.2d 169 (Colo. 1978).

People in the Interest of A.S.M., 2022 CO 47. CSC considers whether a juvenile is entitled to have a juvenile court judge ("juvenile court") review the PH finding made by a juvenile court magistrate ("magistrate"). CSC holds only a district court magistrate's final orders or judgments-namely, those fully resolving an issue or claim-are reviewable under C.R.M. 7(a)(3), the PH statute in the Children's Code, §19-2.5-609(3), specifically permits review of a magistrate's PH finding. §19-1-108(5.5), which sets the ground rules for a §19-2.5-609(3) review, doesn't alter this conclusion. Therefore, CSC need not decide whether a magistrate's PH finding in a delinquency case constitutes a final order. Instead, CSC holds that §19-2.5-609(3) entitles prosecutors and juveniles alike to ask a juvenile court to review a magistrate's PH finding in a delinquency proceeding.

People v. Brothers, 2021 COA 109M2. The plain language of §16-5-301(1)(b)(II) and CRCP 7(h)(1) — the court shall vacate the PH if there is a reasonable showing that defendant has been released from custody prior to the PH—does not mean that a defendant who is released from custody forever loses the right to request a PH on his charges. Instead, when read in context with the entire statute and rule, it means only that a defendant who is no longer in custody at the time of the hearing lacks the right to a PH. CRCP 7(h)(1)'s seven-day timeframe applies only to defendants who stay in custody for at least seven days following their appearance on the filing of charges. *Here:* because defendant was in custody from the time he requested a PH through the date of the hearing, §16-5-301(1)(b)(II) and Rule 7(h)(1) did not require the trial court to vacate the hearing.

People v. Vigil, 2021 CO 46. A PH protects the accused by ensuring that "the prosecution can at least sustain the burden of proving probable cause," specifically "probable cause to believe that a crime was committed, and that the defendant committed it." *Here:* with the focus, under *Stroup,* properly on the facts of the actual injury as opposed to the risk generally associated with the type of conduct or injury, the stab wound to the neck here did not involve substantial risk of death.

People v. Subjack, 2021 CO 10. Defendants, who had not posted bond, were in custody for the contraband charges against them, and entitled to a PH on those charges, even though defendants were already in custody on unrelated charges, and the contraband charges were not the primary basis of their custodial status; although defendants were in DOC custody for unrelated convictions, they were also in custody for possession of contraband, arrest warrants were issued for both defendants on those charges, and bond had been set.

People v. Gillis, 2020 COA 68. A defendant who seeks appellate review of a court's denial of his or her request for a preliminary hearing must do so before trial because, if the defendant is convicted at trial, the alleged error in denying the preliminary hearing becomes moot.

People v. Rowell, 2019 CO 104. CRCP 7(h)(1) setting forth procedures related to PHs in district court, providing that except upon finding of good cause, request for such hearing must be made within seven days after defendant is brought before court for or following filing of information, did not control time period for defendant to file request for PH, where defendant was on bond during entirety of that seven-day timeframe and did not become eligible for PH until after seven-day deadline, when his bail bonds were revoked.

People v. Tafoya, 2019 CO 13. §16-5-301(1)(b)(II) provides that defendant who is accused of a F4, F5, F6 and is in custody for that offense may demand and shall receive a PH. *Here:* defendant charged with DUI after having 3 or more prior DUI convictions (§42-4-1301(1)(a) that is a F4) and entitled to PH.

People v. Austin, 2018 CO 47. While out-of-custody defendants charged by direct information/felony complaint with F4, F5, F6 are normally not entitled to PH, §16-5-402(1)(a) entitles them to one if they have been charged with an offense subject to mandatory sentencing or which is a COV as defined in §18-1.3-406.

People v. Simpson, 2012 COA 156. Defendant is entitled to PH when charged with F1 or F2. On theft counts, value of the property – whether regarded as element or enhancer – is part of offense charged within the meaning of the PH statute; trial court can grant a PH even after a defendant has entered a plea.

People v. Nichelson, 219 P.3d 1064 (Colo. 2009). Court has authority to restore defendant's right to PH where waiver of that right was based on a miscommunication of plea agreement.

People v. Huggins, 220 P.3d 977 (Colo. App. 2009). Prosecution satisfies the minimum requirement for non-hearsay if it: (1) presents some competent non-hearsay addressing essential elements of offense; and (2) presents hearsay testimony through witness who is connected to offense or its investigation and is not merely reading from report.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). Prosecution may proceed on grand jury indictment and dismiss earlier-filed complaint because probable cause is established and there is no need for PH.

People v. Minjarez, 81 P.3d 348 (Colo. 2003). Trial court may conclude testimony is "incredible as a matter of law" only when witness's testimony conflicts with nature or fully established facts.

People v. Williams, 987 P.2d 232 (Colo. 1999). Before PH, prosecutors moved for dismissal without prejudice because of a missing witness; they then tried to refile case in county court. County court lacks jurisdiction to allow refiling of felony complaint in this circumstance; case must be reinitiated, if at all, by filing a direct information in district court after showing required by Crim.P. 7(c) or by seeking a grand jury indictment §16-5-204.

BAIL: §16-4-103, ET.SEQ.

In re People v. Smith, 2023 CO 40. In this C.A.R. 21, the CSC reviews a trial court's order treating a defendant's charge of first-degree murder as a capital offense for purposes of article II, §19(1)(a) of the Colorado Constitution, which authorizes a trial court to deny bail if proof is evident and presumption is great that a capital offense has been committed. Because (1) the term "capital offenses," as it appears in §19(1)(a), plainly and unambiguously refers to offenses for which a statute authorizes the imposition of the death penalty and (2) the General Assembly has statutorily abolished the death penalty as a punishment for offenses (like the one here) charged on or after July 1, 2020, §16-11-901, the CSC concludes that the trial court abused its

discretion when it treated the charge of first-degree murder as a capital offense and then denied defendant's request for bail.

People v. Barnett, 2020 COA 167. Courts are responsible for setting the conditions of defendant's pretrial bond under §16-4-103(1)(setting forth the various criteria and factors a court must consider to "determine the type of bond and conditions of release"). Conditions may include pretrial release services, with the potential for electronic or global position monitoring of the person under §16-4-105(8)(g) and §16-4-106 (authorizing persons eligible for bond to be evaluated for pretrial services).

People Int. of G.S.S., 2020 CO 32. Provision of Children's Code laying out a juvenile's eligibility for bail in delinquency proceedings and requiring that a detained juvenile be tried within 60 days of an order denying, revoking, or increasing bail is a bail statute rather than a speedy trial statute, and it has the accompanying remedy of immediately holding a bail hearing and ordering the juvenile's release.

People v. Johnson, 2017 COA 97. Two categories of cases where trial court sets bond: (1) defendants who are charged with felonies and awaiting trial; and (2) defendants who have pled guilty to felonies and are placed on probation/deferred judgments. *Here:* defendant was in second category, so he lost presumption of innocence, and trial court had discretion, under §16-4-201.5(1),(2), to deny bail pending revocation of probation/deferred judgment.

People v. Fallis, 2015 COA 75. COA rejected defendant's argument that the trial court's bond conditions transgressed on his presumption of innocence because: (1) trial court considered the appropriate statutory criteria in setting bond conditions; (2) trial court did not treat him as guilty of the charged offense; and (3) instead, the court considered, quite properly, the nature of the charged offense and the penalty that would be imposed if he were found guilty beyond a reasonable doubt. COA also rejected defendant's argument that the bond condition violated his constitutional right to parent his children because: (1) on its face the court's bond conditions said nothing about defendant's right to parent his children; (2) the order did not prevent defendant from having contact with his children or participating in decisions regarding their welfare; and (3) any restrictions of his right to parent arose from circumstances outside the trial court's control-defendant's decision to move himself and his children to Indiana after his wife's death, and the temporary decision of an Indiana court prohibiting the children from being removed from Indiana.

People v. Jones, 2015 CO 20. Trial court summarily revoked defendant's bond under §16-4-105(3) and ordered him held without bond after receiving word that he had charges pending in another jurisdiction. §16-4-105(3) authorizes trial court to have defendant brought before it for purposes of changing/modifying conditions of pretrial release; it does not authorize summary revocation; §16-4-204 provides for an expedited appeal to COA from denial of bond under any parts of title 16, article 4.

People v. Blagg, 2015 CO 2. CSC holds that when a trial court grants a motion for new trial, defendant is restored to the bond status that existed upon the filing of charges. In a capital case, this requires that the court hold defendant without bond until he requests admission to bail. Once requested, the court must set a hearing at which the DA may seek to have bail denied because the proof is evident or presumption great. Even if the DA does not contend the proof is evident or presumption great, the court must still hold a hearing to set bail. In either circumstance, because such a hearing is a "critical stage" as defined by the VRA enabling legislation, the alleged victim/victim's family if the alleged victim is deceased has the right to be present and heard at the bond hearing.

People v. Rickman, 178 P.3d 1202 (Colo. 2008). Absent statutory authorization, a court may not delegate its authority to set bond conditions. Taking bail and setting the amount of bail are incident to the court's power to hear and determine cases. Necessarily, the discretion to set conditions of a bail bond is also a part of the court's

judicial function. While nothing prohibits a judge from utilizing a form to impose bail bond conditions, he/she may use it only in a manner that does not delegate the discretionary authority involved in setting bond conditions to the pretrial services program or another entity. *Here:* pretrial services could not "select" appropriate conditions from a list preapproved by the court because that "selection" necessarily required the pretrial services program to exercise discretion; even though county court judges preapproved the prohibition against possessing weapons as a possible bond condition, the pretrial services program had a choice whether to impose that condition on defendant; this was error.

MANDATORY PROTECTION ORDERS: §18-1-1001

People v. Zoller, 2023 COA 117. COA considered the due process standards that apply when a defendant moves to modify a mandatory protection order that infringes on the fundamental constitutional right to parental association. Relying on federal and state law concerning conditions of probation, the COA concluded that when a defendant challenges such an infringement pursuant to §18-1-1001(6), the trial court may not deny the motion without first finding that: (1) the infringement is justified by compelling circumstances, and (2) the purpose of the infringement cannot be accomplished by less restrictive means. *Here:* the MPO prevented defendant from contacting or directly/indirectly communicating with his minor daughter, victim and witness of his DV crimes, until he completed his prison/parole sentences. The trial court found the order was justified for the daughter's safety and refused to modify it before defendant's sentence is complete. Because the trial court did not make the latter finding, the COA reversed the order denying modification and remands for additional findings. Note: Because *Brockelman* interpreted the parameters of a trial court's statutory discretion and authority to impose geographic conditions of probation, and didn't address any constitutional concerns, COA concluded it did not control the resolution in this case.

People v. Licata, 2023 COA 34. COA holds as a matter of first impression that because Colorado case law deems an NGRI verdict an acquittal that constitutes a final disposition of the action, the plain language of § 18-1-1001(1) and (8)(b) requires termination of the MPO upon an NGRI verdict.

People v. Delfeld, 2021 COA 131. COA considers the impact the illegality of a sentence has on the MPO that, under §18-1-1001(1), remains in effect until the completion of a sentence. COA concludes that where defendant is serving an illegal sentence but hasn't obtained a court order reversing or vacating the judgment of conviction, entering a new sentence, or modifying or dismissing the MPO, and where the illegal portion of the sentence can't be severed, the protection order remains in effect through the entire sentence and any violation of the order is punishable.

People v. Yoder, 2016 COA 50. Statute governing imposition of MPOs did not prohibit trial court from issuing additional orders prohibiting defendant from possessing or using drugs, or driving without a valid driver's license. *Here:* defendant waived for appellate review claim that MPO imposed at sentencing for possession of a controlled substance and false reporting were invalid on the ground that convictions did not involve any victims or witnesses who needed protection, where defense counsel specifically stated that he was not objecting to the "standard protection orders," but instead was only objecting to the specific conditions regarding marijuana and driving.

People v. Sterns, 2013 COA 66. When trial court accepted plea agreement under which defendant pleaded guilty to second degree attempted murder of his ex-wife and her husband, in exchange for dismissal of other charges involving his daughter, it did not, by dismissing those other charges, dispose of the action against defendant, and did not lose jurisdiction to enter MPO that protected the daughter, as well as the ex-wife and her husband.

DETAINERS UMDDA: §16-14-102

People v. Draper, 2021 COA 120. The superintendent of an institution only has knowledge of untried charges, for purposes of UMDDA, which imposes duty on superintendent to promptly inform inmate of his rights to final disposition, when a detainer is filed. A violation of the prompt notification requirement under the UMDDA entitles defendant to a dismissal of the charges unless the DA can demonstrate a lack of prejudice as a result of that violation. *Here:* defendant was not entitled to relief on his pro se claim that superintendent failed to promptly notify him of his rights under UMDDA; defendant was represented by counsel when he filed his pro se document; defense counsel never asserted that superintendent failed to promptly inform defendant of his UMDDA rights; pro se UMDDA document was ineffective; and even if defendant's pro se document preserved his claim for review, defendant's trial began 13 days after statutory deadline for his trial if he could have invoked his right to speedy disposition and court received his request on very same day.

People v. Hines, 2021 COA 45. Under UMDDA, a continuance requested by the DA extends the deadline if the prosecution shows that evidence material to the state's case is unavailable, the DA has exercised due diligence to obtain the evidence, and the evidence is likely to be available at a later date. *Here:* the DA was not required to have subpoenaed a cooperating witness in order to show good cause for extending the UMDDA deadline; it was enough that the DA had previously been in contact with the witness over the phone and had tried to locate her.

People v. Yakas, 2019 COA 117. The UMDDA, which governs the disposition of intrastate detainers provides that "[a]ny person who is in the custody of the [DOC] ... may request final disposition of any untried indictment, information, or criminal complaint pending against him in this state," §16-14-102(1). A parolee in county jail on a parole violation is in DOC custody for purposes of the UMDDA. The UMDDA's purpose is to provide a mechanism for prisoners to timely resolve untried charges that are the subject of a detainer so that they may proceed with or complete rehabilitative programs. Once a prisoner requests final disposition, the untried indictment, information, or criminal complaint must be brought to trial "[w]ithin one hundred eighty-two days after the receipt of the request by the court and the prosecuting official ...." §16-14-104(1). If the matter is not brought to trial within 182 days, "no court of this state shall any longer have jurisdiction thereof, nor shall the untried indictment, information, or criminal complaint be of any further force or effect, and the court shall dismiss it with prejudice." Defendant may waive the right to final disposition of an untried matter within the 182-day period if the waiver is express, on the record, and made after full advisement by the court. §16-14-104(2).

People v. Medina, 2019 COA 103M. Defendant charged with second degree assault failed to make a valid request for final disposition under UMDDA, as required to trigger 182-day jurisdictional period for final disposition of untried charges; although defendant submitted request for final disposition to superintendent, prosecution and district court did not receive request. The UMDDA gives prisoners a mechanism for insisting on speedy and final disposition of untried charges. *Here:* because the record does not show that the court or DA ever received or were otherwise made aware of defendant's request, his request never triggered the 182-day period.

Stackhouse v. People, 2015 CO 48. Whether defendant has waived a right is a question of law that we review de novo.

People v. McKimmy, 2014 CO 76. State's initial concession that it had received actual notice of defendant's request for timely trial under the UMDD did not serve to waive the issue for further consideration; State did not have "actual notice" of defendant's request for timely trial under UMDDA absent actual knowledge of the request; and remand was necessary to determine when State gained actual knowledge of defendant's request for timely trial under UMDDA.

People v. Adolf, 2012 COA 60. Statutory interpretation of the UMDDA is a question of law that is reviewed de novo.

People v. Glasser, 293 P.3d 68, 76 (Colo. App. 2011). Where the facts are undisputed, a trial court's denial of a motion to dismiss for violation of the UMDDA is reviewed de novo. When the facts are disputed, review of the court's decision for an abuse of discretion.

People v. Gess, 250 P.3d 734, 736 (Colo. App. 2010). A trial court loses jurisdiction if it fails to comply with §16-14-104, and that defect is not waived by a subsequent guilty plea. Defendant could seek relief under the UMDDA even though he committed his offense after release from incarceration and while on parole. Where court and DA had notice of defendant's request, the deficiencies in the pleading still amounted to substantial compliance.

People v. Carr, 205 P.3d 471 (Colo. App. 2008). Defendant who requested trial within 180 days pursuant to the UMDDA did not waive his UMDDA speedy trial right by accepting a trial date that fell outside the 180-day speedy trial period; trial court did not advise defendant that assent to the trial date would waive his speedy trial right, defendant did not expressly waive such right on the record, and the UMDDA advisement form attached to defendant's speedy trial request did not advise him that agreement to a trial date beyond the speedy trial period would waive his rights under the UMDDA.

GUILTY PLEAS

Advisements Generally: Crim. P. 11(b)

Medina v. People, 2023 CO 46. The CSC considers whether an Alford plea requires that the trial court make a finding of strong evidence of actual guilt to pass constitutional muster. The CSC concludes that there is no such requirement. Rather, a defendant may enter an Alford plea while nonetheless waiving the establishment of a factual basis for the charge under Crim. P. 11(b)(6), provided that the plea is voluntary, knowing, and intelligent. The supreme court therefore affirms the division's judgment, albeit on slightly different grounds.

People v. Brooks, 2019 CO 75. At time he entered guilty plea, defendant was properly advised and acknowledged that he understood that he needed to have specific intent to permanently deprive victim of property taken to be guilty of misdemeanor theft; defendant did not express any confusion or challenge his specific intent; guilty plea was valid.

People v. Leverton, 2017 COA 34. Courts have discretion to reject guilty pleas.

Neuhaus v. People, 2012 CO 65; People v. Hoffman, 2012 CO 66; Escobedo v. People, 2012 CO 67. Conditional guilty pleas that reserve right to appeal an unsuccessful motion to suppress evidence despite having entered guilty plea are not authorized under Colorado law; reaffirms that guilty plea, as an admission of all elements of criminal charge, precludes appellate review of issues that arose prior to plea; defendant forfeits right to appellate review of suppression of evidence when he admits in open court that he is in fact guilty of charged offense; need to suppress evidence no longer exists once guilty plea has been entered; CSC declines to create an exception to this rule by judicial decision-consistent with other jurisdictions that have considered question and with Colorado precedent, authorization for conditional pleas is better achieved by statute/court rule.

People v. Butler, 251 P.3d 519 (Colo. App. 2010). A valid, unconditional guilty plea waives all non-jurisdictional objections, including allegations that constitutional rights have been violated. A guilty plea waives defendant's right to challenge his or her plea on the basis of an illegal search and seizure.

People v. Hodge, 205 P.3d 481 (Colo. App. 2008). Where applicable sentencing range was extraordinarily aggravated based on fact defendant was on probation when he committed current offense, it was error to advise

him that he could receive sentence of half minimum of presumptive range if extraordinary mitigating circumstances were present.

People v. Corral, 174 P.3d 837 (Colo. App. 2007). Generally, where plea is not knowing/intelligent, remedy is to vacate plea. In some circumstances, court may remand case to allow defendant to withdraw/affirm his plea following proper advisement. *Here*: defendant was advised of only presumptive range, not maximum aggravated range, and he received maximum aggravated sentence; because defendant did not seek to vacate plea, remedy was to allow him, after being properly advised, to reaffirm/withdraw plea.

People v. Gresl, 89 P.3d 499 (Colo. App. 2003). Prosecutor's statements during providency hearing regarding range of sentences that could be imposed upon entry of guilty plea compensated for any deficiency in court's advisement.

People v. Ochoa-Magana, 36 P.3d 141 (Colo. App. 2001). Defendant claimed his plea was not knowingly, voluntarily and intelligently made because, at providency hearing, trial court had not advised him that interpreter was available to help him communicate with his attorney; Crim.P. 11 does not require that non-English speaking defendant be advised that he may use interpreter to communicate with his attorney.

People v. Wirsching, 30 P.3d 227 (Colo. App. 2000). Defendant was informed a period of parole would attach to sentence but not informed of length of parole. Under *Clark*, because defendant was not adequately advised of parole length, appropriate remedy is remand to allow defendant opportunity to withdraw his plea; not entitled to sentence reformation.

People v. Flagg, 18 P.3d 792 (Colo. App. 2000). Defendant admitted crime occurred between December 1989, and July 9, 1993; because crime was not completed until after July 1st it did not violate due process/ex post facto principles to apply mandatory parole law (which became effective 7/1/93); defendant was adequately advised.

People v. Montaine, 7 P.3d 1065 (Colo. App. 1999). Failure to advise that parole would be 5 not 3 years was harmless; sentence imposed, plus parole, was still less than possible 32-year sentence that defendant was told he could receive.

People v. Phillips, 964 P.2d 628 (Colo. App. 1998). Defendant's guilty plea can be vacated if judge does not advise him that he faced possibility of consecutive sentences if simultaneous pleas were entered in same jurisdiction; if pleas were entered separately, court does not have to advise defendant how the instant sentence would relate to a sentence in a different case.

Collateral v. Direct Consequences

People v. Marez, 39 P.3d 1190 (Colo. 2002). Trial court must advise defendant of direct consequences of his conviction; guilty plea is not rendered invalid by trial court's failure to warn defendant of collateral consequences of plea.

People v. Joslin, 2018 COA 24. Fact that interest will accrue on unpaid restitution is collateral consequence of guilty plea and not a direct one; court does not need to advise defendant of this; defendant's attorney does not render ineffective assistance if he fails to advise defendant that interest will accrue on unpaid restitution obligations unless attorney has reason to believe that issue is "highly significant" to defendant's decision to plead guilty.

People v. Boespflug, 107 P.3d 1118 (Colo. App. 2004). Loss of right to vote during imprisonment is collateral consequence of guilty plea; advisement not required.

People v. Jackson, 109 P.3d 1017 (Colo. App. 2004). Possibility that defendant might be subjected to post-release supervision is not direct consequence of guilty plea, and court is not obliged to advise defendant of it.

Young v. People, 30 P.3d 202 (Colo. 2001); Dawson v. People, 30 P.3d 213 (Colo. 2001). Although mandatory parole is not inevitable consequence of probation/COMCOR, trial court must advise of mandatory parole because it reserves right to impose DOC sentence upon guilty plea.

People v. Montaine, 7 P.3d 1065 (Colo. App. 1999). Duty to register as sex offender was not intended to inflict retribution/additional punishment and is a collateral rather than direct consequence of guilty plea.

People v. Jones, 997 P.2d 1286 (Colo. App. 1999). Since agreement failed to mention mandatory parole at all, it could not be read as agreement to eliminate mandatory parole; since defendant was advised about mandatory parole at original providency hearing, second plea was not invalid for failure to advise him again of possible penalties.

Craig v. People, 986 P.2d 951 (Colo. 1999). Mandatory parole §18-1-105(1)(a) is direct consequence of plea that results in prison sentence; defendant must be advised of mandatory parole and length of parole.

People v. Ruiz, 935 P.2d 68 (Colo. App. 1996). DOC security classification does not implicate a liberty interest and is collateral consequence of plea.

Immigration Issues [4]

People v. Morones-Quinonez, 2015 COA 161. Defendant's claim that her lawyer misadvised her about immigration consequences of plea, and that she would not have pled but for that erroneous advisement, was sufficient to warrant evidentiary hearing. Defendant alleges sufficient prejudice when remaining in U.S. may be more important than any potential jail sentence. Counsel's affirmative misrepresentation cannot be cured by court advisement as easily as counsel's failure to advise; particularly in immigration context, proper advisement by court does not preclude, as a matter of law, a finding of prejudice based on counsel's specific, erroneous advice.

People v. Vincente-Sontay, 2014 COA 0175. Plea counsel's advice regarding immigration consequences of defendant's guilty plea was sufficient because it was "not truly clear" that defendant's criminal impersonation conviction was a "crime involving moral turpitude;" counsel was only required to advise that plea carried risk of adverse immigration consequences.

Probation & DJ&S Revocation Advisements

Finney v. People, 2014 CO 38. Crim.P. 11(b) and due process require advisement on consequences of guilty plea to substantive offense, but they do not apply when defendant admits revocation complaint; defendant has statutory right to pre-revocation penalty advisement, but that right can be waived by defense counsel.

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[4] Padilla v. Kentucky, 559 U.S. 356 (2010). Counsel provides constitutionally deficient representation under the first prong of Strickland v. Washington, 466 U.S. 668 (1984), if she fails to advise her non-citizen client whether a plea of guilty carries the risk of deportation. More precisely, where deportation is the clear consequence of pleading guilty, counsel has a duty to advise the defendant of that fact; where the deportation consequences of a plea are unclear, counsel must advise the defendant that pleading guilty may carry adverse immigration consequences. The Court did not extend its holding to other collateral consequences of pleading guilty, finding that deportation has unique consequences and is intimately related to the criminal process. And the Court did not address whether petitioner is entitled to relief, which depends on whether he can show prejudice, an issue the lower courts can address on remand.

People v. Wright, 53 P.3d 730 (Colo. App. 2002). Where defendant was adequately advised of mandatory parole period at time he entered guilty plea, trial court need not readvise him about mandatory parole upon DJ&S revocation.

Withdrawal of Plea (Before Sentencing): Crim.P. 32(d); §16-7-302

People v. Davis, 2012 COA 1, rev'd other grounds, 2015 CO 36M. Defense counsel has broad authority to determine what strategy to employ in defense of case; several decisions involve fundamental constitutional right that is reserved to defendant personally; decision to ask court to withdraw guilty plea is one of those decisions. *Here*: because it was defendant's, not counsel's, decision to move to withdraw guilty plea before sentencing, trial court should have inquired of defendant, after defendant consulted counsel, whether he still wished to do so.

People v. Madera, 112 P.3d 688 (Colo. 2005). Defendant bears burden of demonstrating a fair and just reason for withdrawal of his guilty plea.

Dawson v. People, 30 P.3d 213 (Colo. 2001). If court chooses to reject a sentence recommendation in plea agreement, it must advise parties and ask defendant to affirm/withdraw his guilty plea.

People v. Laeke, 2018 COA 78. Crim.P. 32(d) does not apply to defendant seeking to withdraw his plea of not guilty by reason of insanity.

Flores-Heredia v. People, 2017 CO 64; People v. Roman, 2017 CO 63; Zafiro-Guillen v. People, 2017 CO 62; Espino-Paez v. People, 2017 CO 61; People v. Corrales-Castro, 2017 CO 60. Withdrawal of guilty plea and dismissal of charge with prejudice occur by operation of law even if no court enters formal order when DJ&S is successfully completed. Plain terms of Crim.P. 32(d) require a plea to exist in order for it to be withdrawn.

People v. Pendleton, 2015 COA 154. Defendant entered guilty plea to child abuse resulting in death and filed post-conviction motion alleging she was incompetent at time and did not knowingly, voluntarily, and intelligently enter it; her plea counsel was ineffective in failing to pursue competency determination; post-conviction court retrospectively determined she was competent when she pled and rejected her claims. COA affirmed: (1) although retrospective competency determinations are not favored, they are permitted whenever record, together with any additional evidence available, allows court to make an accurate assessment of defendant's competency; (2) in deciding whether meaningful retrospective competency determination is possible, court should consider: (a) passage of time, (b) availability of contemporaneous medical evidence, including medical records and prior competency determinations; (c) defendant's statements in trial record, and (d) availability of individuals/witnesses who interacted with defendant around time of plea. Because post-conviction court had sufficient contemporaneous information to evaluate defendant's competency at time of her plea, fact that it did it 5 years later does not invalidate its findings.

Kazadi v. People, 2012 CO 73. Defendant serving DJ&S may seek to withdraw guilty plea under Crim.P. 32(d), since no sentence has been imposed/suspended; defendant has burden to establish fair and just reason for the withdrawal.

Crumb v. People, 230 P.3d 726 (Colo. 2010). Where record demonstrated trial judge impermissibly engaged in plea negotiations, defendant established fair and just reason for withdrawing guilty pleas; trial court abused its discretion by denying motion.

People v. Hodge, 205 P.3d 481 (Colo. App. 2008). When case is remanded for resentencing, defendant is entitled to file Crim.P. 32(d) motion to withdraw plea, provided he does so after his sentence is vacated on appeal and before resentencing occurs.

People v. Rogers, 220 P.3d 931 (Colo. App. 2008). Prosecutor failed to formally reinstate original charges after defendant withdrew guilty plea to added charges; defendant was tried on original charges; trial court did not lack jurisdiction to try defendant on original charges; formal reinstatement of original charges was not required where their dismissal was conditioned on defendant's guilty plea/sentence to added charges.

People v. Scott, 176 P.3d 851 (Colo. App. 2007). Because court order to reimburse state for cost of court-appointed counsel, §1-1-106, is independent judgment and is not considered part of defendant's sentence, trial court did not abuse its discretion by denying defendant's motion to withdraw his plea. Order was, as matter of law, not part of parties' plea agreement because it was not part of defendant's sentence, and defendant was not entitled to specific performance.

People v. Finley, 141 P.3d 911 (Colo. App. 2006). Court did not abuse its discretion in denying motion to withdraw plea where it found and concluded, with record support, that: (1) plea counsel's lack of COCCA experience was not unusual; (2) plea counsel acted competently by researching statute and discussing case with experienced attorneys; (3) plea counsel filed several motions, and decision not to file others was appropriate tactical decision; (4) plea counsel was heavily involved in case and was responsive to defendant's requests; (5) plea counsel was not deficient in advising defendant about array of penalties he faced; and (6) although plea counsel was incorrect in concluding that defendant was probation eligible, this mistake was common and not result of incompetence. Court did not abuse its discretion in denying motion to withdraw plea where it found, with support in the record, that while solitary confinement between final pretrial motions hearing and trial date was unpleasant, decision to plead guilty was made knowingly, voluntarily, and intelligently.

People v. Dawson, 89 P.3d 447 (Colo. App. 2003). Term "sentence concessions" in Crim.P. 32(d) refers only to prosecution's agreement to make or not to oppose favorable recommendations. *Here*: prosecutor's agreement 'not to seek an aggravated-range sentence' did not constitute favorable sentence recommendation for purposes of Crim.P. 32(d), and defendant not entitled to withdraw his plea when trial court ultimately elected to impose aggravated-range sentence.

People v. Manzanares, 85 P.3d 604 (Colo. App. 2003). Interpretation of plea agreement is question of law subject to de novo review; reviewing courts interpret plea agreements pursuant to objective standard, focusing on meaning reasonable person would have attached to agreement under the circumstances, and recognizing that terms of plea agreement may be implied as well as expressed plainly on agreement's face. *Here*: plea agreement included DJ&S stipulation in which parties expressly agreed that defendant would comply not only with certain specified conditions but also with "any other conditions reasonably related to [his] rehabilitation and the purpose of this supervisory period, as ordered by the Court." Language of plea agreement put defendant on notice that he could expect probation to impose additional conditions of a certain type-those reasonably related to rehabilitation and purpose of supervision.

People v. DiGuglielmo, 33 P.3d 1248 (Colo. App. 2001). When it became apparent that he would not receive DJ&S, defendant sought withdrawal of his guilty plea. Absent allegation that he was promised DJ&S, trial court properly found he failed to demonstrate fair and just reason for withdrawal.

People v. Jones, 33 P.3d 1258 (Colo. App. 2001). Defendant's subjective belief that he would receive concurrent sentence, unsupported by any evidence that he was promised this, did not establish fair and just reason for withdrawal; defendant must provide objective evidence to demonstrate that misunderstanding was reasonable.

Keller v. People, 29 P.3d 290 (Colo. 2000). Where trial court reduces defendant's stipulated sentence after completion of boot camp §17-27.7-104(2), prosecution not entitled to withdraw from plea agreement.

PLEA AGREEMENTS

People v. Johnson, 999 P.2d 825 (Colo. 2000). The meaning of a plea agreement is determined by the interpretation a reasonable person would attach to the language under the circumstances.

People v. Romero, 745 P.2d 1003 (Colo. 1987). The decisive factors in determining the defendant's right to enforce a plea agreement are: (1) whether a promise was made to the defendant by a government official who had authority to bind the government; (2) the scope of the promise; (3) whether the defendant detrimentally relied on the promise by performing his side of the bargain; and (4) if the defendant did rely on the promise, the appropriate remedy to which he is entitled.

People v. Justice, 2020 CO 9. A trial court lacks the authority to require the parties to mediate in a criminal case. *Here:* because the trial court ordered mediation over the People's objection, and because the mediation order arguably involved the trial court in the plea bargaining process, the CSC makes absolute the rules to show cause in these two companion cases.

People v. Mazzarelli, 2019 CO 71. In the context of plea agreements, "sentence stipulations," "sentence agreements," "sentence concessions," and other similar terms are nothing more than sentence recommendations that the trial court is free to accept or reject, including after the defendant's guilty plea. *Here:* people were not entitled to withdraw from plea agreement on charge for child abuse after trial court rejected sentencing recommendation provided for in plea agreement; the statute and rules required the trial court to exercise its independent judgment in deciding whether to accept or reject sentence concessions in a plea agreement, and allowed the defendant, but not the People, to withdraw from the plea agreement when the trial court rejected a sentence concession after the defendant had pled guilty.

Robertson v. People, 2017 COA 143M. The statutory ten-year waiting period for sealing criminal records applies regardless of the parties' wishes. And this statutory requirement exists for the public's benefit, not only for the parties in this case. The sealing statute reflects a "broad public policy against the sealing of criminal records in situations involving a favorable disposition to the defendant under a plea agreement...." Because the statutory restrictions on sealing criminal records have a broad public purpose, the parties cannot subvert them through their agreement. Declined to Follow People v. Ward-Garrison, 72 P.3d 423 (Colo. App. 2003).

People v. Leverton, 2017 COA 34. Courts have discretion to reject guilty pleas.

People v. Torrez, 2013 COA 37. Even though defendant pled guilty to multiple counts, there is information in the record that allows COA to conclude that there is no other reasonable inference than that the two counts in each pair were based on identical evidence. Unlike in *Maestas*, the charging document expressly refers to sexual contact based on the same incidents in counts 2 and 3; the prosecutor's sentencing argument described some of the events in a manner indicating that the two counts in each pair were based on identical evidence; counts 2 and 3 obviously concerned a single, discrete event: sexual contact that led to the birth of a child; during the sentencing hearing, the court and prosecutor both stated that they believed that at least some of the counts for which the prosecution requested mandatory consecutive sentences were based on identical evidence; and the prosecution does not, on appeal, directly address the question whether there is "no reasonable inference" that the two counts in each pair were based on identical evidence.

Neuhaus v. People, 2012 CO 65; People v. Hoffman, 2012 CO 66; Escobedo v. People, 2012 CO 67. Conditional guilty pleas that reserve right to appeal an unsuccessful motion to suppress evidence despite having entered guilty plea are not authorized under Colorado law; reaffirms that guilty plea, as an admission of all elements of criminal charge, precludes appellate review of issues that arose prior to plea; defendant forfeits right to appellate review of suppression of evidence when he admits in open court that he is in fact guilty of charged offense; need to suppress evidence no longer exists once guilty plea has been entered; CSC declines to create an exception to this rule by judicial decision-consistent with other jurisdictions that have considered question and with Colorado precedent, authorization for conditional pleas is better achieved by statute/court rule.

People v. Chirico, 2012 COA 16; People v. Stovall, 2012 COA 7M. In plea agreement, defendant expressly waived his right to challenge constitutional effectiveness of plea counsel; such waiver is unenforceable to extent that ineffectiveness allegations relate to knowing, voluntary, and intelligent nature of plea.

People v. Glasser, 293 P.3d 68 (Colo. App. 2011). Although defendant's plea violated due process because it included promise of illegal sentence, DNA obtained as result of plea was not subject to exclusionary rule and could be used in subsequent case.

People v. Butler, 251 P.3d 519 (Colo. App. 2010). Valid, unconditional guilty plea waives all non-jurisdictional objections, including allegations that constitutional rights were violated; guilty plea waives defendant's right to challenge the plea on basis of illegal search/seizure.

Crumb v. People, 230 P.3d 726 (Colo. 2010). Trial court erred by making participatory comments in plea negotiations, in violation of proscription against judicial participation in plea discussions; judge gave legal advice to defendant by comparing potential sentencing consequences of pleading guilty with consequences of going to trial, repeatedly emphasized that he could exercise sentencing discretion if defendant pleaded guilty, which suggested promise of leniency, and stated that he would not be a happy judge if the People told him that they did not have a deal. *Here:* defendant showed fair and just reason for withdrawing his guilty plea based on judge's participation in plea discussions; although prosecution would experience some prejudice by having to prepare again for trial and having to reschedule witnesses to appear, comments appeared to have influenced defendant's decision to reconsider his earlier rejection of offered plea and his ultimate decision to plead guilty, since judge, after defendant expressed his resolve to go to trial, made a tacit offer of leniency and stated that he would be unhappy if no deal were reached.

People v. Ford, 232 P.3d 260 (Colo. App. 2009). Guilty plea bars "as applied" challenge to constitutionality of a statute.

People v. Kirk, 221 P.3d 63 (Colo. App. 2009). After sentencing, defendant may claim in Crim.P. 35(c) motion that trial court intruded into plea negotiation process, undermining voluntariness of the guilty plea. *Here*: because defendant raised his claim on direct appeal rather than in postconviction motion, appeal dismissed.

People v. Maestas, 224 P.3d 405 (Colo. App. 2009). §18-1-408(3), requiring concurrent sentences for multiple offenses arising from same criminal episode/supported by identical evidence, does not apply when defendant pleads guilty to multiple offenses and waives factual basis for at least one of the offenses unless guilty plea includes stipulation for concurrent sentences.

People v. Barton, 174 P.3d 786 (Colo. 2008). Because plea agreement did not limit term "illegal sentence" to its use in former version of Crim.P. 35(a), trial court erred in determining defendant's *Blakely* claim breached plea agreement; trial court should have interpreted agreement to allow defendant to attack sentence on ground that it was "unlawful in some way," which is what her *Blakely* claim entailed; interpretation of plea agreement is "strictly a question of law" that focuses on meaning a reasonable person would have attached to agreement at

time agreement was made. Every federal court that has considered the issue of whether plea agreement can include defendant's waiver of appellate rights has upheld such a waiver.

People v. Scott, 176 P.3d 851 (Colo. App. 2007). Because court order to reimburse state for cost of court-appointed counsel, §21-1-106, is independent judgment and is not considered part of defendant's sentence, trial court did not abuse its discretion by denying defendant's motion to withdraw his plea. Order was, as matter of law, not part of parties' plea agreement because it was not part of defendant's sentence, and defendant was not entitled to specific performance.

People v. Canody, 166 P.3d 218 (Colo. App. 2007). Defendant's declarations in both written plea agreement and at providency hearing refuted postconviction allegations that his waiver of "appellate rights" was result of coercion/illness.

People v. Manzo, 144 P.3d 551 (Colo. 2006). Plain language of statute prohibiting leaving the scene of an accident neither required nor implied culpable mental state and was a strict liability offense; defendant's guilty plea upheld.

People v. Starkweather, 159 P.3d 665 (Colo. App. 2006). Defendant's guilty plea was not coerced where counsel told him he had no defenses, judge was unhappy with him, and he could get maximum sentence if he went to trial.

People v. Rockwell, 125 P.3d 410 (Colo. 2005). Factual basis consists of those facts which establish that an offense was committed. Factual basis for unlawful sexual behavior can be established by (1) defendant's statements; (2) facts or fact-finding stipulated to by defendant; or (3) facts found by jury. To establish factual basis as required by discretionary parole provisions, judge must be able to fairly conclude defendant would be convicted of unlawful sexual behavior offense if he went to trial.

People v. Darlington, 105 P.3d 230 (Colo. 2005). Trial court may reject plea agreement in exercise of sound judicial discretion and independent judgment but may not reject plea agreement on arbitrary basis. When trial court rejects plea agreement, it must consider all relevant factors and articulate on record its reasons for rejecting it. A plea of nolo contendere is fully equivalent to plea of guilty for all purposes in criminal case, including imposition of any lawful punishment. Sole distinction between guilty plea and nolo contendere plea is that a nolo contendere plea gives defendant advantage of not being estopped from denying fault in civil action based upon same facts. Nolo contendere plea allows defendant to enter plea that is fully equivalent to guilty plea in criminal case, while still protesting innocence or gaining other practical benefits, and serves a practical function in administration of criminal justice. Nolo contendere pleas are allowed liberally.

People v. Roy, 109 P.3d 993 (Colo. App. 2004). At providency hearing, court "committed in advance" to imposing 8-year DOC sentence; court subsequently determined that it was unwilling to proceed with plea agreement based on information in defendant's presentence report. *Held*: once trial court committed to plea agreement, it became bound by terms of agreement and could not set agreement aside; defendant entitled to specific enforcement of court's original promise.

People v. Shepard, 98 P.3d 905 (Colo. App. 2004). Where defendant stipulates in plea agreement to aggravated range sentence, court need not make additional findings on record; defendant can stipulate to consecutive sentences, but DA needs to provide appropriate factual basis of separate evidence of acts to support consecutive sentences.

People v. Bobrik, 87 P.3d 865 (Colo. App. 2003). Defendant pled guilty to several sex offenses committed between 1991 and 1996, and also pled guilty to COV count associated with those offenses. *Here*: Defendant's guilty pleas to substantive offenses and associated COV waived "ex post facto" claim that underlying offenses

occurred before 7/1/94, effective date of applicable COV enhancer; this is true despite fact that factual basis for pleas suggested that some of offenses were committed before 7/1/94.

People v. Simpson, 69 P.3d 79 (Colo. 2003). Defendant, who was 17, waived counsel and pled guilty; allegations that he had mental disorder, no parent/guardian present when he pled, and only had 6th grade education, could, if proven, render his plea invalid.

People v. Ward-Garrison, 72 P.3d 423 (Colo. App. 2003). Public policy favors enforcement of defendant's express waiver of statutory right to request sealing of record. *Here*: trial court improperly sealed defendant's record where plea agreement waived any right to have record sealed by court order. Disagreed with in Robertson v. People, 2017 COA 143M.

People v. Andracki, 68 P.3d 526 (Colo. App. 2002)(admitted escape); People v. Munkus, 60 P.3d 767 (Colo. App. 2002). *Apprendi* does not prohibit defendant from admitting facts necessary to support conviction or enhancer (deadly weapon) or waive factual basis for charged offense.

People v. Walker, 46 P.3d 495 (Colo. App. 2002). Trial court must advise defendant that, if court should reject stipulated sentence in plea agreement, defendant may withdraw his guilty plea; this is true even if defendant is aware of full sentencing range and knows that court will ultimately determine sentence.

Patton v. People, 35 P.3d 124 (Colo. 2001). Defendant may attack guilty plea that was made in violation of his double jeopardy rights - imposed multiple punishments for same conduct. *Here*: charging documents/plea agreement did not established that defendant manufactured/possessed controlled substance in distinct incidents; was necessary to vacate conviction for possession as lesser-included offense.

People v. DiGuglielmo, 33 P.3d 1248 (Colo. App. 2001). If defendant receives information, from counsel or court, that is different from information in plea documents, he has affirmative obligation to seek clarification from court; failure to do so prevents him from advancing postconviction claim that he was confused/misinformed.

People v. Schneider, 25 P.3d 755 (Colo. 2001). Where defendant intelligently concludes that his interests require guilty plea and record before judge contains strong evidence of actual guilt, guilty plea is sufficient, whether or not defendant admits actual guilt; because defendant entering an *Alford* plea has engaged in some assessment of state's case, *Alford* plea is properly characterized as guilty plea.

People v. Jasper, 17 P.3d 807 (Colo. 2001). Trial court possesses inherent authority to impose plea cutoff deadline as part of case management responsibilities, provided parties have notice of deadline; if parties seek to tender plea after deadline, they must show good cause to bypass deadline; determination of good cause rests within sound discretion of court.

People v. Seaney, 36 P.3d 81 (Colo. App. 2000). Where plea agreement includes stipulated sentence, and court fails to advise defendant regarding mandatory parole term, sentence "cannot be reformed to render absence of proper mandatory parole advisement harmless because modification would entirely disregard stipulated DOC sentence contained in plea agreement and would result in an illegal sentence. Since People are also entitled to receive benefit of their bargain, and reducing sentence would not afford People such benefit, only remedy available to defendant is opportunity to withdraw plea.

People v. Antonio-Antimo, 29 P.3d 298 (Colo. 2000). Defendant pled guilty in exchange for sentence of "no jail, deportation;" trial court legally ordered him to report to INS, but illegally ordered him to "leave this country." Proper remedy was to delete illegal part of sentence, not to vacate valid guilty plea.

Clark v. People, 7 P.3d 163 (Colo. 2000). Court declines to require, as prerequisite to relief from inadequate mandatory parole advisement, that defendant establish he had no actual knowledge of mandatory parole or that

he would not have pled guilty if he had known. Plea agreement's maximum "cap" on prison constitutes maximum prison term defendant risks receiving for purposes of determining whether failure to advise of mandatory parole is harmless ab initio. Disapproving People v. Priester, 996 P.2d 766 (Colo. App. 2000).

People v. Turley, 18 P.3d 802 (Colo. App. 2000). Court will not invalidate prior guilty plea for purely technical flaws; although defendant did not personally state he was pleading guilty, manifest intent of providency hearing was that defendant was pleading guilty in exchange for favorable disposition.

People v. Johnson, 999 P.2d 825 (Colo. 2000); People v. Romero, 745 P.2d 1003 (Colo. 1987). The meaning of plea agreement is determined by the interpretation a reasonable person would attach to language under the circumstances. Decisive factors in determining defendant's right to enforce plea agreement are: (1) whether a promise was made to defendant by government official who had authority to bind government; (2) scope of the promise; (3) whether defendant detrimentally relied on promise by performing his side of bargain; and (4) if defendant did rely on promise, appropriate remedy to which he is entitled.

People v. Johnson, 999 P.2d 825 (Colo. 2000). Plea agreement required defendant to take polygraph test in exchange for reduced sentence; polygraph examiner needed results of defendant's two prior polygraphs in order to design fair exam; defendant refused to provide the results, claiming privilege. *Here*: defendant cannot force specific performance of plea agreement; his decision to exercise 5th amendment privilege violated his duty to perform his plea obligations in good faith.

People v. Moriarity, 8 P.3d 566 (Colo. App. 2000). Because DA failed to identify an aggravating circumstance, defendant claimed plea agreement implicitly included sentence concession, requiring sentence in presumptive range; plea agreement made clear there were no sentence concessions.

People v. Kyler, 991 P.2d 810 (Colo. 1999). After several escape attempts, defendant was placed in physical restraints in jail and during court appearances; he claimed the restraints caused coercive effect on guilty pleas; restraints are part of totality of circumstances that must be considered when evaluating voluntariness of guilty plea; restraints are relevant only to extent they affected defendant's state of mind when he entered pleas; under totality of circumstances, pleas here were valid.

People v. Jones, 997 P.2d 1286 (Colo. App. 1999). Since agreement failed to mention mandatory parole at all, it could not be read as agreement to eliminate mandatory parole; since defendant was advised about mandatory parole at original providency hearing, second plea was not invalid for failure to advise him again of possible penalties.

Benavidez v. People, 986 P.2d 943 (Colo. 1999). There was no promise that defendant would be spared mandatory parole, where (1) plea documents indicated that all sentences to DOC would "include" mandatory parole period of 5 years; and (2) understood in context, court's statement did not contradict/invalidate advisement.

Craig v. People, 986 P.2d 951 (Colo. 1999). Agreement to reduce period of mandatory parole is illegal; remedy for such agreement is invalidation of plea, not specific performance. Absent express promise, agreement should not be construed to mean that parties agreed to eliminate/reduce period of mandatory parole. Failure to advise about mandatory parole may be rendered harmless by imposing (or modifying within statutorily permitted range) sentence so that burden of undisclosed consequence is removed. If failure to advise is not harmless (or cannot be made harmless), remedy is to allow plea to be withdrawn. *Here:* advisement form indicated that defendant could serve "up to 5 years" of parole "after his sentence" and indicated that parole period for F4 was 3 years.

People v. Frye, 997 P.2d 1223 (Colo. App. 1999). In exchange for defendant's plea, DA agreed "not to object" to order allowing defendant to leave country; later defendant ordered to surrender passport, and he sought withdrawal of his plea; request properly denied because: (1) original agreement was legal; and (2) subsequent order did not violate terms of agreement.

People v. Wetter, 985 P.2d 79 (Colo. App. 1999). Court exceeded its jurisdiction in accepting plea to offense that was not a crime at time incident occurred; because non-existent offense formed material part of plea agreement, conviction was vacated, and original charges reinstated.

People v. Birdsong, 958 P.2d 1124 (Colo. 1998). When defendant pleads guilty and consents to probation, he accepts conditions irrespective of whether he enters regular plea or *Alford* plea. *Here*: (1) *Alford* plea did not insulate defendant from revocation for failure to complete sex-offender treatment (which required him to admit guilt); (2) it was unnecessary - a collateral consequence - to advise defendant that probation might be revoked if he continued to maintain his innocence about sexual contact with daughter.

Competency, Sanity & Impaired Mental Condition

Competency: §16-8.5-101, et.seq.

People in interest of A.T.C., 2023 CO 19. In this Rule 21, the CSC holds that juvenile in a delinquency case can seek interlocutory review of a magistrate's competency finding in the juvenile court. A magistrate's finding of competency pursuant to §19-1-108(3)(a.5), is subject to review in the juvenile court under the ground rules laid out in §19-1-108(5.5). The CSC looks to the specific text of §19-1-108, rather than the general provisions of C.R.M. 7(a)(3), and concludes that, when a party waives their right to a hearing before a juvenile judge in the first instance, the party is then "bound by the findings and recommendations of the magistrate, subject to a request for review as set forth in subsection (5.5) of this section." § 19-1-108(3)(a.5). CSC reverses the juvenile court's order denying the petition for review for lack of jurisdiction and makes the rule to show cause absolute.

People v. Zimmer, 2021 COA 40. Trial court ruled that defense counsel's post-trial, pre-sentencing competency motion failed to meet the requirements of §16-8.5-102(2)(b). Applying *Lindsey*, COA concluded the motion met the statutory requirements and should have triggered the competency procedures in §16-8.5-103.

People v. Lindsey, 2020 CO 21. Competency is determined by whether defendant has a rational understanding of the proceedings against him and is able to participate or assist in his defense. Trial court has discretion to reject competency motion that fails to satisfy threshold statutory requirements. *Here*: trial court did not abuse its discretion in rejecting defense competency motion that was "barren of specific facts supporting a good-faith doubt" regarding the defendant's competency.

People v. Roina, 2019 CO 20. Where defense counsel files a sealed motion raising defendant's competency and requesting the trial court to order an initial competency evaluation, §16-8.5-102(2)(b) requires trial courts to consider these motions even though they may be characterized as ex parte communications. It is not until defendant requests a competency hearing that the defense must provide a copy of the sealed motion to the prosecution.

People v. A.C.E.-D., 2018 COA 157. The previous version of the competency statute for juveniles, §19-2-1301(2), was neither facially unconstitutional nor unconstitutional as applied because it incorporated the definition of "incompetent to proceed" for adults in criminal proceedings set out in §16-8.5-101(11) (old version of statute).

Zapata v. People, 2018 CO 82. The trial court properly declined to give defendant access to, or to review in camera, a co-defendant's competency reports. The reports were protected by the physician-patient or psychologist-client privilege and the co-defendant did not waive the privilege as to defendant when he raised

competency in his own, separate, case. Because defendant did not make a sufficient showing that the competency reports contained exculpatory evidence, the trial court's denial did not violate due process or Crim.P. 16.

People v. Liggett, 2018 COA 94M. Where defendant was found legally incompetent after the notice of appeal was filed, the direct appeal would proceed through counsel. However, defendant would be permitted to raise in a postconviction motion any matter not raised on direct appeal due to his incompetence. COA would bifurcate and stay ruling on defendant's requests that his appeal and counsel be dismissed and would grant a limited remand to restore defendant to competence.

Nagi v. People, 2017 CO 12. Because the speedy trial statute, §18-1-405, does not condition tolling during competency evaluations on whether the order for such an evaluation was proper, tolling applies provided simply that the order was not entered in bad faith or to circumvent the speedy trial mandate.

People v. Pendleton, 2015 COA 154. Defendant entered a guilty plea to child abuse resulting in death and filed a post-conviction motion alleging that she was incompetent at the time and did not knowingly, voluntarily, and intelligently enter it; and her plea counsel was ineffective in failing to pursue a competency determination. Post-conviction court retrospectively determined that she was competent when she pled, and it rejected her claims. COA affirmed, holding: (1) although retrospective competency determinations are not favored, they are permitted whenever the record, together with any additional evidence available, allows the court to make an accurate assessment of the defendant's competency; (2) in deciding whether a meaningful retrospective competency determination is possible, the court should consider: (a) the passage of time, (b) availability of contemporaneous medical evidence, including medical records and prior competency determinations, (c) defendant's statements in the trial record, and (d) availability of individuals and witnesses who interacted with the defendant around the time of her plea. Because the post-conviction court had sufficient contemporaneous information to evaluate defendant's competency at the time of her plea, the fact that it did so five years later does not invalidate its findings.

People v. Davis, 2015 CO 36M. CSC declined to adopt a new competency standard under Indiana v. Edwards, 554 U.S. 164 (2008) for mentally ill defendants who wish to waive their Sixth Amendment right to counsel. Colorado's 2-part framework for determining whether a defendant has validly waived the right to counsel affords trial courts sufficient discretion to consider a defendant's mental illness. A defendant (1) must be competent to waive the right, measured by the standard for competence to stand trial under Dusky v. U.S., 362 U.S. 402 (1960)-whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. If defendant does meet the standard, he may waive the right to counsel if (2) his waiver is voluntary, knowing, and intelligent. Even if a defendant is found competent to stand trial, his mental illness can impact whether he makes a voluntary, knowing, and intelligent waiver of counsel; the illness could impact whether his waiver arose due to threats, promises, or undue influence or the illness might prevent him from broadly understanding the charges, punishments, defenses, and other essential facts of the case. As such, a trial court may consider defendant's mental illness during its totality-of-the-circumstances analysis to determine whether the waiver is voluntary, knowing, and intelligent. If a trial court finds that the totality of the circumstances shows that defendant, although competent, has not voluntarily, knowingly, and intelligently waived the right to counsel, then the trial court will insist on representation by counsel.

People v. Wingfield, 2014 COA 173. That defendant was being treated for mental health issues, rambled and made inappropriate comments, and became upset and expressed paranoid thoughts when the court denied his motions was insufficient to establish a bona fide doubt as to his competency. Even if the trial court abused its discretion in denying defendant's request for a second competency examination, any error was harmless

because: (1) his first competency examination found him competent; (2) the court had ample opportunity to observe him throughout trial; and (3) defendant never made any offer of proof about what evidence to establish his incompetence could be presented at either a competency hearing or during a second competency examination.

People v. Presson, 2013 COA 120M. If, after ordering a requested second competency evaluation, the trial court receives an incomplete report (lacking an opinion on competency due to insufficient information), the court should then order that (1) the evaluator render an opinion based on the available information, if possible; or (2) defendant be returned "to the appropriate facility for further observation so that a competency opinion can be rendered."

People v. Price, 240 P.3d 577 (Colo. App. 2010). Defendant's suicide attempt alone is not necessarily sufficient to establish a "bona fide doubt" as to defendant's competency to stand trial. *Here*: although defendant attempted suicide and was put on medical hold, trial court correctly concluded that defendant's suicide note reflected that he understood nature and course of proceedings against him; court was under no obligation to make competency determination because defense failed to raise a "sufficient doubt" regarding defendant's competency.

People v. Mondragon, 217 P.3d 936 (Colo. App. 2009). Under *Dusky* standard for competency to stand trial, a defendant lacks the requisite rational understanding if his mental condition precludes him from accurately perceiving, interpreting, or responding to the world around him. If a defendant's mental disease or defect prevents him from rationally deciding whether to testify, thus rendering him incompetent to decide whether to exercise the right to testify, then he is incompetent to proceed at trial. Allowing an incompetent defendant to stand trial is structural error requiring reversal. *Here:* trial court failed to apply the correct legal standard because it determined only whether defendant factually understood the proceedings and could assist in his defense and cooperate with counsel but did not consider whether his perceptions and understanding were grounded in reality; remand is necessary for the trial court to determine by a preponderance of the evidence if defendant was competent, at the time he waived his right to testify.

People v. Karpierz, 165 P.3d 753 (Colo. App. 2006). The court is not required to advise a defendant per (former) §16-8-117 and People v. Branch, 805 P.2d 1075 (Colo. 1991) (right to counsel, right to remain silent, right to hearing) before ordering defendant to submit to a postconviction retrospective competency examination; they apply only to competency determinations made during the guilt phase of a criminal trial. Defendant is not entitled to an examination by a neutral and detached psychiatric expert when he claims, in a Crim.P. 35(c) motion, that he was incompetent at the time of his plea. Where defendant fails to object to the court's appointment of forensic psychiatrist who previously treated defendant to perform a postconviction retrospective competency evaluation, it is defendant's burden to show the appointment undermined the fundamental fairness of the proceeding.

People v. Palmer, 31 P.3d 863 (Colo. 2001). Amnesia, in and of itself, does not constitute incompetency. Defendant must show that the amnesia renders him unable to understand the proceedings against him or to assist in his own defense, which the trial court should determine based on the totality of the circumstances. (Note: holding regarding entitlement to second competency examination superseded by statutory amendments.)

People v. Corichi, 18 P.3d 807 (Colo. App. 2000). A hearing to retrospectively evaluate defendant's competency was meaningful - even 15 months after trial - where there was sufficient evidence to accurately assess defendant's mental condition during trial. Record supported trial court's determination that, although defendant may have been delusional for a brief period, she failed to prove by a preponderance of the evidence that she suffered from a mental disease or defect that rendered her incapable of understanding the nature of the proceedings or assisting in her defense.

People v. Tally, 7 P.3d 172 (Colo. App. 1999). Medicating defendant against his will wasn't error. Record supported the finding of a "compelling need" to order medication. Preventing the further deterioration of defendant is a sufficient ground to override defendant's wishes. *Here:* main reason to order medication was not to achieve competency to stand trial; that was merely an incidental effect. No need to instruct jury about this medication: (a) jury was aware of the medication through the evidence; (b) such an instruction would have had the effect of "directing" jury to accept a witness's view about the effects of the medication.

People v. Thomas, 962 P.2d 263 (Colo. App. 1997). Before a competency exam, a defendant should be advised that: (1) he has the right not to say anything to the psychiatrist during the evaluation; and (2) any statements he makes can be used against him in the guilt phase of trial as rebuttal or impeachment evidence, including impeachment on mental capacity. *Here:* trial court properly ordered a competency exam, *sua sponte*; even though defense attorneys did not specifically request a competency evaluation, they expressed concern that defendant might not be competent to proceed with the trial.

People v. Woods, 931 P.2d 530 (Colo. App. 1996). That defendant once had mental health treatment is not, by itself, sufficient to trigger a (*sua sponte*) inquiry into competency. *Here:* there was no indication that defendant suffered from any mental problems at the time of the pre-trial hearing; there was a reference to counseling, but that had occurred six years earlier.

Blehm v. People, 817 P.2d 988 (Colo. 1991). Incompetency is not a defense to a criminal act, but merely pertains to defendant's mental capacity to defend against criminal charges.

Insanity: §16-8-103, et.seq. & Impaired Mental Condition: §16-8-103.5, et.seq.

People v. Day, 2023 COA 115. §16-8- 107(3) distinguishes between expert testimony offered to show that the defendant could not form the requisite mental state and expert testimony offered to show that, on the occasion in question, she did not form the requisite mental state. Under the plain language of the insanity statutes, the probative effect of the mental condition evidence is what governs, not the purpose for which it is offered. Thus, trial courts must determine whether the proffered testimony relating to a mental condition is probative of, or tends to prove, insanity as statutorily defined. The court must parse any proffered mental condition evidence, line by line if necessary, to distinguish what is probative of insanity under this exacting definition from what is not. Applying this framework in People v. Moore, 2021 CO 26, the COA concluded that the court erred in denying the admission of some, but not all, of defendant's proffered expert testimony. Concluding that the evidentiary error was not harmless beyond a reasonable doubt, the COA reversed and remanded for a new trial on all counts for which defendant's culpability was at issue. *Here:* defendant asserted that her mental illness could have caused her to experience disorganized thoughts and problem-solving difficulties, which she offered to explain her detached affect and her failure to call 911 immediately after the incident. *[Cert Accepted (12/23/24) in case #24SC16: (1) Whether the court of appeals erred by holding that the trial court abused its discretion in considering respondent's non-cooperation with the court-ordered mental condition examination; (2) Whether the court of appeals improperly expanded People v. Moore, 2021 CO 26, to preclude consideration of the purpose for which mental condition evidence is offered when evaluating the admissibility of such evidence under CRE 403 (SAAG Frank Lawson)]*

Liggett v. People, 2023 CO 22. When a defendant presents psychiatric evidence supporting an insanity defense, it opens the door to the admission of psychiatric evidence rebutting that defense, even if that evidence includes defendant's voluntary but non-Mirandized statements. §16-8-103.6 waiver of privilege as to communications made by defendant to a psychologist or physician includes communications to their agents too. *Here:* because the nonphysician medical providers who testified at trial each made their observations as agents of defendant's physicians, defendant waived the privilege he shared with those witnesses.

People v. Moore, 2021 CO 26. Absent an insanity plea, the trial court must exclude any evidence that is probative of insanity, as that term has been defined by the legislature, irrespective of the ostensible purpose for which it is offered. The court must exclude parts of the proposed testimony that tend to prove defendant (a) was so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong, or (b) suffered from a condition of mind caused by mental disease or defect that prevented the defendant from forming a culpable mental state that is an essential element of a crime charged. For defendant's mental condition to implicate the statutory definition of "mental disease or defect" at the time of the offense, it must have been so severely abnormal that it grossly and demonstrably impaired defendant's perception or understanding of reality, without being attributable to the voluntary ingestion of drugs or alcohol. Court must parse any proffered mental condition evidence to distinguish what is probative of insanity under this exacting definition from what is not. *Here:* trial court's order allowing the blanket admission of mental condition evidence was vacated.

People v. Rosas, 2020 CO 22. Evidence that a mental disease/defect prevented defendant from forming the culpable mental state required by an offense is evidence relevant to the issue of insanity; it is not other mental condition evidence under §16-8-107(3). Defendant, even one charged with specific intent crimes, cannot introduce evidence that, as a result of a mental disease or defect, he was incapable of forming the requisite culpable mental state relevant to the issue of insanity without first pleading NGRI.

People v. Eastwood, 2015 COA 150. Sanity is an issue of fact for the jury; the kind/quantity of evidence of sanity which prosecution must produce to meet its burden and take the issue to the jury will vary depending on the defense evidence of insanity. If there is no evidence of insanity, prosecution need not offer any sanity evidence. To overcome token evidence of insanity, some competent lay evidence of sanity may suffice, but more evidence may be required when defendant's evidence of insanity is substantial. Jury is entitled to disregard expert opinions of insanity in favor of lay testimony supporting a contrary conclusion. In resolving the issue of sanity when the evidence is in dispute, jury must resolve any conflicts in the testimony and weigh all relevant evidence to determine whether defendant was legally insane at the time of the act. *Here:* defendant took a loaded rifle to a middle school where he shot and injured two students; jury found him NGRI on ten of eleven counts but guilty of unlawful possession of a weapon on school grounds. Sufficient evidence supported that verdict: lay testimony indicated defendant was acting rationally before bringing the gun to school, and some expert testimony suggested that defendant could appreciate the wrongfulness of his conduct at times during the day of the shooting. This provided a sufficient basis for jury to conclude beyond a reasonable doubt that defendant was sane when he arrived at the school with a rifle, even if it was not convinced beyond a reasonable doubt that defendant was sane when he actually fired the shots later that afternoon.

People v. Marko, 2015 COA 139. Under §16-8-107(1)(a) and (1.5)(a), evidence acquired for the first time from communications derived from defendant's mental processes during court-ordered examination is admissible only as to issue of insanity. *Here:* psychiatrist's testimony that opined on defendant's knowledge of the wrongfulness of his actions (which was based on defendant's statements made during the sanity examination) was improper, but was not reversible error because the improper statements were "few and relatively inconspicuous in the context of the psychiatrist's lengthy testimony;" prosecutor did not misuse the evidence during closing argument; and court instructed jury that psychiatrist's statements could only be considered as to the issues raised by the insanity plea. State psychiatrist's testimony that defendant was malingering his amnesia symptoms and psychiatrist did not "believe" defendant's version of events was not improper as it directly addressed the issues raised by the insanity plea. The testimony also did not violate the rule that a witness may not opine as to whether another witness was telling the truth on a specific occasion, as psychiatric evaluation is "necessary to establish a firm factual basis" for the sanity opinion and is a "critical part of the experts' evaluation." NGRI statutes, which require a unitary trial on the issues of sanity/guilt, do not violate defendant's

due process rights and privilege against self-incrimination, as jury is instructed that evidence first acquired from defendant during court-ordered examination may only be used to establish defendant's sanity/insanity. NGRI statutes do not impermissibly require defendant to choose between incriminating himself or forfeiting an insanity defense, nor do they compel defendant to make involuntary statements.

People ex rel. A.A., 2013 CO 65. Trial court ruled that it would allow juvenile to introduce testimony from his psychological expert without regard for court-ordered examination mandated by §16-8-107; because C.R.C.P., Title 16, expressly provides that it will not apply to proceedings under Children's Code except as specifically set forth in Criminal Procedure Code, and because no provision of the Criminal Procedure Code suggests that §16-8-107 was intended to apply to proceedings under Children's Code, the court-ordered examination cannot apply to delinquency proceedings.

People v. Voth, 2013 CO 61. Defendant who is found to be legally insane at the time of an offense, but who regained sanity shortly, thereafter, may assert insanity as an affirmative defense if he/she meets all of the other relevant requirements; that is, the general insanity affirmative defense contemplates both temporary and long-term insanity.

People v. Herdman, 2012 COA 89. If defendant's pleas or filings at any stage trigger court-ordered mental exam, exam may be admitted to rebut defense evidence of mental condition, even if defense theory ultimately chosen would not trigger a court-ordered exam. (§16-8-107(1)(a); (1.5)(a); 107(3)(b)). When defendant gives notice of intent to introduce mental-condition evidence for some purpose other than to establish legal insanity, §16-8-107(3)(b) authorizes court-ordered mental exam and allows prosecution to admit evidence of defendant's communications during such exam to rebut defense expert's opinion on defendant's mental condition. As used in statute, "mental condition" is broadly interpreted to include learning disabilities, clinical depression, anxiety disorder, and involuntary intoxication. *Compare People v. Garcia*, 113 P.3d 775 (Colo. 2005)(assertion involuntary intoxication does not mandate court-ordered exam).

People v. Bondurant, 2012 COA 50. Statutory scheme requiring defendant to undergo a psychiatric examination if he intends to introduce expert mental-condition testimony does not violate constitutional privilege against self-incrimination or due process (by prohibiting calling of witnesses to establish a defense); statutory requirement does not preclude a line of defense; it only requires defendant to comply with the statute if he chooses to pursue it.

People v. Wilburn, 2012 CO 21. Defendant may introduce mental condition evidence that does not rise to the level of the affirmative defense of insanity/IMC without pleading NGRI - such as to show factually that he did not form the requisite mens rea on the occasion in question (as opposed to showing he lacked the capacity to do so) - pursuant to §16-8-107(3)(b). He must comply with the notice and exam requirements of that statute. *Here:* expert testimony concerning defendant's learning disability, offered to support mistake of fact defense to show that he did not form requisite mens rea, was properly offered as mental condition evidence pursuant to §16-8-107(3)(b) and did not require that defendant plead NGRI. While defendant must provide adequate notice and submit to a court-ordered examination, trial court has discretion to specify the place and period of time for the exam based on the nature of the defense.

People v. Laeke, 2012 CO 13. When defendant has entered NGRI plea and prosecution concedes defendant was insane at the time he committed the offense, defendant has neither a statutory nor constitutional right to jury trial on affirmative defense of insanity of the merits of the charged offense. Fact that NGRI plea was entered upon motion of defense counsel, and over defendant's personal objection, does not change this result. Sixth Amendment of the U.S. Constitution right to a jury trial is not violated when court finds defendant NGRI based on defendant's affirmative defense of insanity. The right to a jury trial requires that convictions rest upon jury determination that defendant is guilty of every element of a crime. NGRI judgment does not constitute a

conviction but operates as an acquittal of charged offenses. Trial court is required to hold PH prior to the entry of NGRI plea §16-8-103(3) if there has been no GJ indictment or PH prior to the plea. This mandatory hearing operates as a "check" on the People by requiring that there be some showing of evidence that the accused committed the acts alleged before NGRI proceedings may begin. In creating unitary trial system for NGRI, it was not legislature's intent to create a substantive right to jury trial; purpose was to create a unitary trial to replace the former system of bifurcated trials when affirmative defense of insanity is raised.

People v. Gonzales-Quevedo, 203 P.3d 609 (Colo. App. 2008). By statutory definition, proof that defendant suffered only from antisocial personality disorder is relevant to rebut a NGRI defense. Prosecution's rebuttal of NGRI defense is not limited solely to presenting evidence that directly disproves the disorder claimed by defendant, and prosecution may properly present alternative explanations of defendant's behavior. Where defendant enters NGRI plea and prosecution contends defendant suffers from antisocial personality disorder, expert witness may testify regarding defendant's prior antisocial behavior where such activities formed basis for expert's opinion.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). "Settled insanity" is "insanity arising from the long-term use of intoxicants but separate from immediate intoxication." Although settled insanity is not a recognized defense (and an instruction on such a defense is not permissible), it is unclear whether evidence probative of settled insanity is admissible to show insanity as defined by legislature. Trial court is not required to make an explicit finding that the presumption of sanity was rebutted, nor is it required to instruct the jury as such, before it allows expert testimony on the issue of defendant's sanity. *Here*: defendant's proposed expert testimony did not establish that his long-term drug use, when viewed together with evidence of his other mental illnesses, rendered him incapable of distinguishing right from wrong; it was unnecessary to address whether evidence of settled insanity would establish the affirmative defense of insanity, and trial court did not abuse its discretion in excluding the evidence. Jury was adequately instructed on prosecution's burden to disprove the affirmative defense of insanity where jury was instructed that: prosecution bore the burden to prove the existence of all the elements necessary to constitute the crime charged, including the culpable mental state; insanity is an affirmative defense to all crimes charged; prosecution has burden of proving defendant's guilt as to the affirmative defense, as well as to the elements of crime charged; and prosecution must prove that elements of each crime were committed without the affirmative defense of insanity. Court properly instructed jury on limited use of sanity evidence under §16-8-107(1)(a), as advised jury that the evidence could only be used on the issues raised by defendant's NGRI plea. Court was not required to instruct jury using language in subsection (1.5)(a), which provides essentially the same protection. In order to preserve privilege against self-incrimination, evidence derived from court-ordered sanity examinations may only be used to determine defendant's capacity to form requisite mental state. Jury was instructed that "after considering the evidence concerning the affirmative defense with all of the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant's guilt you must return a verdict of not guilty." This instruction "could have indicated to a juror that it was permissible to consider evidence from the insanity defense in conjunction with the determination of defendant's guilt." However, jury was also instructed several times that physicians' testimony could only be considered regarding issues raised by defendant's NGRI plea. Jury instructions, as a whole, adequately instructed jury on the proper use of the sanity evidence. Defense is not entitled to use statements made for the first time during court-ordered examinations as they favor the defense for the purpose of showing his innocence. Court properly rejected defendant's proposed instruction which would have advised jury that it could "use [the physician's] testimony as it favors the defense for any purpose."

People v. Flippo, 159 P.3d 100 (Colo. 2007). Defendant is entitled to present evidence in his defense, but manner of that presentation may be controlled by statute; defendant who wishes to present evidence of his mental condition must comply with §16-8-107(3)(b) by providing notice and permitting court-ordered

examination before offering expert testimony. Defendant who seeks to present expert evidence of his mental retardation to show that he was highly suggestible (and thereby challenge credibility of his inculpatory statements to police) must comply with §16-8-107(3)(b). The term "mental condition" in §16-8-107(3)(b) encompasses defendant's mild mental retardation; term "condition" is variously defined as "mode or state of being; state of health; a disease or physical ailment."

People v. Grant, 174 P.3d 798 (Colo. App. 2007). After defendant's sanity has been evaluated, court may order additional evaluations for good cause shown. Good cause occurs where a potentially new and significant diagnosis was proposed that could dramatically affect the assessment of defendant's behavior. Where defendant pleads NGRI, prosecution need not present evidence proving defendant's sanity until some credible evidence of his insanity has been admitted. If some evidence on each element of the NGRI affirmative defense has been presented during prosecution's case-in-chief—and prosecution has failed to present any evidence that defendant was sane— defendant is entitled to a directed verdict. De novo is the standard of review for determining whether sufficient evidence was presented to support the NGRI defense. Defendant may not claim that he was insane because of a mental state he contracted through his voluntary use of intoxicants. Evidence from court-ordered sanity examinations may only be used to determine whether defendant had the capacity to form the required mental state during the commission of the crime. Testimony about whether defendant was "able to" or "could" form a culpable mental state is permissible. Because defendant's sanity is not an element of an offense, the right against self-incrimination is not implicated by testimony about his refusal to answer questions during a sanity evaluation. Even in a case where defendant cannot claim that he was insane due to self-induced intoxication, if evidence shows that his level of intoxication led him to believe that he was killing or assaulting demons, dragons, or the devil—as opposed to killing or assaulting humans—then the evidence is insufficient. The imposition of life imprisonment on defendant who, because of his drug use, could not distinguish between right and wrong at the time he committed his crimes, does not violate prohibition against cruel and unusual punishments.

People v. Vanrees, 125 P.3d 403 (Colo. 2005). Evidence of mental slowness is admissible where it is offered to negate the culpable mental state of crime charged. Where evidence of mental impairment is not offered to excuse or to justify criminal conduct and no claim is made that defendant's mental slowness constitutes a "mental disease or defect" within the definition of that term in the statutes, evidence of mental impairment may be offered to negate mental culpability. Although defendant has a constitutional right to offer evidence to contest the culpable mental state of a crime, he is not allowed to present evidence in support of an affirmative defense when such defense has not been raised in accordance with applicable statutory requirements. It is within legislature's authority to formulate statutory affirmative defenses, or defenses based on principles of justification or excuse, and place appropriate limitations on the assertion of those defenses. Evidence offered in support of NGRI plea has a legally distinct purpose from that of evidence offered to negate a culpable mental state. NGRI plea is analogous to the common law plea of confession and avoidance; person found to be legally insane is absolved of responsibility for all crimes including those that do and those that do not require proof of a culpable mental state. Where defendant presents evidence to negate the culpable mental state of crime charged, this evidence does not necessarily absolve him of criminal responsibility.

People v. Riggs, 87 P.3d 109 (Colo. 2004). Person acquitted by reason of insanity is committed to State Hospital until, and unless, he becomes eligible for release. In the interim, State Hospital may authorize his temporary supervised or unsupervised removal, pursuant to §16-8-118, unless defendant or prosecution objects. When any party objects, trial court must conduct a hearing, and no removal is permitted unless court grants approval. In conducting that hearing, no party bears the burden of proof, and court's decision is entrusted to its sound discretion, guided only by the balancing of the statutory factors: defendant's need for treatment involving such removal, and safety of the public.

People v. Welsh, 80 P.3d 296 (Colo. 2003). Defendant's failure to respond to questions, at the scene and hospital, regarding the shooting that took place several hours earlier was neither material nor probative of her sanity and should have been excluded under CRE 401. Under CRE 403, unfair prejudicial impact of admitting the testimony so far outweighed any minimal probative value that trial court abused its discretion in admitting the evidence.

People v. Roadcap, 78 P.3d 1108 (Colo. App. 2003). Defendant who seeks to put in evidence that he was suffering from an organic condition that affected his mental state immediately after commission of the crime must comply with §16-8-107(3)(b).

People v. Anderson, 70 P.3d 485 (Colo. App. 2002). Although defendant ordinarily has a fundamental personal right to determine the nature of his/her defense and to choose which plea to enter, that principle does not apply to assertion of NGRI plea where there is simply no proffered evidence which would support an insanity plea and defense. *Here:* trial court's imposition of strict deadlines for defense to disclose expert witness reports did not improperly prevent defendant from presenting insanity defense, where (1) trial was twice continued for nearly 7 months to allow defense an opportunity to obtain expert witnesses; (2) defense counsel had contacted 12 experts, none of whom could support an NGRI defense; and (3) nothing indicated any likelihood that an expert to support NGRI defense could be obtained. Shortly before trial, after months of unsuccessfully trying to procure evidence to support an insanity defense, defense counsel, contrary to his client's wishes, asked the court to withdraw defendant's NGRI plea and substitute a straight "not guilty" plea. Finding that there was "no credible evidence of insanity," the court withdrew the NGRI plea over defendant's protest.

People v. Freeman, 47 P.3d 700 (Colo. App. 2001). Pursuant to §16-8-107(1.5)(a), evidence acquired directly or indirectly for the first time from communication derived from defendant's mental processes during the course of a court-ordered examination...is admissible only as to the issues raised by defendant's NGRI plea, and jury, at the request of either party, shall be so instructed. Where there is no request for a limiting instruction, trial court does not err in failing to give one.

Hendricks v. People, 10 P.3d 1231 (Colo. 2000). Where defense counsel seeks to enter an insanity plea over defendant's objection, trial court must balance: (1) public interest in ensuring that defendant who lacked the mental capacity to commit the crime is not wrongfully convicted against, and (2) defendant's interest in controlling her own defense. To do this, trial court must determine whether defendant's reasons for attempting to forego the mental status defense satisfy a basic rationality inquiry when balanced against defendant's state of mind at time of the offense.

People v. Ullery, 984 P.2d 586 (Colo. 1999). When defendant asserts insanity/IMC, he waives his psychologist-physician privilege. DA can obtain the records/reports of any expert who has examined defendant or who is endorsed to testify. But this waiver does not extend to attorney "work-product." When defense asserts that doctor's file contains work product, trial court should conduct an in-camera review and excise portions of documents that record the mental processes of defense counsel. *Here*: defense counsel abandoned work-product claim by failing to make a record that would enable review.

People v. Tally, 7 P.3d 172 (Colo. App. 1999). Presenting evidence of defendant's non-cooperation with insanity examination does not violate his right against self-incrimination. Lay witness may express an opinion as to the sanity of another. *Here:* trial court did not abuse its discretion allowing witness to express opinion that defendant was sane 9 days before the murder, or even 3 months before. Trial court's instructions on "deific delusions" and the effects of a verdict of NGRI were sufficient.

People v. Bielecki, 964 P.2d 598 (Colo. App. 1998). Insanity comprises traditional insanity and the former defense of impaired mental condition. The issue of insanity is tried together with a determination of guilt or

innocence. The affirmative defense of insanity must be raised by specific plea at the time of the arraignment. However, for good cause shown, the plea may be entered at any time prior to trial. The court must advise defendant of the consequences of the plea. When defendant pleads insanity, he waives his right to claim the attorney-client and psychologist-patient privileges, and consents to disclosure of pre- or post-offense information about his medical condition. In jury instructions: (1) no error in instructing that if jury convicts defendant of any one or more charge, it does not need to answer interrogatories (purpose of interrogatory is to determine whether acquitted defendant should be released outright or committed for treatment), and (2) instruction on presumption of sanity does not impermissibly shift burden of proof.

People v. Lowe, 967 P.2d 177 (Colo. App. 1998). After defendant has been adjudicated insane, he has a right to a hearing in two situations: (1) when he would like to be released, but the Department of Human Services disagrees; (2) when the Department would like to release him to DOC, but he'd prefer to stay.

DISCOVERY

Crim.P. 16 Requirements Generally

Solano v. Newman, 2024 COA 93. COA addresses the remedial actions a DA may take to ensure that he complies with Crim.P. 16(I)(b)(4) which requires that a prosecutor "shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged." Because a law enforcement agency had engaged in a pattern and practice of not timely disclosing Rule 16 compliant information to the prosecutor over several years and numerous criminal prosecutions (many of which were dismissed based on discovery issues), it was appropriate under the circumstances for the prosecutor to obtain declaratory and injunctive relief to ensure the law enforcement agency timely provides Rule 16 compliant information.

People v. Walthour, 2023 CO 55. Rule 16 does not permit a trial court to suppress the results of a blood alcohol test when no trial has been set and the prosecution has not yet received the results of the test from the Colorado Bureau of Investigation. The Court exercised its jurisdiction in this C.A.R. 21 proceeding because: (1) the People had no adequate appellate remedy; and (2) the Court had not yet considered the boundaries of a trial court's ability to order expedited disclosure of a CBI toxicology report in the absence of a Rule 16-imposed deadline. After determining that the trial court cannot base its suppression order on Crim.P. 16(I)(b)(3), Crim.P. 16(I)(b)(4), or the court's inherent power to regulate discovery, the Court makes absolute the rule to show cause, reverses the trial court's suppression order, and remands for further proceedings consistent with this opinion.

People v. Kilgore, 2020 CO 6. Trial court was devoid of authority to require defendant to disclose his exhibits to the prosecution before trial because nothing in discovery rule permitted the court to do so. *Here:* trial court erred in ordering the parties to exchange exhibits 30 days prior to trial.

People v. Corson, 2016 CO 33; U.S. v. Ruiz, 536 U.S. 622 (2002) - there is no constitutional duty to disclose material impeachment evidence when defendant pleads guilty - is not restricted to "fast-track" guilty pleas. *Here: Ruiz* holding applied to the prosecution's inadvertent non-disclosure of victim's prior false-reporting adjudication; defendant's guilty plea was not involuntary or a violation of due process; juvenile adjudications are not "criminal convictions" and not part of a witness's criminal history, and not subject to automatic disclosure under Crim.P. 16(I)(a)(1)(V).

People v. Ramos, 2012 COA 191, aff'd other grounds, 2017 CO 6. Crim.P. 41.1 applies only to requests for nontestimonial identification evidence made before police have probable cause to make an arrest; once

defendant arrested and charged, Crim.P. 16(II)(a)(1) applies; Crim.P. 16 does not require affidavit/special circumstances before trial court may order defendant to provide such evidence.

People v. Ray, 252 P.3d 1042 (Colo. 2011). Defendant's right to know witness's identity/address can be limited where DA demonstrates that revealing such information would endanger witness's safety, and there is nexus between defendant and the danger; if defendant shows some materiality in witness's name/identity, court must balance the threat against the materiality in order to determine whether to reveal that information. *Here:* where an eyewitness was killed to prevent him from testifying at defendant's trial, trial court abused its discretion in ordering disclosure where DA demonstrated, and trial court found an extraordinary and compelling threat to witness safety and defendant had made minimal showing of materiality.

People v. Jimenez, 217 P.3d 841 (Colo. App. 2008). Defendant's records from Pikes Peak Mental Health, which were obtained by prosecution absent written consent form that comported with requirements of federal statutes, were not improperly acquired because they qualified as a report of child abuse, which is excluded under federal statutes. Any illegality in disclosure for failing to comply with statutory requirements does not require suppression, but rather, at most, a fine.

People v. Armijo, 179 P.3d 134 (Colo. App. 2007). DA not required to disclose derivative trial exhibits that are identical in content to and were prepared from discoverable material.

People v. Ellis, 148 P.3d 205 (Colo. App. 2006). Defendant moved shortly before trial for order allowing him to collect additional physical evidence that was located in his former home; court properly denied motion because further delay of trial would not be in interest of justice.

People v. Verbrugge, 74 P.3d 429 (Colo. App. 2003). In light of purpose of Crim.P. 16 to ensure a fair trial, §18-6-403(3)(b), sexual exploitation of a child, does not apply to duplication of photographs for use by defense counsel in preparation for trial when court takes adequate precautions to limit their use. *Here*: court prohibited defense counsel from disseminating/copying/leaving material in defendant's possession and required that at conclusion of case the photographs be returned to court for destruction.

People v. White, 64 P.3d 864 (Colo. App. 2002). Defendant filed a motion for discovery of all other burglary incidents in county in prior 2 years; trial court partially granted it but denied it as to incidents that did not involve defendant or another suspect. *Here:* ruling proper because defendant failed to show the relevance/exculpatory value of such a broad discovery request.

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). Neither prosecutor nor court has duty to make witness speak with defense counsel; witnesses have choice whether to speak with counsel, except when depositions are permitted; depositions require an allegation that the witness is unable to attend trial.

Experts

People v. Greer, 262 P.3d 920 (Colo. App. 2011). While it might have been better practice to identify endorsed witness as an expert prior to trial, Crim.P. 16(I)(d)(3) does not require it.

People v. Anderson, 70 P.3d 485 (Colo. App. 2002). Trial court's imposition of strict deadlines for defense to disclose expert witness reports did not improperly prevent defendant from presenting insanity defense, where: (1) trial was twice continued for nearly 7 months to allow defense opportunity to obtain expert witnesses; (2) defense counsel contacted 12 experts, none of whom could support NGRI defense; and (3) it appeared unlikely that defendant could obtain expert to support NGRI defense.

People v. Avila, 944 P.2d 673 (Colo. App. 1997). Neither Crim. P. 16(II) (c) nor §16-5-203 requires the prosecution to endorse rebuttal witnesses; testimony of an unendorsed expert rebuttal witness is admissible when offered solely to impeach the credibility of a defense witness, or to question the analysis of a defense

expert. *Here*: the expert witness - a police officer - was properly directed to specific points of the opinion testimony offered by defendant's accident-reconstruction expert. Because the need for this witness was unknown until mid-trial, the prosecution was not required to disclose the identity of the witness any earlier than practicable.

Witness Statements

People v. Grant, 2021 COA 53. Crim.P. 16 requires the prosecution to disclose any statements of defendant made to the police or prosecution, including statements "in the possession or control" of "any others" who have been part of a case's investigation and who, "with reference to the particular case[,] have reported" to the prosecution. *Here:* prosecutors were required to disclose a written report containing a statement defendant made to an out-of-state police officer during his post-arrest booking.

People v. Herdman, 2012 COA 89. Prosecution witness opined defendant did not serve in Iraq, based on an unrecorded phone call from defendant's commanding officer. *Here:* assuming without deciding that prosecution was required to disclose testimony, its failure to do so was not prejudicial, because defendant rebutted it with documentary evidence that he served in Iraq.

People v. Vlassis, 247 P.3d 196 (Colo. 2011). Exculpatory witness statements included in prosecution's notes/emails are automatically discoverable under Crim.P. 16(I)(a)(2); all other such statements may be discoverable under (II)(d)(1), but only if trial court determines the information sought is relevant, unavailable from any other source, and defense request is reasonable.

People v. Denton, 91 P.3d 388 (Colo. App. 2003). Crim.P. 16(I)(a)(1)(I) only requires DA provide defense with written statements of witnesses or any written reports that quote/summarize oral statements made by witnesses. *Here:* in DA's rebuttal case, victim testified defendant's ex-wife tried to persuade her to drop charges and testify falsely; she also testified that she reported this incident to the police; defendant objected to this rebuttal testimony, arguing prosecution committed discovery violation by failing to disclose substance of conversation between victim and ex-wife. COA found defendant failed to show that police officer to whom victim spoke ever prepared written report about conversation.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). Victim's son gave statement that contradicted earlier statements; although not clearly exculpatory, any significant change in testimony is potentially exculpatory, to extent it bears on credibility. DA violated Crim.P. 16, by failing to disclose the change until trial; trial court's cautionary instruction was sufficient as tacit sanction.

Criminal Histories

People v. Villano, 181 P.3d 1225 (Colo. App. 2008). DA filed memorandum under seal regarding its knowledge of federal criminal case against man who was arrested with defendant, but not charged with any offense; defendant demanded access to memo, believing man was federal informant and information would support an entrapment defense; trial court's refusal to provide memo to defense was proper because evidence was not exculpatory and did not support defendant's entrapment theory.

People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). DA failure to disclose criminal history of witness was not misconduct where witness's prior felony conviction was under different name and could not be discovered through NCIC/Blackstone; DA was not required to interview witness for purpose of ascertaining information helpful to defense; DA's failure to disclose pending juvenile robbery case against witness, which was relevant to witness's bias, prejudice, and motive for testifying, was reversible error.

People v. Carlson, 72 P.3d 411 (Colo. App. 2003). DA had no responsibility under Crim.P. 16(I)(a)(1)(V) to provide defendant with criminal history of defense witness.

Suppression & Destruction of Evidence

People v. Braunthal, 31 P.3d 167 (Colo. 2001); People v. Greathouse, 742 P.2d 334 (Colo. 1987). Prosecution's suppression of evidence favorable to accused violates due process where evidence is material either to guilt or punishment, irrespective of the prosecutor's good/bad faith. Brady v. Maryland, 373 U.S. 83 (1963). Impeachment evidence falls within this rule. U.S. v. Bagley, 473 U.S. 667 (1985). Elements of a *Brady* claim are: (1) prosecution suppressed or destroyed evidence; (2) evidence had exculpatory value that was apparent before it was lost/destroyed; (3) defendant was unable to obtain comparable evidence by other reasonably available means; and (4) there is "reasonable probability" that missing evidence would have changed outcome of trial.

People v. Wyman, 788 P.2d 1278 (Colo. 1990); Arizona v. Youngblood, 488 U.S. 51 (1988). Failure to preserve evidentiary material "of which no more can be said that it could have been subjected to tests" is not due process violation unless accused can show bad faith by police.

People v. Young, 2014 COA 169. Under §18-1-1102(1)(b) and §18-1-1103(2), law enforcement agency that collects DNA during sexual offense criminal investigation must preserve that evidence for remainder of defendant's life if convicted. For §18-1-1104(4) destruction of evidence claim, defendant must show that destruction violated his due process rights: (1) evidence was suppressed/destroyed by state; (2) evidence possessed an exculpatory value that was apparent before it was destroyed; and(3) defendant was unable to obtain comparable evidence by other reasonably available means. Absent showing of bad faith by police, failure to preserve potentially useful evidence does not constitute denial of due process: (1) "negligent destruction" of evidence cannot constitute a due process violation; (2) evidence that is "potentially useful" does not show that it had "apparent exculpatory value" when it was destroyed; (3) due process clause does not require state to preserve evidence which "might" be favorable to accused where "no more can be said than it could have been subjected to tests." *Here:* trial court properly denied defendant's motion based on alleged destruction of DNA evidence because (1) evidence was subjected to testing in 2007 that yielded no exculpatory information; and (2) defendant's DNA expert acknowledged that even if "touch DNA" was found, there would be no way of knowing whether that DNA was deposited by assailant or someone else who handled evidence subsequent to the 1998 crime.

People v. Eason, 2022 COA 54. In determining the appropriate remedy for the state's delay in producing evidence that amounts to a due process violation, a court should consider: (1) the reason for the delay in providing the requisite discovery; (2) any prejudice a party has suffered as a result of the delay; and (3) the feasibility of curing such prejudice by way of a continuance or recess in situations where the jury has been sworn and the trial has begun. *Here:* defendant failed to establish that deputy's bodycam recording of his discussion with victims and their mother had exculpatory value before sheriff's department negligently destroyed it in violation of their own three-year document retention policy; defendant's assertion that the recording had apparent exculpatory value as the only reasonably available means of testing victims' credibility was conclusory and speculative.

People v. Bueno, 2018 CO 4. To prove *Brady* violation, defendant must show prosecution suppressed material evidence that was exculpatory/favorable to him. *Here:* in prison murder case, prosecution violated *Brady* by not turning over to defense 2 investigative reports prosecution possessed shortly after crime that could have supported an alternate suspect defense; did not matter that reports were contained among large numbers of prison incident reports to which defense was given access.

People v. Abdu, 215 P.3d 1265 (Colo. App. 2009). Where defendant cannot demonstrate apparent exculpatory value of destroyed evidence, he must show it was destroyed in bad faith. COA declined to adopt broader standard where "negligent destruction" would constitute due process violation. *Here*: jail's videotape recording of incident was automatically recorded over by jail's recording system; defendant, who was unable to show that recording had apparent exculpatory value, did not establish due process violation because there was no bad faith.

People v. Wartena, 156 P.3d 469 (Colo. 2007). Trial court abused its discretion when it committed to ordering suppression of DNA results for testing that had not yet been conducted unless prosecution agreed to pay expense of defense expert and/or CBI agreed to permit videotaping. CSC affirmed trial court's broad authority to oversee preservation of evidence, adopting ABA Criminal Justice Section Standard 3.4(e) authorizing trial court to require procedures that permit independent evaluation of analysis (including but not limited to videotaping preparation and testing).

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). *Youngblood* did not eliminate *Trombetta*'s "irreplaceability" requirement; defendant must show that any exculpatory information in destroyed evidence could not be obtained from other sources. *Here*: 1997 videotaped interviews were destroyed after sexual assault charges involving those victims were dismissed; DA sought to admit victims' 2003 trial testimony as "other act" evidence; court found no due process violation; defense did not show: (1) tapes had apparent exculpatory value regarding charged offenses involving these victims; (2) prosecution acted in bad faith when it destroyed tapes pursuant to routine practice after charges were dismissed, or (3) any exculpatory information contained on videotapes could not be obtained through other sources.

People v. Baca, 109 P.3d 1005 (Colo. App. 2004). Wallet found in car search was returned to defendant's wife; assuming without deciding, that this constitutes destruction of evidence by state action, wallet was not apparently exculpatory when destroyed, and defendant made no showing of bad faith.

People v. Simpson, 93 P.3d 551 (Colo. App. 2003). Failure to preserve potentially exculpatory evidence is not a due process violation absent showing of bad faith by police. *Here:* where defendant failed to establish bad faith or that evidence had apparent exculpatory value before it was destroyed, trial court did not err in denying motion to dismiss.

People v. Trujillo, 62 P.3d 1034 (Colo. App. 2002), rev'd other grounds, 83 P.3d 642 (Colo. 2004). As sanction for losing audiotape of hostage negotiations, court properly instructed jury regarding defendant's version of what tape included, and defendant was entitled to elicit testimony that tape was made and subsequently lost; loss of tape was not due process violation because there was no credible evidence that tape had exculpatory value.

In re Attorney C, 47 P.3d 1167 (Colo. 2002). Rule of Professional Conduct 3.8(d) requires prosecutors to disclose constitutionally material exculpatory evidence, including impeachment evidence, to defense in advance of any critical stage of proceeding; an intentional non-disclosure is ethical violation.

People v. Braunthal, 31 P.3d 167 (Colo. 2001). After viewing surveillance video at police station, witness tried to rewind tape and VCR "ate" it; trial court suppressed testimony as sanction for destruction of the tape. *Here:* although evidence was lost/destroyed by state, no due process violation; videotape was not exculpatory because it did not suggest an innocent explanation for defendant's actions and because still photographs were made, defendant had "comparable evidence" that could serve same purpose as videotape.

People v. Kearns, 988 P.2d 189 (Colo. App. 1999). In vehicular assault/DUI, trial court did not err in denying motion to dismiss based on failure of investigating officers to obtain blood sample from unconscious victim for alcohol testing.

People v. Barrientos, 956 P.2d 634 (Colo. App. 1997). Police released defendant's truck and its contents to lienholder. No violation of due process: (1) defendant was arrested when police found drugs in water-bottle located under spare tire; (2) truck and contents had no apparent exculpatory value when released; (3) truck, tire, and water-bottle were mass-produced products, so replacements could be obtained for demonstration purposes.

Sanctions

People v. Eason, 2022 COA 54. In determining the appropriate remedy for the state's delay in producing evidence that amounts to a due process violation, a court should consider: (1) the reason for the delay in providing the requisite discovery; (2) any prejudice a party has suffered as a result of the delay; and (3) the feasibility of curing such prejudice by way of a continuance or recess in situations where the jury has been sworn and the trial has begun. *Here:* defendant failed to establish that deputy's bodycam recording of his discussion with victims and their mother had exculpatory value before sheriff's department negligently destroyed it in violation of their own three-year document retention policy; defendant's assertion that the recording had apparent exculpatory value as the only reasonably available means of testing victims' credibility was conclusory and speculative.

People v. District Court, 793 P.2d 163 (Colo. 1990). Although lack of knowledge or good faith is no defense to charge of suppressing exculpatory evidence, it is a consideration in fashioning appropriate remedy; when there is no willful violation, and when a continuance would substantially cure any prejudice, sanction of excluding evidence may constitute an abuse of discretion.

People v. Pronovost, 773 P.2d 555 (Colo. 1989); People v. Cobb, 962 P.3d 944 (Colo. 1998). There is a 5-part test to determine constitutional limits of discretion to exclude relevant/competent defense expert evidence when defendant fails to timely endorse expert witness: (1) the reason for late endorsement and defendant's culpability; (2) prejudice to prosecution in preparing for trial; (3) whether events after defendant's noncompliance mitigate prosecution's prejudice; (4) whether there is a less drastic alternative than preclusion; and (5) any other relevant factors.

People v. Whittington, 2024 CO 65. The county court abused its discretion by excluding late-disclosed evidence from a preliminary hearing as a Rule 16 violation sanction; because the court did not find the late disclosures were willful violations or that there was a pattern of violations, the punitive/deterrent sanction of exclusion of evidence was inappropriate where a continuance would have sufficed to cure any prejudice.

In re People v. Tippel, 2023 CO 61. In this Rule 21 appeal, CSC addressed whether the trial court erred by reducing defendant's charge from first-degree to second-degree murder as a sanction for discovery violations. CSC concludes that while this type of sanction is a disfavored remedy reserved for rare cases, the trial court did not abuse its discretion by using it as a deterrent given DA's two-year long pattern and practice of neglect of its discovery obligations that persisted, notwithstanding repeated admonitions by multiple judicial officers in the 11th Judicial District, and the imposition of many and varied sanctions against the office on numerous documented cases.

People v. Mendez, 2017 COA 129. Discovery sanction was inadequate in this case because defendant was given no opportunity to cross-examine CI about whether he believed he would receive immigration support from Homeland Security for his willingness to participate in controlled buy; due to the overwhelming evidence of

guilt, any error was harmless.

People v. Acosta, 2014 COA 82. There is no willful misconduct where prosecutor provides evidence to defense as soon as he becomes aware of it; violation of discovery rules is not reversible error without a showing of prejudice; and there is no prejudice from late disclosure where defendant received evidence before trial began, was offered more time to review it, refused a continuance, and People ultimately did not use the information at trial.

People In the Interest of A.D.T., 232 P.3d 313 (Colo. App. 2010). Where the juvenile court has performed an in-camera review of materials sought by the defense and has made disclosure determinations that are properly challenged on appeal, the right to meaningful review requires that the appellate court conduct independent in camera review. A trial court's erroneous failure to disclose documents does not, in and of itself, establish prejudice or reversible error. To obtain a new trial for a discovery violation, defendant must show a reasonable likelihood that the verdict would have been different had the pertinent information been disclosed before trial. *Here*: the case was remanded for the juvenile court to consider, among other things: whether the records would have been admissible under the rape shield statute; whether the records would have been admissible under CRE 403; and whether the defense knew, or could reasonably have discovered elsewhere, the information contained in the undisclosed records.

People v. Perez, 201 P.3d 1220 (Colo. 2009). When sanctioning prosecutors for discovery violations, courts must impose least restrictive sanctions that preserve truth-finding process, restore level playing field, and deter prosecutorial misconduct; disqualification of DA's office is not least restrictive sanction.

People v. Moore, 226 P.3d 1076 (Colo. App. 2009). When prosecution's discovery violation was inadvertent and there was no evidence of pattern of discovery violations, trial court abused its discretion in dismissing burglary/criminal mischief counts as sanction for prosecution's inadvertent discovery violation; court should have sought to impose least severe sanction that could have cured any prejudice resulting from violation.

People v. Jimenez, 217 P.3d 841 (Colo. App. 2008). Defendant's records from Pikes Peak Mental Health, which were obtained by prosecution absent written consent form that comported with requirements of federal statutes, were not improperly acquired because they qualified as a report of child abuse, which is excluded under federal statutes. Any illegality in disclosure for failing to comply with statutory requirements does not require suppression, but rather, at most, a fine.

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008). To establish a due process violation for failure to preserve exculpatory evidence, defendant must show: (1) the evidence was destroyed by state action; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (3) defendant was unable to obtain comparable evidence by other reasonably available means. If the evidence was not apparently exculpatory when it was destroyed and was merely potentially useful, defendant must show that the state agents acted in bad faith.

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). Any factual insufficiency in the prosecutor's offer of proof regarding disclosure of a witness's address can be cured by the witness's trial testimony. *Here:* denial of address was upheld since the record supports a reasonable inference that the "other act" witness legitimately feared for her safety.

People v. Carmichael, 179 P.3d 47 (Colo. App. 2007), rev'd other grounds, 206 P.3d 800 (Colo. 2009). Even though trial court did not undertake analysis required under *Pronovost*, record supported trial court's decision to exclude unendorsed defense witness; defendant violated discovery rules by late endorsement, did not explain why witness was not endorsed, and witness would have provided only cumulative testimony.

People v. Ellis, 148 P.3d 205 (Colo. App. 2006). Limiting testimony of defendant's expert witness to topics covered in pretrial notice did not deprive defendant of his right to present defense; expert was still able to testify regarding aging of DNA samples, so defendant suffered no prejudice.

People ex rel D.S.L., 134 P.3d 522 (Colo. App. 2006). Trial court appropriately concluded that one-day recess in proceedings was adequate remedy for late disclosure of photographs/videotape which were in police department internal affairs file.

People v. Daley, 97 P.3d 295 (Colo. App. 2004). Because trial court found that neither prosecution nor state patrol acted in bad faith/willful violation of Crim.P. 16 in mislaying victim's clothing until a week before trial, sanction that was tantamount to dismissal by excluding evidence of victim's clothing, bumper from Defendant's vehicle, and color of defendant's vehicle as wells as testimony from 9 state patrol officers was error.

People v. Copeland, 976 P.2d 334 (Colo. App. 1998). Forensic evidence, linking defendant to a prior offense, was disclosed late. As a remedy, the court ruled that the defense would be able to interview the forensic witness before he testified, and it ordered the prosecution to provide any other materials that it had. *Here:* The trial court acted within the bounds of its discretion in choosing this approach instead of excluding the evidence.

People v. Cobb, 962 P.2d 944 (Colo. 1998). Exclusion is a drastic remedy and is strongly disfavored. *Here:* court abused its discretion by failing to apply *Pronovost* test where defense counsel deliberately withheld evidence until his case-in-chief; as sanction for the willful misconduct, trial court excluded the evidence.

People v. Lowe, 969 P.2d 746 (Colo. App. 1998). Dismissal of charges is not required absent prejudice to defendant. *Here*: prosecution learned just before trial that its witness (a veterinarian) would give an expanded estimate of the time during which horse was stabbed; prosecution failed to disclose the change, but there was no prejudice: (1) DA did not rely on expanded estimate in argument; and (2) defendant had no witnesses to support his alibi, even for the more limited time period.

People v. Lopez, 946 P.2d 478 (Colo. App. 1997). Trial court could not exclude defense evidence as sanction for discovery violation merely because actions of other defense lawyers in unrelated cases appeared to constitute a pattern of misbehavior; it is appropriate to sanction only for behavior of particular lawyer.

Attorney-Client Privilege Crim.P. 16(I)(e)(1)

People v. Angel, 2012 CO 34. The protection from disclosure of prosecutorial work product extends to opinion work product prepared by the prosecution in anticipation of any criminal prosecution, not merely the particular prosecution in which the request for disclosure is made. Work-product doctrine is an intensely practical one, grounded in the realities of litigation in the adversary system, and further, the doctrine is firmly rooted in a pragmatic understanding that a rule allowing for the discovery of work product would have a chilling effect on an attorney's incentive to analyze a case thoroughly and to memorialize that analysis in writing for later inspection and review. *Here:* CSC reversed trial court order limiting work product doctrine to only the information addressing the current case; case remanded because the trial court did not inspect the contested materials nor decide whether they constitute opinion work product prepared in anticipation of a criminal prosecution; trial court must make this determination through an ex parte, in camera review.

People v. Trujillo, 144 P.3d 539 (Colo. 2006). Defendant was implicated in armored car robbery; defense issued SDT on co-defendant counsel for copy of his file; trial court granted access, ruling that co-defendant waived attorney/client privilege by entering into plea agreement where she agreed to testify truthfully against defendant. In a Rule 21, CSC found that co-defendant had neither explicitly nor impliedly waived attorney/client privilege.

People v. Madera, 112 P.3d 688 (Colo. 2005). Assertion of IAC claim results in very narrow waiver of attorney-

client privilege limited to issues relevant to claim. Prior to ordering in camera review of documents, trial court must determine: (1) information sought; (2) whether information is relevant to issue; (3) whether information could be obtained by other means; (4) whether information is privileged; (5) whether privilege was waived; and (6) if waived, scope of waiver. *Here:* while defendant did waive attorney-client privilege with regard to advice about sentencing, trial court's order for in camera review of entire file was incorrect because: (1) entire file was not relevant to IAC claim; (2) there was no showing that prosecution could not obtain information by other means; and (3) prosecution failed to establish that there was undue hardship in obtaining information from other means.

Gall v. Jamison, 44 P.3d 233 (Colo. 2002). Under Rules of Civil Procedure, attorney work product loses its privileged status when it is disclosed to, and considered by, testifying expert.

People v. Trujillo, 15 P.3d 1104 (Colo. App. 2000). Prosecutor's *voir dire* notes are protected by work-product doctrine and not discoverable on remand for further *Batson* findings.

People v. Ullery, 984 P.2d 586 (Colo. 1999). Implicit in our rules addressing the regulation of discovery is the authority of the trial court to examine material in chambers in order to excise attorney work product to protect undiscoverable information. Such a procedure, while informed, also contemplates that the trial court will take steps to preserve confidentiality and will create a record of its orders and actions for appeal. Crim.P. 16(III)(e)(2). In addition to an in chambers or informal in camera examination, our rules permit the trial court, in its discretion, to accomplish the same examination through a formal "in camera proceeding." Crim.P. 16(III)(f) provides a formal mechanism for determining whether the disputed materials are work product: Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. *Here:* informally or through in camera proceedings, the trial court should have conducted an examination of the requested files in order to determine which portions of the records, if any, were defense counsel's work product, and therefore entitled to protection from discovery. Upon completing such an informal or formal examination, the trial court should take steps to protect confidential or privileged material, including attorney work product, only requiring disclosure after a defendant has the opportunity to excise any such portions from material that is open to discovery.

Doctor/Psychologist-Patient Privilege[5]: §13-90-107

People v. Bachofer 192 P.3d 454 (Colo. App. 2008). Because witness did not waive privilege regarding medical records, records were not discoverable and were not subject to in-camera review.

People v. Sisneros, 55 P.3d 797 (Colo. 2002). Once psychologist-patient privilege has attached, it protects testimonial disclosures and pretrial discovery of files/records derived/created in course of treatment; once privilege attaches, discovery cannot be compelled.

Dill v. People, 927 P.2d 1315 (Colo. 1996). When psychologist files written report of sexual abuse, there is no privilege in notes made during interviews that formed basis of report; but notes/records made later, during therapy sessions, remain privileged and are not discoverable; trial court cannot conduct an *in camera* inspection of notes made during therapy sessions.

Zapata v. People, 2018 CO 82. When co-defendant raised competency in his own trial, his waiver under §16-8.5-104 was limited to DA, defense attorney, and court; under §16-8.5-108, co-defendant's competency reports would be inadmissible in defendant's case; defendant's right to disclosure/constitutional rights to confrontation and due process do not trump co-defendant's claim of privilege. *Here:* trial court did not abuse its discretion in denying requested discovery of co-defendant's competency reports and in declining to review them in camera. Reports were privileged under psychologist-patient privilege.

People v. Martinez, 2015 COA 37. Doctor treating defendant for injury suffered during criminal act properly testified even though defendant did not waive doctor-patient privilege; reporting statute §12-36-135 creates an exception to doctor-patient privilege because doctor who treats an injury that he has reason to believe involves criminal act has a duty to report injury to police. *Here:* doctor had reason to believe defendant's injury involved criminal act because defendant was in police custody during exam and doctor was required to sign discharge papers so defendant could go to jail.

People v. Marsh, 396 P.3d 1 (Colo. App. 2011), aff'd other grounds, 389 P.3d 100 (Colo. 2017). Claimant of a psychologist-patient privilege bears burden of establishing its applicability; once privilege attaches, it protects testimonial disclosures as well as pretrial discovery of files/records derived/created in course of treatment; parent does not have authority to waive child's privilege when there is conflict between parent and child. *Here*: B.L. did not believe defendant (her father) sexually assaulted her two daughters and wanted to help defense; conflict negated parent's authority to waive daughter's privilege.

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). The psychologist-patient privilege assures a victim of a sexual assault that all records of any treatment will remain confidential unless otherwise directed by the victim. The privilege protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment. These records, however, are subject to waiver of the privilege. An evidentiary showing of waiver is required before the trial court may order the documents produced for an in camera review. To determine whether there was a waiver, the proper inquiry is not whether the information sought may be relevant. Instead, the proper inquiry is whether the victim has injected her physical or mental condition into the case as the basis of a claim or an affirmative defense. To establish a waiver, defendant must show that the privilege holder, by words or conduct has expressly or impliedly forsaken his claim of confidentiality with

[5] *See* §13-90-107 (statutory privilege); §12-36-135 (physician's duty to report injuries); §16-8-103.6 (waiver for mental condition defenses); §19-3-304 and §19-3-311 (suspension for reports of child abuse/neglect).

respect to the information in question. *Here:* CSC agreed with the trial court and held that K.H. did not waive the psychologist-patient privilege, either expressly or impliedly, as to the records from AMH; the trial court correctly drew a line between K.H.'s records from Children's Hospital and her records from AMH, holding that the two sets of records were distinct and required separate waivers to be admissible; K.H. expressly waived her privilege to the Children's Hospital records relating to her treatment and PTSD diagnosis but there was no such waiver for the AMH records because K.H. never placed the substance of her ongoing AMH treatment sessions at issue.

People v. Jimenez, 217 P.3d 841 (Colo. App. 2008). Defendant's records from Pikes Peak Mental Health, which were obtained prosecution absent written consent form that comported with requirements of federal statutes, were not improperly acquired because they qualified as a report of child abuse, which is excluded under federal statutes. Any illegality in disclosure for failing to comply with statutory requirements does not require suppression, but rather, at most, a fine.

People v. Ullery, 984 P.2d 586 (Colo. 1999). When defendant asserts insanity/IMC, he waives psychologist-physician privilege; DA can obtain records/reports of any expert who has examined defendant or who is endorsed to testify; waiver does not extend to attorney work-product; when defense asserts doctor's file contains work product, trial court should conduct *in camera* review and excise portions of documents that record mental processes of defense counsel. *Here*: Defense counsel abandoned work-product claim by failing to make record that would enable appellate review.

People v. Meyer, 952 P.2d 774 (Colo. App. 1997). Trial court did not err in refusing to examine *in camera* (or otherwise permit defense access to) subpoenaed hospital records: (1) defendant provided no basis for asserting that records may have contained evidence to support his theory that victim set fire in a suicide attempt; and (2) defendant failed to overcome the physician-patient privilege protecting the records.

School Records FERPA & §22-1-123

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). Prior to the issuance of a judicial order/subpoena regarding disclosure of child's education records, defendant must articulate, in good faith, a specific need for the information contained in the records, and the trial court must then balance defendant's need for the information with the privacy interests of the student and her parents; a non-exclusive list of factors the court should consider includes the nature of the information sought, the relationship between this information and the issue in dispute, and the harm that may result from disclosure. If the trial court determines that defendant's need outweighs any privacy interests, then it should review the records in camera. The trial court, in its discretion, may then order disclosure of the records. *Here:* although child victim's education records could be reviewed in camera if defendant showed a need for the information that outweighed any privacy interests, in defendant's trial for sexual assault on a child by one in a position of trust the education records did not relate to any evidence presented, and trial court's refusal to review the records in camera was harmless. CSC also held that, under the circumstances of this case, neither *Brady* or its progeny required K.H.'s education records to be reviewed for exculpatory information. K.H.'s education records related only tangentially to her diagnosis and treatment for sexual abuse, and academic performance is only one among many factors that are considered in a PTSD diagnosis; the prosecution never relied on the education records at trial. Had the prosecution relied on them, the trial court's pre-trial ruling would have required disclosure or, at the very least, an in camera review.

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008). Under certain circumstances, defendant may obtain school records of student who is witness in criminal case without consent of student/student's parents under §22-1-123 and Federal Education Rights and Privacy Act of 1974 (FERPA). School records of a student/witness may be disclosed to a party upon a proper showing of need under FERPA and §22-1-123 if the court considers the following: (1) court must ascertain whether student/parents have been notified and given opportunity to

respond; (2) if student/parents do not consent to release of records, court must balance student's/parents' confidentiality interests against party's need for requested information - court may review records in camera to determine whether disclosure is required; (3) court must disclose any information that is materially favorable to defendant under *Brady* and court should disclose inculpatory information that will be of material assistance in preparing defense; (4) in making its determination, court should consider: (a) nature of information sought; (b) relationship between this information and issue in dispute, and (c) harm that may result from disclosure. Here: on appeal, to determine whether non-disclosure of school records of a student/witness was appropriate, the court should determine whether records contained evidence that would have materially undermined student/witness's credibility. *Here:* any error in not disclosing records was harmless because: (1) records contain no mention of legal proceedings that would have supported impeachment under *Davis v. Alaska*, 415 U.S. 308 (1974); and (2) records would have yielded only cumulative information.

Social Services Records §19-1-307

People v. Jowell, 199 P.3d 38 (Colo. App. 2008). Records/reports of child abuse/neglect that are created/maintained by social services agencies are protected by rule of nondisclosure in §19-1-307. Discovery of child abuse/neglect records is determined solely by standards set forth in that statute, which provides such reports shall be confidential, but also provides two specific exceptions to rule of nondisclosure. Access to child abuse/neglect records and reports shall be given to: (1) law enforcement agency, district attorney, coroner, or county or district department of social services investigating a report of a known/suspected incident of child abuse/neglect; (2) a court, upon its finding that access to such records may be necessary for determination of an issue before it, but such access is limited to in camera inspection unless court determines that public disclosure of information contained is necessary for resolution of an issue then pending before it. Pursuant to §19-1-307, defense is not entitled to automatic disclosure of all child abuse/neglect records within possession and control of prosecutor. In order to trigger an in-camera review, defendant must request an in-camera review, identify the type of information sought, and explain why disclosure of information is "necessary." The trial court will not conduct in-camera review unless defendant sets forth sufficient information to support threshold finding that access to child abuse/neglect records may be necessary for determination of an issue; to justify review, defendant must show child abuse/neglect records exist and may contain relevant information. The trial court conducts an in camera review whenever it reasonably appears records may contain discoverable information; under due process principles, court must disclose any information materially favorable to defendant because it is either exculpatory or impeaching; trial court should disclose even inculpatory information when it is necessary for fair resolution of charges or would materially assist in preparing defense; and it may be significant, although not necessarily determinative, that records contain information that would otherwise be subject to automatic disclosure under Crim.P. 16(I)(a)(1).

Zoll v. People, 2018 CO 70. When an appellate court determines that the trial court erred in failing to disclose certain documents from a file reviewed in-camera, the proper remedy is to remand the case to the trial court with instructions to provide the documents to the parties and to afford defendant an opportunity to demonstrate a reasonable probability that, had the documents been disclosed before trial, the result of the proceeding would have been different. If the trial court concludes there is a reasonable probability that the result of the trial would have been different, then it must grant defendant a new trial; if the trial court finds no such reasonable

probability exists, then it may leave in place its judgment of conviction, subject to the defendant's right to appeal. Disapproved of People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

People v. Conyac, 2014 COA 8M. DHS records that referenced prior sexual assault case involving victim were properly excluded because records did not demonstrate that victim understood consequences of sexual abuse allegation because she had not made an outcry of sexual abuse, her father was never removed from home as a result of case, and victim did not suffer any consequences as result of prior allegations.

People v. Herrera, 2012 COA 13. Defendant's burden to show that in camera review of confidential social services records is necessary is satisfied where prosecutor has articulated reasonable belief that records contain exculpatory, impeaching, or inculpatory information that would materially assist in preparing defense.

People In the Interest of A.D.T., 232 P.3d 313 (Colo. App. 2010). Once court has made determination that moving party made a sufficient showing to warrant in camera review of social service records, court is obligated to review all records notwithstanding fact such review may impose significant burden. *Here:* juvenile court abused its discretion in refusing to review all volumes of social service records.

People v. Frost, 5 P.3d 317 (Colo. App. 1999). Appellate (defense) counsel may not review the confidential records in preparation for appeal/briefing.

Police Internal Affair Records

Martinelli v. Dist. Ct. City & Cty. of Denver, 612 P.2d 1083 (Colo. 1980). When addressing whether internal police files should be disclosed and whether a privilege applies, the trial court should consider the following factors: (1) extent to which disclosure will thwart governmental processes by discouraging citizens from giving government information; (2) impact upon persons who have given information of having their identities disclosed; (3) degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether information sought is factual data or evaluative summary; (5) whether party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from incident in question; (6) whether police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from investigation; (8) whether plaintiff's suit is nonfrivolous and brought in good faith; (9) whether information sought is available through other discovery or from other sources; and (10) importance of the information sought to plaintiff's case.

People v. Cline, 2022 COA 135. COA clarifies that defendant who has been charged with assaulting a police officer must make the showing required by People v. Spykstra, 234 P.3d 662 (Colo. 2010), when requesting an in camera review of the police officer's subpoenaed personnel files. Because defendant failed to make the requisite showing, the trial court need not have conducted an in-camera review before quashing a subpoena for the file.

People v. Battigalli-Ansell, 2021 COA 52. Trial court did not abuse its discretion in denying defendant's request for in camera review of the investigating detective's personnel file. He failed to make a threshold showing of need under *Spykstra*, and prosecution had standing to object even though the police department did not object and produced documents in court.

People v. Lowe, 2020 COA 116. Under Crim.P.16, defendant is entitled to discovery of material and information in the possession or control of law enforcement. At the same time, the CSC has recognized that police officers have a right to privacy in their personnel files. *People v. Spykstra*, 234 P.3d 662, 670 (Colo. 2010). To obtain disclosure of such files, defendant must make a greater showing of need. A police officers'

expectation of privacy may be overridden by the state's compelling interest in the determination of the truth and safeguarding of the defendant's right to exculpatory evidence. When conducting an in-camera review, a trial court may not draw a distinction between sustained and unsustained complaints. When defendant challenges a trial court's ruling denying access to records, the reviewing court conducts an independent review to determine whether any should have been disclosed. A defendant who is charged with assaulting a police officer is entitled to disclosure of complaints charging excessive use of force filed against that officer. Here: after a review of the two officer's files, COA agrees with the trial court that defendant's interest in obtaining exculpatory information does not outweigh officer A's privacy interest because his files contained no relevant or material information. After review of officer B's sealed files, particularly reviewing for complaints charging excessive use of force and challenging officer B's credibility, COA finds some records should have been disclosed as related to credibility.

People v. Trujillo, 62 P.3d 1034 (Colo. App. 2002), rev'd other grounds, 83 P.3d 642 (Colo. 2004). When ruling on a request for police internal affairs records, trial court must conduct an in-camera review of materials: (1) to balance defendant's interest in disclosure against government's interest in confidentiality; and (2) to determine whether information in materials is discoverable. To determine whether originals of documents are to be presented for review or whether copies should be made (and who should bear the cost of copying), trial court should consider: (1) if defendant's subpoena was unreasonable/oppressive; (2) if city's proffered concerns as to use and possible loss of originals are justified; and (3) if adequate safeguards could be provided for an initial in-camera review of original documents and then limit any payment required to actual costs.

People v. Blackmon, 20 P.3d 1215 (Colo. App. 2000). The trial court correctly quashed the subpoena and refused to review the officer's personnel records in camera because defendant's request for "all documents that would relate to officer's credibility" was too broad. Absent allegations that "previous contacts" had motivated the officer to arrest him, or that the officer had used excessive force during the arrest, the defendant failed to show how the records would be relevant to his defense.

Depositions Crim.P. 15

People v. Knisley, 2022 CO 59. CSC holds the court abused its discretion by denying to quash a subpoena compelling the judge to sit for a deposition. During a SDT hearing, the prosecution told the court that one of the participants (defendant in a separate yet related case), was making a video recording of the hearing in violation of the court's decorum order. When the judge questioned her about this, she denied recording the hearing. But the prosecution later filed a verified motion asking to hold her in contempt for dishonesty to the court, claiming she did record the hearing. The judge referred the motion to another judge (all the judges in the 21st JD recused, so a judge from the 5th JD presided). The participant then issued a subpoena to depose the original judge to ask about, among other things, his assessment of the participant's credibility when she denied recording the hearing.

CSC held that because the judge's testimony was not "necessary" to resolve the participant's contempt proceedings (judge was "the only possible source of testimony" on factual information that was "highly pertinent to the jury's task"), the court abused its discretion by denying the judge's motion to quash the subpoena.

People v. Hebert, 2016 COA 126. Pursuant to §18-6.5-103.5(1), trial court granted prosecution's request to take deposition from an at-risk victim who was very ill; victim died before trial, and deposition was admitted at trial; defendant had opportunity to cross-examine victim via Skype. Defendant's right to confrontation was satisfied because procedure was necessary to protect victim's health and procedure ensure reliability of victim's testimony.

People v. Arellano-Avila, 20 P.3d 1191 (Colo. 2001). Though Crim.P. 15 permits trial courts to order depositions in criminal cases, it does not permit trial courts to order depositions of foreign citizens residing in foreign nations because depositions under the rule must take place "before the court" ordering it, and there is no grant of authority for Colorado trial courts to issue subpoenas to compel attendance by persons residing outside U.S.

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). Neither prosecutor nor court has duty to make witness speak with defense counsel; witnesses have choice whether to speak with counsel, except when depositions are permitted; depositions require an allegation that witness is unable to attend trial.

People v. Hernandez, 899 P.2d 297 (Colo. App. 1995). Trial court is vested with substantial discretion in deciding whether to allow taking of deposition testimony.

Subpoenas Crim.P. 17

In Re: People v. Honstein, 2024 CO 34. The advocate-witness rule, Colo. RPC 3.7 generally forbids counsel from maintaining dual roles as advocate and witness in the same matter before the same tribunal. Relatedly, when asked to disqualify a prosecutor or prosecutor's office when they are called as a witness, a trial court should disqualify the prosecutor if their testimony is "of sufficient consequence to prevent a fair trial." A defendant who wishes to call a participating prosecutor as a witness must demonstrate a compelling and legitimate reason to do so. This standard requires the testimony in question to be both vital to the case and unobtainable from other sources. Trial courts have discretion to determine whether the proffered reason is compelling and legitimate and should quash subpoenas eliciting testimony when this standard is not met. *Here:* the CSC finds that defendant lacked a compelling and legitimate reason because the testimony he sought constituted impeachment evidence and was obtainable from another witness; trial court erred in ordering the prosecutor to testify and makes the rule to show cause absolute.

People v. Battigalli-Ansell, 2021 COA 52. Trial court did not abuse its discretion in denying defendant's request for in camera review of the investigating detective's personnel file. He failed to make a threshold showing of need under *Spykstra*, and prosecution had standing to object even though the police department did not object and produced documents in court.

Zoll v. People, 2018 CO 70. When an appellate court determines trial court erred in failing to disclose certain documents from file reviewed in-camera, proper remedy is to remand the case to trial court with instructions to provide improperly withheld documents to parties and to afford defendant opportunity to demonstrate that there is a reasonable probability that, had documents been disclosed before trial, the result of the proceeding would have been different.

People v. Spykstra, 234 P.3d 662 (Colo. 2010). Defense issued SDT to child sex assault victim's parents seeking access to parents' computers to retrieve any email written by victim; trial court ordered parents to comply with SDT. CSC reversed, holding that defense was required to present specific factual basis demonstrating a reasonable likelihood that email sought: (1) existed on parent's computer, and (2) contained material evidence. In absence of such basis, court order turned SDT into functional equivalent of search warrant for defense. Crim.P. 17(c) expressly contemplates production of evidence by a subpoenaed witness in court, not search and seizure of witness's property by defense.

People v. James, 5 P.3d 328 (Colo. App. 2000). Trial court quashed defendant's request for police "gang files" and sealed those files for appellate review. Defendant sought access to records on appeal. *Here:* records will be reviewed in-camera by COA division assigned to decide appeal.

Miscellaneous on Discovery

People v. Mitchell, 2024 COA 7. Selective prosecution is a claim that the prosecutor has brought a criminal charge for a forbidden reason, such as race or religion, that violates equal protection. Defendant has the burden of establishing that the selective prosecution had a discriminatory effect and was motivated by a discriminatory purpose. To obtain discovery on a selective prosecution claim, defendant must provide some credible evidence tending to show the existence of both discriminatory effect and discriminatory intent. Charging codefendants with the same offense does not, by itself make them similarly situated for purposes of a selective prosecution claim. Rather, the People may make different prosecutorial decisions with respect to codefendants who share a charge based on their different conduct. *Here:* defendant, who was black, argued that by continuing to prosecute him as an adult while treating the two non-black codefendants as juveniles, the People engaged in selective prosecution based on race because all four codefendants were similarly situated at the outset of the case because the People filed the same charges against all of them (felony murder). *[Cert Accepted (11/4/24) in case #24SC122: (1) Whether the court of appeals erred in affirming the trial court's denial of petitioner's motion to dismiss for selective prosecution in a case in which the petitioner, who is Black, and his three codefendants were all charged with felony murder but only the two non-Black defendants received a plea bargain offer that allowed them to be tried in juvenile court in exchange for their cooperation with law enforcement (AAG Brenna A. Brackett)].*

People v. Chavez, 2016 CO 20. There is no state rule of evidence, federal constitutional requirement or any statute that allows the trial court to grant defendant the authority to have access to a non-party's private home for an investigation without the consent of that non-party.

People in the interest of Respondent E.G., 2016 CO 19. Trial courts lack authority to grant access to crime scene in a third party's private home and defendants do not have right to such access. CSC concluded that non-party homeowner's 4th Amendment right to protection from unreasonable intrusion is not trumped by (1) discovery obligations in Crim.P. 16, (2) Compulsory Process Clause of 6th Amendment, (3) subpoena power Crim.P. 17, (4) Due Process Clause, or (5) Confrontation Clause.

People v. Rivera, 250 P.3d 1272 (Colo. App. 2010). Under §24-4.1-107.5(2) defendant is not automatically entitled to in-camera review of records concerning a victim's application for restitution; defendant must show that: (1) his or her request is not speculative and (2) such documents would tend to disprove all or part of the prosecution's request on the basis that the requested damages were not proximately caused by the defendant's conduct.

People v. Trujillo, 114 P.3d 27 (Colo. App. 2004). Trial court erred by ordering PD pay cost of producing all of internal affairs documents it subpoenaed before court would conduct an in-camera review of those documents; proper procedure was to have court conduct in camera review, then defense required to pay for copies of any discoverable documents.

People v. Martinez, 51 P.3d 1029 (Colo. App. 2001), rev'd other grounds, 69 P.3d 1029 (Colo. 2003). Defendant failed to demonstrate sufficient need for disclosure of CI's identity; CI was not a direct witness to crimes charged, and defendant had other ways to elicit evidence to impeach a key witness.

People v. Harlan, 8 P.3d 448 (Colo. 2000), overruled other grounds, People v. Miller, 113 P.3d 743 (Colo. 2005). Court ordered pre-trial discovery of sentencing-phase experts (i.e. defense experts who would testify about mental health issues in mitigation). To protect defendant's 5th amendment privilege, the trial court ordered that the disclosed materials would be limited to the sentencing phase. This was a sufficient protection. (Under the new statute, disclosure of sentencing phase experts takes place after a guilty verdict.)

People v. District Court, 933 P.2d 22 (Colo. 1997). Confrontation clause normally requires witness to identify his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, and to allow jury to interpret witness's testimony in a light reflected by knowledge of his environment. But there is a personal safety exception to accused's right of confrontation. *Here:* witnesses' right to personal safety outweighed defendants' right of confrontation; witnesses had received threats and feared reprisals from defendants and their gang associates; witnesses' former addresses were more likely to yield reflective information than their current witness protection program addresses.

CONTINUANCES

People v. Kirby, 2024 COA 20. No speedy trial violation where defendant's trial extended past speedy trial due to COVID-19 issues. *Here:* DA argued a continuance was warranted under §18-1-405(6)(g) because (1) an expert witness couldn't travel to Colorado because Illinois had a stay-at-home order in effect; and (2) the COVID-19 virus, and the measures imposed to address it, constituted exceptional circumstances precluding effective administration of the trial. The trial court agreed and viewed proceeding with the as irresponsible considering the rising rate of infections, serious illness, and deaths; heightened public concern over the spread of COVID-19; and the court's inability to ensure social distancing within the courtroom and compliance with other restrictive measures. These concerns applied equally to both parties.

People v. Sauser, 2020 COA 174. Trial court does not err by denying a last-minute continuance raised for the first time the morning of trial to search for evidence (DNA on a gun) that may not exist.

People v. Travis, 2019 CO 15. Defendant's request to "look for and pay for a lawyer" did not implicate her Sixth Amendment right to counsel of her choice and trial court's decision to deny her request for continuance was not an abuse of discretion and did not require a balancing of *Brown* factors. *Here:* when defendant, who was represented by PD, told trial court on morning of trial that she wanted continuance so she could "look for and pay for an attorney," request did not implicate Sixth Amendment right to counsel of choice, as would require trial court to conduct a multi-factor balancing test to determine whether to grant continuance; defendant merely expressed general interest in retaining private counsel, without having identified replacement counsel or having taken any steps to retain any particular lawyer.

People v. Jompp, 2018 COA 128. To extend speedy trial deadline an additional 6 months over defendant's objection, prosecution need only show that "there are reasonable grounds to believe that evidence will be available at later date. §18-1-405(6)(g)(I). *Here:* prosecution's offer of proof as to their attempts to secure crucial out-of-state witness was sufficient to show there was a reasonable possibility that witness would be available to testify; defendant's reliance on *Valles* was misplaced as CSC vacated that opinion; under *Barker* factors used to assess a constitutional violation speedy trial, trial court did not plainly err in granting prosecution's continuance.

People v. Senette, 2018 COA 105. When ruling on a DA continuance because a witness failed to appear for trial, trial courts must consider DA's exercise of due diligence to procure witness' presence, effect continuance would have on procuring witness' presence, and prejudice to DA's case if it denied the motion; if trial court does not do that, it abuses its discretion in denying motion.

People v. Ahuero, 2017 CO 90. Trial court properly denied defendant's motion to continue based on totality of circumstances; defendant's general request for additional time to prepare for trial did not require court to grant continuance where: (1) counsel had 3 weeks to prepare for short trial; (2) trial court had legitimate docket concerns about continuing trial; (3) priority is given to sexual assault on child cases; and (4) victim's family wanted issue resolved.

People v. Garrison, 2017 COA 107. Trial court properly denied defendant's motion to continue. Although defendant argued that new counsel had entered on case 2 months before trial and was unprepared to handle technical aspects of computer-related case, current counsel was well aware of technical aspects; while current counsel proceeded with a different defense than that pursued by defendant's previous attorney, defendant failed to explain why different defense could not have been pursued earlier; 7-month delay in obtaining expert attributable to defense.

People v. Brown, 2014 CO 25. Trial court abused its discretion by basing its decision to deny a continuance on expediency alone. Where defendant's choice-of-counsel rights are implicated, trial court must weigh a multitude of factors when denying a motion for a continuance: (1) defendant's actions surrounding request and apparent motive for making request; (2) availability of chosen counsel; (3) length of continuance necessary to accommodate chosen counsel; (4) potential prejudice of a delay to prosecution beyond mere inconvenience; (5) inconvenience to witnesses; (6) age of the case, both in judicial system and from date of offense; (7) number of continuances already granted in case; (8) timing of request to continue; (9) impact of continuance on court's docket; (10) victim's position, if victims' rights act applies; and (11) any other case-specific factors necessitating or weighing against further delay. In adopting this multi-factor test, no single factor is dispositive, and weight accorded to each factor will vary depending on specific facts at issue in case.

People v. Cook, 2014 COA 33. Trial court did not abuse its discretion when it denied defense counsel's 4th request for continuance: (1) counsel was told applicable deadlines for expert witness issues; (2) expert received all of necessary information and was able to work on it non-stop once he received it; (3) expert produced a report before he testified; (4) expert testified at trial; (5) expert testified at 1st trial and had all of information then; (6) defense had three prior continuances to find alternate suspect and had not been able to do so; and (7) defense gave no reasons why another continuance would be of any more help in locating alternate suspect.

People v. Villano, 181 P.3d 1225 (Colo. App. 2008). Defendant's 3rd motion for continuance was properly denied where motion: (1) failed to show that continuance would lead to discovery of additional evidence; (2) failed to describe specific evidence likely to be uncovered; and (3) failed to articulate how evidence sought would have been exculpatory/supported entrapment defense; on appeal, defendant failed to show denial of his motion resulted in "actual prejudice."

People v. Ellis, 148 P.3d 205 (Colo. App. 2006). Where defendant moved for continuance based on need for additional DNA testing of material that was available to him for 6 months, court properly denied motion.

People v. Cruthers, 124 P.3d 887 (Colo. App. 2005). Trial court did not abuse its discretion in denying defendant's motion for continuance to obtain victim's medical records where defendant failed to articulate any actual prejudice he suffered from denial of continuance.

People v. Roybal, 55 P.3d 144 (Colo. App. 2001). Defense wanted more time to secure witness who would testify that defendant was absent when his codefendant planned burglary; continuance properly denied because proffered testimony was too remote to support duress defense.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). Defendant requested continuance to find witness whose testimony would implicate another suspect. Denial affirmed: (1) it was uncertain that witness could be found; (2) his testimony would have been largely cumulative; and (3) court issued warrant for his arrest.

People v. Webster, 987 P.2d 836 (Colo. App. 1998). Defendant requested continuance to accommodate sick witness. Denial affirmed: (1) witness's testimony was relevant but had little probative value: (2) there was a ½ hour delay between witness's observations and shooting; (3) witness admitted she could not see clearly because she was not wearing glasses.

People v. Inman, 950 P.2d 640 (Colo. App. 1997). Continuance properly denied where purpose was to locate and return ex-wife for cross-examination on conviction which defendant either knew or should have known about, defendant excused her from stand without objection, and jury ready to receive instructions.

Miller v. People, 497 P.2d 992 (Colo. 1972). The grant or denial of continuance is within sound discretion of trial court and will not be overturned on appeal unless record reflects clear abuse of that discretion. Appellate court reviewing such decision, must consider totality of circumstances surrounding request for continuance.

TRIAL

JUDGES & COUNSEL

JUDGES

May Require Prosecution: §16-5-209

People v. Storlie, 2014 CO 47. A DA's decision not to prosecute a case may not be challenged unless there is a showing by clear and convincing evidence that the decision was arbitrary or capricious and without reasonable excuse. *Here:* trial court abused its discretion in denying DA's motion to dismiss charges of sexual assault of a child because there was no evidence that the DA acted in bad faith in seeking the dismissal, nor did the trial court make any findings suggesting bad faith; instead, the record demonstrated that the DA based its motion on candid assessment of strength of victim's and potential witnesses' testimony and concluded that there was insufficient evidence to pursue the case, and decision to dismiss constituted a good faith exercise of prosecutorial discretion.

Kailey v. Chambers, 261 P.3d 792 (Colo. App. 2011). §16-5-209 only applies to a DA's decision not to file charges; it does not cover DA's decision not to do an investigation. Ordinarily, when a person alleges a DA's unjustified refusal to prosecute, a trial court should first determine whether the DA made a charging decision not to prosecute; if no such decision has been made, then there has not been a "refusal" to prosecute, as contemplated by the statute and no further inquiry is necessary. Factors to consider in determining whether to order a DA to prosecute a case or appoint a special prosecutor to do so includes: (1) the likelihood of conviction; (2) sufficiency of the evidence; (3) availability of witnesses in corroboration of the offense; (4) credibility of the victim; (5) evidence relating to motive or intent of the offender; (6) seriousness of the injuries inflicted; and (7) the competing demands of other cases on the time and resources of the prosecution. *Here:* DA's refusal to prosecute alleged sexual assaults was not shown to be arbitrary or capricious, as was necessary for trial court to appoint special prosecutor to prosecute case; while serving prison sentence for committing the same offenses against his daughters, father filed motion for appointment of special prosecutor, claiming that his former sister-in-law had sexually assaulted his daughters, but there were significant credibility issues with the daughters' averments, claims lacked factual specificity regarding where and when the events occurred, and a significant amount of time had passed since the alleged incidents occurred. Father, as a private citizen, also lacked standing to seek felony arrest warrant on his siter-in-law under this statute.

J.S. v. Chambers, 226 P.3d 1193 (Colo. App. 2009). DA has broad discretion in determining what offenses to prosecute. Under §16-5-209, a judge may only order the DA to prosecute a case -- or appoint a special prosecutor to do so -- upon finding that the refusal to prosecute was "arbitrary and capricious and without reasonable excuse." *Here*: COA reversed the trial court's order appointing a special prosecutor, holding that based upon the asserted reasons for not prosecuting, it cannot be said that clear and convincing evidence showed the refusal to prosecute was arbitrary and capricious. DA's charging decision is afforded a presumption of correctness, which the challenging party must overcome by clear and convincing evidence. Proper scope of review under §16-5-209 is a mixed question of law and fact.

Recusal: Crim.P. 21(b); §16-6-201

People v. Nozolino, 2014 COA 95. Due process requires judicial recusal only if a judge: (1) has a direct, personal, substantial pecuniary interest in reaching a conclusion against one of the litigants; (2) becomes embroiled in a running, bitter controversy with one of the litigants; or (3) forms a part of the accusatory process by acting as a one-man grand jury by both bringing charges and trying, convicting, and sentencing a party.

People v. Taylor, 131 P.3d 1158 (Colo. App. 2005). Motion to change judge must be supported by affidavits of at least 2 credible persons not related to defendant, stating facts showing the existence of grounds for disqualification; absent such affidavits, court cannot determine whether defendant has alleged facts that, when taken as true, would warrant a finding that the trial judge has bias or prejudice which would prevent him from dealing fairly with defendant.

People v. Julien, 47 P.3d 1194 (Colo. 2002). In ruling on the disqualification motion, a judge must accept as true the factual statements contained in the motion and affidavits.

Estep v. Hardeman, 705 P.2d 523 (Colo. 1985). In evaluating a motion to recuse, trial court may only examine the timeliness and legal sufficiency of the motion and affidavits.

People v. Garcia, 2024 COA 91. In a matter of apparent first impression, the COA concludes that prior service in the same case as counsel of record for defendant does not, by itself, establish that a defense attorney who became a judge harbored actual bias against defendant. *Here:* the judge who presided over defendant's trial in this case had previously appeared as his counsel (PD) at a single hearing in another case where defendant failed to appear. On remand from the CSC (2024 CO 41M), the COA now also concludes that defendant's remaining statutory claim (§13-1-122) and objective due process claim that the judge was disqualified based on her prior appearance as an attorney in his case were also waived.

People v. Garcia, 2024 CO 41. Because defense attorneys were aware the presiding judge was statutorily disqualified because she appeared on defendant's behalf at a hearing when she was a public defender, the CSC concludes that defendant's attorneys' failure to object to her presiding over defendant's case waived their claim. Because the claim was waived, the majority declined to address whether statutory disqualification of a judge is a structural error. Marquez and Hart dissented, saying this objection was not waived, the error was structural, and the conviction should be reversed, but unpreserved structural errors should be reviewed for plain error. Gabriel also dissented, saying the error was not waived, was structural, and is not reviewed for plain error.

Sanders v. People, 2024 CO 33. As an issue of constitutional law (due process), a judge is subject to recusal when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable, or that the judge had a direct, personal, substantial, or pecuniary interest in this case. Under §16-6-201(1)(d) and Crim.P. 21(b), a judge is subject to disqualification when it could be reasonably inferred that the judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with a party. Under CJC 2.11(a), a judge might have to recuse due to an appearance of partiality. *Here:* defendant's crime consisted of a road rage incident where defendant shot at the victim's car when she cut him off in traffic; the bullet traveled through the car and hit the victim lacerating her spleen; the presiding judge, during jury selection, disclosed to counsel that a few years earlier she had been driving by an altercation on the side of the road where shots were fired; a stray bullet hit her car but she was not injured. Defendant requested the judge recuse herself; she declined. CSC extensively discussed facts of case under each of the legal theories/rules.

In re People In Int. of A.P., 2022 CO 24. Although a judge's involvement in a case might create an appearance of impropriety warranting recusal, that alone does not imply that the judge was biased, and it is only when judge was actually biased will a reviewing court question the reliability of the proceeding's result on a motion for relief from judgment under the provision of the rule authorizing relief "for any reason justifying relief from operation of the judgment"; in other words, while both an appearance of impropriety and actual bias are grounds for recusal from a case, only when the judge was actually biased will the court question the result.

People v. Jennings, 2021 COA 112. As matter of first impression, claim by defendant, who enters guilty plea, that trial judge was biased is exception to the general rule that guilty plea waives appellate review of issues that arose prior to the plea; disqualification of judge based on actual bias cannot be waived; guilty plea did not waive appellate review of defendant's claim of actual bias so as to warrant disqualification of judge, even if claim arose prior to plea. Here: fact that trial judge repeatedly declined to reduce defendant's $250,000 bond did not mean that judge was biased against her so as to warrant disqualification; and trial judge's criticism of defendant's second retained attorney, in passing as attorney was leaving case, did not reflect such intense hostility as to require judge's recusal.

People v. Mentzer, 2020 COA 91. Judge's supervisory role over DA who filed the charges against defendant at the time the charges were filed created appearance of bias and thus warranted disqualification of judge in prosecution for internet luring of a child and internet sexual exploitation of a child, although judge had no memory of the case.

Richardson v. People, 2020 CO 46. Neither a statute nor the Code expressly requires a judge to sua sponte disqualify himself when he is related to a juror. Trial judge was not sua sponte required to recuse himself on basis that his wife was a seated juror in the case, absent showing that judge was biased or prejudiced toward a party or counsel. *Here:* trial judge's wife answered jury summons, judge and wife informed parties of their relationship, neither party challenged her for cause or with a peremptory challenge, and she served on jury that decided the case. On appeal, defendant argued judge should have sua sponte recused himself or excused his wife. Although "it might have been preferable" and "prudent" for "the trial judge to [have] excuse[d] his spouse from jury service or to [have] recuse[d] himself," any error was neither structural nor plain.

People v. Roehrs, 2019 COA 31. Judge's involvement in underlying dependency and neglect hearing in which alleged offenses occurred created an appearance of impropriety in subsequent criminal trial, and recusal was warranted. Appellate court reviews a trial court's ruling on a motion to disqualify a judge de novo. Here: although defendant's motion to recuse was deficient for failure to include affidavits of two credible persons who were not related to the defendant, COA chose to address the merits of the motion to recuse on appeal from convictions for retaliation against a witness and harassment; the judge was aware of the facts on which the motion was based and did not dispute those facts, the single affidavit submitted by defendant was sufficient to verify facts in the motion, and had the technical deficiency of only having one affidavit been raised before the trial court, defendant may have been able to cure it by submitting a second affidavit.

People v. Dobler, 2015 COA 25. Defendant waived his claim that the judge should have recused based on an appearance of impropriety because he failed to file a motion to disqualify. *Here:* sentencing judge's statements that "if I hadn't reconsidered [defendant's earlier sentence, victim] would still be alive today and I can't tell you how that makes a judge feel" and "[victim's death is] something that's going to haunt me" did not demonstrate that judge was actually biased against the defendant.

People v. Flockhart, 2013 CO 42. There is no per se rule requiring disqualification whenever a presiding judge, as a former prosecutor, had brought unrelated criminal charges against defendant in the past. Absent facts demonstrating some material relationship between the 2 proceedings, or facts showing the past prosecution is relevant to the current case, disqualification is not required. *Here,* although both prosecutions against defendant

involved similar marijuana charges, there was no material relationship between the 2 cases, and nothing in the record suggested the previous prosecution was at all relevant to this case; disqualification not required.

Crumb v. People, 230 P.3d 726 (Colo. 2010). A judge may explain to defendant that he/she has a decision to make and may impose a deadline for making that decision, but judge cannot influence defendant to accept/reject a particular plea bargain. *Here:* defendant had shown fair and just reason for withdrawing his guilty plea based on trial judge's participation in plea discussions; although prosecution would experience some prejudice by having to prepare again for trial and having to reschedule witnesses to appear, comments appeared to have influenced defendant's decision to reconsider his earlier rejected offered plea and his ultimate decision to plead guilty, since judge, after defendant expressed his resolve to go to trial, made a tacit offer of leniency and stated that he would be unhappy if no deal were reached.

People v. Hagos, 250 P.3d 596 (Colo. App. 2009). During pretrial hearing, witness told her attorney that defendant twice silently mouthed the words "you're dead" to her in the courtroom; her attorney promptly interrupted the proceedings and informed the court; trial court directed either the witness's attorney or the prosecution to "report that to the police authorities" (record was unclear as to whom the court was speaking) and ordered an investigation. *Here:* recusal was not required because there was no indication that the judge had become personally embroiled in the controversy over whether threats were made, and the mere order for an investigation did not create a potential conflict of interest or indicate that judge might become a witness in any prosecution.

People v. DeBella, 219 P.3d 390 (Colo. App. 2009), rev'd other grounds, 233 P.3d 664 (Colo. 2010). Judge who ruled on defendant's post-conviction motion had no need to recuse himself because he was a prosecutor in the office that prosecuted defendant at trial. COA refused to depart from the standards set forth in Schupper v. People, 157 P.3d 516 (Colo. 2007) and People v. Julien, 47 P.3d 1194 (Colo. 2002).

Kane v. Jefferson County, 192 P.3d 443 (Colo. App. 2008). Affidavits were not sufficient to require recusal where they simply contained parties' subjective conclusion that judge was biased because one of the attorneys had filed a complaint against the judge with the Judicial Performance Commission in 2002; affidavits did not allege that judge, through conduct or otherwise, expressed any actual bias against the attorneys or their clients; judge's decisions to recuse herself in prior cases do not lead to conclusion that she should permanently recuse herself in cases involving the attorneys and their firm.

Schupper v. People, 157 P.3d 516 (Colo. 2007). "The mere existence of a trial judge's friendship with a member of the prosecution team, by itself, does not create either actual bias or the appearance of impropriety. Rather, as in *Julien*, reviewing court must look to specific circumstances of the case in order to determine whether the closeness of that friendship and the extent of the friend's involvement in the underlying case are of such intensity as to require the judge's disqualification." Successor judge erred in applying the recusal retroactively because the circumstances warranting recusal did not exist prior to the time of the actual recusal. While recusal is appropriate whenever a judge's impartiality might reasonably be questioned, a judge is not required to recuse simply because he was formerly a prosecutor in the office prosecuting the case. If prior employment is to be a basis for disqualification, judge must have performed some role in the case, or must have obtained actual knowledge of disputed evidentiary facts. A judge's impartiality is not called into question simply because someone the judge considers a friend appears as counsel in a case before the court. *Here:* trial judge denied 3 defense motion for recusal; while this case was on appeal, judge recused himself from another, unrelated case against defendant, citing increased animosity between attorneys and recent involvement of an attorney who was a friend of the judge; on limited remand, a successor judge granted defendant's motion to vacate the conviction, finding that trial judge's recusal should be applied retroactively in this case.

People v. Julien, 47 P.3d 1194 (Colo. 2002). Colorado's canons, statutes, and rules governing judicial conduct do not require disqualification of a judge based solely on previous employment with the DA's office when the case before the judge was in that office. *Here:* presiding trial judge had worked for DA's office when defendant's case was pending, but took no part in the investigation, preparation, or presentation of the case, nor did he supervise those who did, nor did he have knowledge of disputed evidentiary facts; no disqualification necessary.

People v. Thoro Products, 45 P.3d 737 (Colo. App. 2001), rev'd other grounds, 70 P.3d 1188 (Colo. 2003). Trial court properly denied motion for recusal that was filed 5 months late; defendants knew of the grounds for recusal when they hired defense counsel and were obligated to make their motion within 10 days of counsel's entry of appearance.

People v. Castro, 10 P.3d 700 (Colo. App. 2000). After conviction, the question of whether the judge who presided over the PH should have been recused is moot; guilty verdict beyond a reasonable doubt provides evidence to support probable cause.

People v. Harmon, 3 P.3d 480 (Colo. App. 2000). Trial judge properly declined to recuse himself from the probation revocation hearing because the allegations were insufficient to support a claim of bias where defendant alleged that the judge: (1) sternly told him to follow the probation officer's instructions, and (2) was aware of defendant's picketing to protest the judge's conduct. Defendant's motion for case transfer was not pending at the time of the revocation hearing because defendant had filed it in the wrong courtroom.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). After trial, judge called the number on a matchbook to check on its source-this was a hearsay issue at trial. Claiming that this demonstrated bias, and that the judge might have to be called as a witness, defendant asked judge to recuse from ruling on his motion for new trial. Motion for recusal properly denied.

People v. Anderson, 991 P.2d 319 (Colo. App. 1999). While he was being tried in courtroom C, for trespass, defendant was also being tried in courtroom B, on charges that he stole computer equipment from courtroom C; defendant requested recusal of judge in courtroom C. Motion properly denied because the "victim" of the theft was not the judge or a relative.

People v. Kriho, 996 P.2d 158 (Colo. App. 1999). An allegation that all judges in judicial district are "too close to this case" is insufficient to require recusal. It was OK to refuse defendant's request to call a judge as a witness. It is best to avoid calling judges as witnesses, and any information that this judge could offer was available through the transcript.

People v. Collie, 995 P.2d 765 (Colo. App. 1999). Trial judge filed a grievance against defendant's attorney, and then decided several pre-trial motions against defendant before recusing himself; new trial judge adopted the pre-trial rulings without conducting an independent review; this was not structural error because the appellate courts can review the pre-trial rulings to determine whether there was any adverse impact to the defendant; all pre-trial rulings were proper.

People v. Arledge, 938 P.2d 160 (Colo. 1997). General principles discussed in context of resolving speedy trial issue, including: (1) party's obligation to timely raise recusal issues; (2) court's job to timely resolve; (3) court's duty to preside unless facts reasonably support an inference that judge has a bias; and (4) when trial judge is recused, he/she loses jurisdiction over subsequent rulings requiring the exercise of judicial discretion.

Misconduct

People v. Hall, 2021 CO 71M. CSC reviews COA decision holding that the trial court deprived defendant of his right to a fair trial because the trial court crossed the line from impartial judge to partisan advocate during a

bench trial when it requested additional argument after closing arguments. CSC holds that a trial court presiding over a bench trial acts well within its discretion and does not abandon its role as a neutral arbiter when it asks both parties for additional argument about properly admitted evidence before rendering a verdict. The trial judge's request was not an invitation for personal opinion testimony and did not deprive defense counsel of a meaningful opportunity to respond.

People v. Flynn, 2019 COA 105. Well-intentioned trial courts, seeking to provide additional clarity to prospective jurors, sometimes feel the urge to go beyond these instructions and either insert their own supplemental instructions or attempt to add "flesh to the bones" of the standard instructions by providing examples and hypotheticals. Divisions of this court have repeatedly expressed disapproval of the practice, because such instructions run the risk of confusing the jurors and may even lower the burden of proof or diminish the presumption of innocence. The CSC has also added its voice to this cautionary chorus: "[F]urther attempts by courts or parties to define 'reasonable doubt' do not provide clarity." particularly because an inarticulate attempt to do so — if it takes the form of an instruction — may result in automatic reversal, deviating from or expounding on the standard instructions in this area is undeniably risky, in that it exposes the conviction to a challenge that the comments lowered the burden of proof.

People v. Lopez, 2016 COA 179. Trial court's comments during voir dire, relating a basketball analogy to help explain the law of intoxication, neither misstated the law nor amounted to plain error in light of the accurate final instructions on this issue.

People v. Waller, 2016 COA 115. Trial court's decision to defer to previous rulings made by another judge may be an appropriate exercise in discretion.

People v. Acosta, 2014 COA 82. To constitute deprivation of a fair trial, a trial judge's comments in front of the jury must cause prejudice to defendant. *Here:* the court did not demonstrate bias because it did not act as an advocate, call or question witnesses, or otherwise advocate for the admission or exclusion of evidence; court's rulings were made outside jury's presence and consisted of neutral commentary on the admissibility of challenged evidence.

People v. Ramos, 2012 COA 191. Trial court's comments during voir dire in attempting to explain, using hypotheticals, the prosecution's burden of proof and the presumption of innocence posed a risk of confusing or misleading the jury, and as such, should not be repeated.

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008), aff'd by operation of law, 238 P.3d 1283 (Colo. 2010). Trial judge's conduct did not so depart from the required impartiality as to deny defendant a fair trial where: comments were directed at both defense counsel and the prosecution; judge's questions to witnesses were not slanted toward one side or the other, and, under the circumstances (involving an emotionally-charged atmosphere with highly contentious parties, and under the pressure of a heavy docket), a display of irritation or frustration on the part of judge would not warrant reversal.

People v. Gibson, 203 P.3d 571 (Colo. App. 2008). Court's actions in holding defense counsel in contempt for suggesting that court's rulings favored prosecution and correcting defense counsel when he misstated the evidence before jury did not reflect a bias against defense counsel or irritation with counsel sufficient to require disqualification.

People v. Aleem, 149 P.3d 765 (Colo. 2007). Court may restrict speech within a courtroom, a non-public forum for First Amendment purposes, provided that the restriction is both reasonable and viewpoint neutral. *Here*: trial court's order to defendant to remove a T-shirt containing a political symbol did not violate defendant's First Amendment rights and was reasonably related to court's authority to control the courtroom.

People v. Baenziger, 97 P.3d 271 (Colo. App. 2004). Where trial court found defense counsel in contempt for repeatedly violating its court order, interrupted defendant's testimony that went beyond the scope of the questions asked, and limited a defense line of questioning that did not relate to an issue at trial, the court did not exhibit bias against defendant.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). No plain error where trial court stated in passing to prosecutor that it "might" want a complicity instruction; trial court's suggestion to defense counsel that duress was a possible defense and its assistance in drafting a theory of defense instruction showed no partiality or appearance thereof.

People v. Woellhaf, 87 P.3d 142 (Colo. App. 2003), rev'd other grounds, 105 P.3d 209 (Colo. 2005). Defendant was not denied a fair trial based upon comments made by trial court to child sexual assault victim which were intended to assuage victim's fear about testifying and were not comments on her credibility.

People v. Salyer, 80 P.3d 831 (Colo. App. 2003). It is constitutional error for judge, even with parties' consent, to absent himself from courtroom during presentation of evidence to jury, including the playing of many hours of videotaped evidence. *Here*: the error was harmless since no objection was raised, and judge was present when issues arose regarding the logistics of playing the videotapes. No reversible error where judge told jurors, out of defense counsel's presence, that they could have snacks and soft drinks while watching videotaped evidence; allowing jurors to have snacks, and referring to videotape as "watching TV," did not diminish seriousness of proceedings.

People v. James, 40 P.3d 36 (Colo. App. 2001), overruled other grounds, McDonald v. People, 2021 CO 64. Trial court erred in telling venire that defendant was in custody and wearing a leg-restraint security device. But defendant was not prejudiced, and no reversible error occurred, where: (1) court's remarks were couched within instructions regarding need to favor defendant with the presumption of innocence and prosecution's burden of proof; (2) defense counsel could have, but did not, ask venire about any potential prejudice court's comments created; (3) comments were made only once; (4) defendant was dressed in street clothes; and (5) restraint was hidden beneath defendant's clothing. Although trial court's choice of words could have been better, it did not overstep the bounds of required judicial restraint when it berated defense counsel in front of jury for engaging in "obviously-misleading" cross-examination of a co-defendant.

People v. Coria, 937 P.2d 386 (Colo. 1997). Characterizing the motivation of an advocate who makes an objection detracts from a judge's role in focusing on the merits and conducting the proceedings impartially. *Here:* during closing argument, defense counsel objected to prosecutor's remarks; trial court overruled, suggesting that defense counsel objected only to interrupt the flow of prosecutor's argument; court should not have made these comments, particularly when defense objection could well have been sustained; but harmless error because without more, comments that disappoint, discomfort, or embarrass counsel in the presence of jury rarely amount to deprivation of a fair trial.

DEFENDANT'S TRIAL RIGHTS

Right to Counsel

People v. Arguello, 772 P.2d 87 (Colo. 1989). A defendant is not entitled to hybrid or mixed representation. Before defendant may proceed pro se, the trial court must conduct a specific on-the-record inquiry to ensure that defendant has validly waived his right to counsel. An adequate advisement must comply substantially with a specific list of questions in the Colorado Trial Judge's Benchbook. Courts must indulge every reasonable presumption against finding a waiver of the right to counsel.

People v. Tresco, 2019 COA 61. In reviewing a trial court's denial of defendant's motion for substitute counsel, a reviewing court will defer to a trial court's explicit and implicit credibility determinations.

People v. Ronquillo, 2017 CO 99. A defendant may fire retained counsel without needing to make a good cause showing, even if he wants to replace retained counsel with appointed counsel.

People v. Hebert, 2016 COA 126. Trial courts determine the probative effect and weight of the evidence regarding defendant's eligibility for appointed counsel. *Here:* though defendant indicated on her PD application that she had no income and was separating from her husband, the trial court properly assessed her credibility and determined that she was ineligible for the PD.

People v. Guzman-Rincon, 2015 COA 166. Trial court's decision to instruct a deliberating jury that their lives had been threatened without the presence of counsel violated defendant's right to counsel at a critical stage.

People v. Guzman-Rincon, 2015 COA 166. When defense counsel is excluded from a portion of a proceeding due to concerns that he or she may have acted unethically, defendant's rights must be protected by: (1) appointing independent conflict counsel; (2) having second chair counsel step in for the narrow proceedings (without sharing the information with possibly conflicted counsel.

People v. Schupper, 2014 COA 80. In determining indigency, trial court may also consider whether defendant has secreted assets. A determination of indigency is within the sound discretion of the trial court because that court is in the best position to determine the assets which the defendant can access. It is defendant's burden to prove, by a preponderance of the evidence, that he is indigent. This means more than providing self-serving statements to the collections investigator that monies placed in an account are loans that must be repaid. A defendant may waive assistance of counsel either expressly or impliedly through his conduct. An implied waiver occurs when defendant is deemed to have forfeited the right to counsel, as opposed to having made a deliberate decision to forgo the right. Before a court may find a valid implied waiver based on defendant's conduct, there must be ample, unequivocal evidence in the record that defendant was advised properly in advance of the consequences of his actions. The reviewing court must not only look at the advisement, but also weigh the totality of circumstances in ascertaining the validity of the waiver. *Here:* the record established that defendant (1) is highly educated, (2) understood the charges against him and the possible penalties from those charges, (3) knew of his right to counsel, his right to court-appointed counsel if he was indigent, and the importance of having counsel, (4) understood his Fifth Amendment right to remain silent, and (5) understood his right to subpoena and confront witnesses, his failure to secure private counsel, after being found ineligible for court-appointed counsel, was tantamount to a knowing, intelligent, and voluntary waiver of his right to counsel.

People v. Delgadillo, 2012 COA 33. A defendant has a right to counsel at every critical stage of the proceedings against him.

People v. Moore, 251 P.3d 451 (Colo. App. 2010). Lack of counsel at arraignment when a not guilty plea is entered does not amount to a total deprivation of counsel and, therefore, is not structural error. *Here*: because defendant did not assert that he desired or had any reason to pursue any of the rights that could be lost within a certain time after arraignment, the absence of counsel at arraignment was harmless beyond a reasonable doubt.

People v. Bergerud, 223 P.3d 686 (Colo. 2010). Counsel may make binding strategic decisions related to the defense of the client. Counsel may not: (1) decide whether defendant will plead guilty, testify, waive a jury trial, or appeal; (2) take actions that contravene the truth-seeking purpose of criminal trials (e.g., present false evidence, make non-bona fide defenses, labor under conflicts of interest, or be affected by a complete breakdown of communications with the client); or (3) make professionally unreasonable strategic decisions. Counsel may not usurp defendant's right to choose his plea by making an opening statement that relieves the

prosecution of its burden of proof as to the crimes charged, or which prevents counsel from later seeking the defendant's outright acquittal. Counsel may not usurp defendant's right to testify with a defense that "completely contradicts" or "wholly undermines" defendant's expected testimony.

People v. Munsey, 232 P.3d 113 (Colo. App. 2009). Indigent defendants have a constitutional right to the appointment of counsel to file prejudgment motions for new trial. A defendant who becomes indigent during trial has the right to discharge retained counsel without having to show cause and then obtain court-appointed counsel, unless the discharge of counsel or request for appointment counsel is made for an improper purpose or will significantly disrupt judicial proceedings. Trial courts are obligated to review determinations by the PD pursuant to §21-1-103(3) that an unrepresented defendant is not indigent.

People v. Steinbeck, 186 P.3d 54 (Colo. App. 2007). Before a court may require defendant claiming indigency to go forward without counsel, the court must inquire into defendant's financial condition. *Here*: although the trial court made prior inquiries into defendant's financial status, it did not determine from those inquiries defendant's income or the value of his business. The trial court should have inquired into defendant's financial status in reviewing the PD's determination that defendant was not indigent as some of defendant's prior statements and portions of his application for court-appointed counsel indicated that he met the indigency guidelines. A court must make specific findings to support a determination of nonindigency. A defendant cannot waive the statutory right to have the court review the PD's determination of indigency.

People v. Cohn, 160 P.3d 336 (Colo. App. 2007). Where defendant has been excluded from the courtroom because of his own misconduct, defendant's right to counsel will be preserved by appointing standby counsel ready to step in should the trial court find it necessary: (1) to make a finding that defendant, by his conduct, has waived the right to self-representation, and (2) to exclude defendant from the courtroom when disruptive behavior occurs. The exclusion of a pro se defendant from the courtroom due to his misconduct was constitutional error where defendant was absent from the exercise of peremptory challenges, a critical stage of the proceedings.

People v. Kelling, 151 P.3d 650 (Colo. App. 2006). A trial court's error in failing to inquire into the grounds for defendant's dissatisfaction with counsel is not in and of itself structural error mandating a new trial, and thus it is subject to harmless error review. The remedy on appeal is to remand the case for a determination of whether substitution of counsel was warranted. On remand, defendant has the burden to establish that he had a completely fractured relationship with appointed counsel because of an irreconcilable conflict or a total breakdown in communication. The party adversely affected by the court's ruling on remand has a right to appeal that ruling.

People v. Pineda, 40 P.3d 60 (Colo. App. 2001). Whether counsel shall be permitted to withdraw from a case is a matter within the trial court's discretion. *Here:* since the case was beyond the PH stage, counsel's assertion that there were insufficient funds to mount a defense, without more, was not enough to warrant allowing his withdrawal.

Right to Self-Representation

People v. Waller, 2016 COA 115. A defendant has a constitutional right to represent himself, but he has no right to the appointment of advisory counsel. A defendant's lack of technical legal knowledge should not be considered when a court rules on a motion to proceed pro se. A trial court does not abuse its discretion in declining to appoint advisory counsel where the record shows the trial court considered the particular circumstances in the case, including the legal and factual complexity of the issues, defendant's familiarity with the criminal trial process, and his formal education and ability to effectively communicate with the court and jury.

People v. Brante, 232 P.3d 204 (Colo. App. 2009). The Sixth Amendment right to counsel does not require that a pro se defendant who voluntarily absents himself from his criminal trial be appointed counsel during his absence.

People v. Abdu, 215 P.3d 1265 (Colo. App. 2009). De novo review applies to claims of denials of the right to self-representation. Fact-specific cases applying an abuse of discretion standard (in situations such as an untimely request that would disrupt ongoing trial proceedings) do not create a general abuse of discretion standard. *Here:* defendant failed to make an unequivocal request to represent himself because his request was tethered to his objection to a continuance of the trial. Upon learning that trial would be continued regardless of whether or not he had counsel, defendant made clear he wanted legal representation. Therefore, defendant was not denied the right to represent himself.

People v. Wallin, 167 P.3d 183 (Colo. App. 2007). While defendant may waive assistance of counsel at sentencing, the record must show that defendant knowingly and willingly undertook a course of conduct that demonstrated an unequivocal intent to relinquish or abandon his right to representation. Because there is a strong presumption against the waiver of such a right, the trial court has a duty to make careful inquiry about defendant's desires regarding legal representation. A request for new counsel is not ordinarily a waiver of the right to counsel. However, an unreasonable request or a request without good cause may be considered a waiver. Ultimately, the court must give defendant a clear choice between counsel and a waiver, and before the court permits a waiver of counsel, it should make defendant aware of the dangers and disadvantages of self-representation. *Here:* prior to sentencing, the PD moved to withdraw at defendant's request, which was based on defendant's allegations of lack of communication. Defendant indicated that he would proceed pro se or would try to hire counsel. After granting the PD's request to withdraw, the court refused to appoint ADC. Defendant neither expressly nor impliedly waived his right to counsel. The court also held that (1) defendant's statement about the lack of communication with counsel indicated the possibility of a complete breakdown in communication, which required inquiry into whether defendant had good cause for substitution of counsel, and (2) the trial court failed to advise defendant of the dangers and disadvantages of self-representation.

People v. Alengi, 148 P.3d 154 (Colo. 2006). A trial court need not delve into an unrepresented defendant's financial dealings other than to engage in an *Arguello* colloquy. After the court has informed defendant of the right to representation, defendant bears the burden to establish his or her inability to retain private counsel before the trial court needs to engage in any further investigation into defendant's financial affairs. Declining to extend King v. People, 728 P.2d 1264 (Colo. 1986) beyond the facts of that case.

People v. King, 121 P.3d 434 (Colo. App. 2005). Defendant's statement that he wanted appointment of new counsel and a continuance and that he would have to proceed pro se against his will if court denied requests did not constitute an unequivocal request for self-representation and court did not err in denying it.

People v. Shreck, 107 P.3d 1048 (Colo. App. 2004). Where defendant made several requests to represent himself that were secondary to requests for other things such as a law library, they were not unequivocal requests for self-representation.

People v. Edwards, 101 P.3d 1118 (Colo. App. 2004). Request to proceed pro se was not unequivocal where defendant claimed was prepared to go to trial "with or without counsel" but trial court told him that an appointed attorney would visit him at the jail and defendant could determine whether he wanted that representation and defendant subsequently went to trial with appointed counsel.

People v. Mossman, 17 P.3d 165 (Colo. App. 2000). The trial court properly permitted defendant to discharge his PD and proceed pro se, even though it did not conduct the specific colloquy set forth in People v. Arguello,

772 P.2d 87 (Colo. 1989). Defendant understood his rights and insisted on representing himself, even after being urged to reconsider his decision.

Waiver of Right to Counsel

People v. Gemelli, 2023 COA 119. A defendant's waiver of his right to counsel is not invalid merely because he is required to choose between waiving his right to counsel and another course of action. As long as the choice is not "constitutionally offensive," the waiver is not rendered involuntary. Even if defendant's self-representation is ineffective, the trial court is neither obligated nor authorized to sua sponte override a defendant's valid waiver of the right to counsel and require that he be represented by counsel. *Here:* defendant waived his right to counsel and proceeded pro se at trial; he argued on appeal that his waiver was invalid because it was induced by his continued detention and his desire to avoid a continuance of his trial date; he also contended that when it became apparent that his self-representation was ineffective, the trial court should have sua sponte intervened and ordered advisory counsel to take over the representation.

People in the Interest of J.V.D., 2019 COA 70. The trial court did not give the statutorily required advisement when juvenile chose to waive his right to counsel and proceed pro se. Because juvenile was only relying on the facts within the record, COA could analyze the issue on direct appeal and it concluded that the record did not establish the juvenile's waiver was knowing and intelligent.

People v. Davis, 2015 CO 36M; People v. Wilson, 2015 CO 37. CSC declined to adopt a new competency standard under Indiana v. Edwards, 554 U.S. 164 (2008) for mentally ill defendants who wish to waive their Sixth Amendment right to counsel. Colorado's two-part framework for determining whether defendant has validly waived the right to counsel affords trial courts sufficient discretion to consider a defendant's mental illness. If defendant fails to meet the standard for competence under Dusky v. United States, 362 U.S. 402 (1960) he may not waive the right to counsel. If defendant does meet the standard, he may waive the right to counsel if his waiver is voluntary, knowing, and intelligent. Even if defendant is found competent to stand trial, his mental illness can impact whether he makes a knowing and intelligent waiver of counsel because the illness might prevent him from broadly understanding the charges, punishments, defenses, and other essential facts of the case. As such, a trial court may consider defendant's mental illness during its totality-of-the-circumstances analysis to determine whether the waiver is knowing and intelligent. If a trial court finds that the totality of the circumstances shows that defendant, although competent, has not voluntarily, knowingly, and intelligently waived the right to counsel, then the trial court will insist on representation by counsel. Defendant has a constitutional right to represent himself. A defendant must validly waive his right to counsel to exercise self-representation; he validly waives this right if he (1) is competent to waive, and (2) makes the waiver voluntarily, knowingly, and intelligently. A "voluntary" waiver of counsel, like any voluntary statement, is one that was not extracted by threats or violence, promises, or undue influence. Trial courts evaluate whether defendant's waiver is voluntary under the totality of the circumstances. Defendant's mental illness is one factor to be considered in determining whether the statement was voluntary because mental illness could impact whether the waiver arose from threats, promises, or undue influence. If a trial court finds that defendant has made a voluntary waiver of counsel, it also must determine whether the waiver was knowing and intelligent. A waiver is knowing and intelligent when the totality of the circumstances demonstrates defendant understands the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

People v. Johnson, 2015 COA 54. The trial court erred in determining that defendant did not knowingly and intelligently waive his right to counsel. The court thoroughly questioned defendant, as required by People v. Arguello, 772 P.2d 87 (Colo. 1989), and the guidelines set forth in the Colorado Trial Judges Benchbook, and

defendant's answers indicated that he "knowingly and intelligently" relinquished his right to counsel. The court erroneously relied on factors such as the seriousness of the charges and defendant's lack of legal knowledge, as such factors are not relevant to the question of whether defendant had a full understanding of what he was doing and the consequences thereof.

People v. Vickery, 229 P.3d 278 (Colo. 2010). A knowing, voluntary, and intelligent *Miranda* waiver is sufficient to waive both a defendant's Fifth and Sixth Amendment rights to counsel. *Here:* defendant was in custody on charges in one jurisdiction and was interviewed by officers investigating a different offense in another jurisdiction. He was represented by counsel on Case #1. Defendant was given a *Miranda* advisement on Case #2, signed a waiver, and then proceeded to discuss both offenses, volunteering information about Case #1. The trial court suppressed the defendant's statements, finding that his waiver was knowing, voluntary, and intelligent, but was insufficient to waive his sixth amendment right to counsel.

People v. Wallin, 167 P.3d 183 (Colo. App. 2007). While defendant may waive assistance of counsel at sentencing, the record must show that defendant knowingly and willingly undertook a course of conduct that demonstrated an unequivocal intent to relinquish or abandon his right to representation. Because there is a strong presumption against the waiver of such a right, the trial court has a duty to make careful inquiry about defendant's desires regarding legal representation. A request for new counsel is not ordinarily a waiver of the right to counsel. However, an unreasonable request or a request without good cause may be considered a waiver. Ultimately, the court must give defendant a clear choice between counsel and a waiver, and before the court permits a waiver of counsel, it should make defendant aware of the dangers and disadvantages of self-representation. *Here:* prior to sentencing, the PD moved to withdraw at defendant's request, which was based on defendant's allegations of lack of communication. Defendant indicated that he would proceed pro se or would try to hire counsel. After granting the PD's request to withdraw, the court refused to appoint ADC. Defendant neither expressly nor impliedly waived his right to counsel. The court also held that (1) defendant's statement about the lack of communication with counsel indicated the possibility of a complete breakdown in communication, which required inquiry into whether defendant had good cause for substitution of counsel, and (2) the trial court failed to advise defendant of the dangers and disadvantages of self-representation.

People v. Rawson, 97 P.3d 315 (Colo. App. 2004). Defendant did not knowingly, intelligently, or voluntarily waive his right to counsel, where the trial court: (1) did not give an *Arguello* advisement; (2) did not sufficiently inquire into defendant's financial affairs; and (3) did not inquire into how defendant's mental health problems might affect his understanding of the consequences of waiver of counsel. Defendant with known mental health problems fired his private attorney, and then, after repeated ad monitions from the court, failed to retain new counsel, stating that he would represent himself or continue to look for counsel he could afford.

Counsel of Choice

Tyson v. District Court, 891 P.2d 984 (Colo. 1995). The right to continue with a particular attorney may be disturbed by a serious conflict. When this situation arises, the trial court must assess defendant's preference for particular counsel; the nature of the conflict; and the public's interest in maintaining the integrity of the judicial process.

Anaya v. People, 764 P.2d 779 (Colo. 1988). The erroneous disqualification of a defendant's counsel of choice is never harmless.

People v. Rainey, 2023 CO 14; People v. Davis, 2023 CO 15. CSC considers whether defendants have a Sixth Amendment right to continued representation by a particular PD, and under what standard a trial court should

determine a defendant's continuance request to enable continued representation with appointed counsel. CSC holds that, although indigent defendants have an interest in continuity of counsel that must be considered by a court, it is not a right guaranteed under the Sixth Amendment. Any Sixth Amendment right to continuity of counsel is a component of the right to choose counsel, and it is settled law that defendants do not have a right to choose a particular appointed attorney. However, a court considering a requested continuance to allow appointed counsel to represent a defendant at trial should consider whether the denial of the continuance and substitution of counsel would prejudice the defendant. *Here Rainey:* The defendant in this case was represented by the PD; defendant requested a continuance so that his second appointed PD, who had represented him for about two weeks, could represent him at trial. Trial court denied the request, noting that the case was straightforward and that a new trial date could not be set for many months if the continuance was granted. *Here Davis:* defendant was represented by the PD and requested a continuance so that his appointed PD could represent him at trial. The trial court denied the request, stating that because of the simple nature of the case, it perceived no prejudice in denying the continuance, though that required substitution of counsel.

People v. Thompson, 2017 COA 56. The majority held that Colorado's requirement that ancillary services be provided at state expense only via appointed counsel comports with the 6th Amendment. The special concurrence found this issue was invited error and did not reach the constitutional issue. *Here:* private counsel asked court to provide an investigator and experts at state expense. Court denied that request, counsel withdrew, and court appointed PD, who provided investigators and experts. Defense on appeal argues this violated his right to counsel of choice.

People v. Cardenas, 2015 COA 94M. Under Crim.P. 44(d)(2) and Crim.P. 44(c), defendant is denied his choice of counsel when a court grants counsel's motion to withdraw over defendant's objection based on information provided outside defendant's presence, and the court does not balance the need for the orderly administration of justice with the facts underlying the request.

People v. Weeks, 2015 COA 77. The trial court did not abuse its discretion when it denied defendant's midtrial request for substitution of counsel: counsel's choice of a particular trial defense was not the product of any interests that conflicted with defendant's interests; the trial court properly considered the ***Bergerud*** factors and placed emphasis on defendant's midtrial change of heart after initially agreeing to counsel's strategy; and defendant was free to testify as to his now-preferred defense and could have called a former defense investigator to demonstrate it was not newly fabricated.

People v. Brown, 2014 CO 25. The right to choice of counsel does not guarantee an absolute right to counsel of choice in all cases. If defendant requests a continuance in order to accommodate his choice of counsel, the trial court must balance defendant's right to counsel of choice against the public's interest in both the efficient administration of justice and maintaining the integrity of the judicial process. The trial court should consider and make a record of the impact of the following factors, so that reviewing courts can determine if the trial court properly exercised its discretion in determining whether to grant a continuance: (1) defendant's actions surrounding the request and apparent motive for making the request; (2) the availability of chosen counsel; (3) the length of continuance necessary to accommodate chosen counsel; (4) the potential prejudice of a delay to the prosecution beyond mere inconvenience; (5) the inconvenience to witnesses; (6) the age of the case, both in the judicial system and from the date of the offense; (7) the number of continuances already granted in the case; (8) the timing of the request to continue; (9) the impact of the continuance on the court's docket; (10) the victim's position, if the victims' rights act applies; and (11) any other case-specific factors necessitating or weighing against further delay.

People v. Krueger, 2012 COA 80. When the court determines defendant has not established good cause warranting substitution of counsel, the court can require defendant to choose between continuing to be

represented by existing counsel or proceeding pro se. Good cause for substituting counsel exists where there is a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict that may lead to an apparently unjust verdict. Trial counsel's decision whether to provide his client with discovery materials constitutes a matter of trial strategy and falls within counsel's discretion. *Here:* counsel's decision to provide defendant with limited access to selected discovery materials did not create a conflict warranting substitution of counsel. Crim.P. 16(III)(c) -- which provides that counsel is not required to provide actual copies of discovery to client if: (1) defense counsel reasonably believes it would not be in the client's interest, and (2) other methods of having client review discovery are available -- was satisfied where counsel summarized some materials for defendant's review and showed some materials to defendant. Defendant's right to decide whether to testify does not extend to a pretrial suppression hearing. The decision whether to move to suppress evidence is a strategic one for counsel to make in the exercise of professional discretion, as is the decision whether to present defendant's testimony at any such hearing.

People v. Ragusa, 220 P.3d 1002 (Colo. App. 2009). The denial of a defendant's constitutional right to counsel of her choice is structural error. In order to demonstrate a violation of her Sixth Amendment rights, defendant must establish that an actual conflict of interest adversely affected her lawyer's performance. *Here:* where defendant's privately retained attorneys met with the court and the prosecutors in the defendant's absence, disclosed client confidences, and concealed the disclosure from defendant, defendant's Sixth Amendment rights to have conflict free counsel and counsel of her choice were violated.

People v. Harlan, 54 P.3d 871 (Colo. 2002). In determining whether defendant will continue to be represented by counsel of choice or whether counsel should be disqualified, the court must balance the public's interest in maintaining the integrity of the judicial process with defendant's right to continued representation by counsel of choice, right to conflict free counsel, and right to waive the right to conflict free counsel. A trial court may not disqualify counsel on the basis of speculation or conjecture and may do so only after facts are alleged that show the potential violation of a rule of professional conduct. *Here*: trial court improperly disqualified counsel. The strong presumption in favor of retaining counsel of choice was not rebutted, and the public's interest in retaining the integrity of the judicial process was not compromised, in part because the motion for appointment of ADC was filed to protect defendant's state and federal postconviction rights. The fact that defendant asked that ADC be appointed to investigate whether his trial counsel had been ineffective was not an actual conflict, but only a potential conflict, and was waivable.

Intrusion on Right to Counsel

People v. Guzman-Rincon, 2015 COA 166. The trial court held an ex parte meeting alerting the court of a threat made to the jury, the prosecutors, and the advisory witness. Defense counsel's absence from this conference, and the court's failure to inform him of the substance of the conference, deprived the defendant of the right to counsel at a critical stage of the proceedings. Trial court's decision to instruct a deliberating jury that their lives had been threatened without the presence of counsel violated the defendant's right to counsel at a critical stage.

People v. Curren, 2014 COA 59. A showing of prejudice is required even when defendant is asserting a Sixth Amendment claim challenging an actual intrusion upon the attorney-client relationship. When a defendant takes the stand and testifies regarding privileged communications and other topics regarding his former attorney, he opens the door to rebuttal evidence on these topics, and he impliedly waives the attorney-client privilege. The prosecution meets the requirements to subpoena a lawyer under Colo. RPC 3.8(e), when the prosecution had a reasonable belief that it was essential to rebut defendant's case-in-chief. *Here:* no plain error in calling former attorney where defendant's testimony alleged that counsel was incompetent, unprepared, and advised him to flee to Mexico. The *Williams* factors regarding calling defense counsel to testify against a client in a criminal

proceeding do not apply to former counsel; the factors only apply when the prosecution subpoenas a defendant's current defense counsel.

In Re People v. Wright, 196 P.3d 1146 (Colo. 2008). Colo. RPC 4.2 does not prohibit an agent of the DA from contacting, for any reason, defendant being represented by the PD, in any case or capacity, without the knowledge and permission of his attorney. *Here:* trial court's sweeping order to the contrary foreclosed a factual inquiry, so the case is remanded for further consideration of defendant's suppression motions.

Hodges v. People, 158 P.3d 922 (Colo. 2007). When appointing counsel for an indigent defendant where the PD has a conflict, the court must appoint an attorney approved by the OADC. However, the failure to appoint an attorney affiliated with OADC will not result in the reversal of a criminal conviction, as such an administrative error does not violate any cognizable right of defendant.

People v. Parsons, 15 P.3d 799 (Colo. App. 2000). Defendant must show actual prejudice to prevail on a claimed violation of his right to a private attorney-client consultation. *Here*: Colorado State Penitentiary attorney-client visiting room was sufficiently private for most purposes. Even if the room did not allow for private physical demonstrations, the record shows that defendant could have conducted such demonstrations during brief visits with counsel in the courthouse jury room.

People v. Thomas, 962 P.2d 263 (Colo. App. 1997). When defense attorneys elect not to appear for the commencement of trial, defendant is not "deprived" of counsel in the constitutional sense. Rather, the issue is whether the trial court was required to grant a continuance because of the strategic decision not to appear.

Conflicts of Interest

People v. Lopez, 2024 CO 50. In this case, the CSC considers whether a defendant who argues, for the first time on appeal, that his constitutional right to conflict-free counsel was violated by the simultaneous prosecution of defense counsel and defendant by the same prosecutor must prove that an actual conflict of interest adversely affected his representation. To answer this question the court must decide whether to adopt the COA's analysis in *Edebohls*, in which the COA concluded that pending criminal charges against defense counsel in the same district in which counsel was representing a defendant created an actual conflict of interest that, absent a valid waiver, required reversal. The CSC concludes that *Edebohls* has been superseded by subsequent case law, which has limited the categories of errors deemed to mandate reversal without a showing of prejudice (i.e., structural errors). The proper framework for analyzing a conflict like that at issue here is the framework set forth in West v. People, 2015 CO 5, which requires a court to determine whether the case falls within one of the few scenarios that the Supreme Court has said support a presumption of prejudice and, if not, whether defendant has shown both a conflict of interest and an adverse effect resulting from that conflict. The CSC reverses the COA and remands this case for findings in accordance with this opinion. ** *Practice Tip:* be aware that ¶45 concludes: "[A] defendant who establishes that a conflict of interest actually affected the adequacy of his representation need not show prejudice to obtain relief." There is also a fairly strong dissent.

People v. Harlan, 54 P.3d 871 (Colo. 2002). The right to conflict-free counsel is encompassed within the right to effective assistance of counsel.

People v. Martinez, 869 P.2d 519 (Colo. 1994). Counsel must withdraw or defendant may waive the conflict. A wavier will be valid only if the court fully explains the nature of the conflict, including the difficulties that defense counsel will face in providing effective representation.

People v. Martinez, 869 P.2d 519 (Colo. 1994); Rodriguez v. District Court, 719 P.2d 699 (Colo. 1986). In some cases, defendant's desires may be outweighed by the paramount necessity of preserving the public confidence in the integrity of the judicial system.

Ybanez v. People, 2018 CO 16. With few exceptions, the Sixth Amendment right to counsel merely protects defendant from being prejudiced by a deficient performance from his counsel. Unlike general ineffective assistance of counsel claims, certain conflicts of interest allow a court to presume prejudice, such as concurrent representation. Reversal is conditioned upon demonstration that the conflict actually affected the adequacy of counsel's representation. In those cases, to prove an adverse effect, defendant must: (1) identify a plausible alternative defense strategy or tactic that counsel could have pursued, (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision, and (3) establish that counsel's failure to pursue that strategy or tactic was linked to the conflict. With regard to the existence of a plausible alternative defense strategy, that inquiry requires defendant to identify an unpursued strategy that was obviously in defendant's interest under the circumstances. In addition to the existence of such a plausible alternative defense strategy, however, must be objectively reasonable. Finally, even if defendant demonstrates the existence of such a plausible alternate defense strategy and that it would have been objectively reasonable to pursue that strategy in light of all the attendant circumstances known to counsel, defendant must also demonstrate that the alternative strategy in question was not pursued due to the attorney's competing loyalties or interests. *Here:* it was unnecessary for the Court to resolve whether the father's engagement contract with defendant's counsel to defend his son created a non-waivable or non-consentable conflict of interest, for the reason that defendant failed to demonstrate in his postconviction proceedings that any such conflict, even if

one existed, had an adverse effect on counsel's performance.

People v. Stroud, 2014 COA 58. In order to demonstrate an actual conflict of interest, defendant must identify something that counsel did or did not do and must show that the course taken was influenced by counsel's conflict. *Here:* the alleged action counsel did not take, was harmless beyond a reasonable doubt, and the actions counsel did take were effective and were not adversely impacted, so no actual conflict of interest adversely affected counsel's performance.

People v. DeAtley, 2014 CO 45. Where defendant discharged counsel and sued them for malpractice, the trial court erred in determining that counsel could continue to effectively represent defendant. Notwithstanding the trial court's belief that defendant was engaging in delay-causing conduct, the trial court should have granted counsel's motion to withdraw and given defendant an appropriate *Arguello* advisement.

People v. Roberts, 2013 COA 50. Defense counsel's heavy case load may constitute a potential conflict of interest that provides a proper basis for counsel's withdrawal.

People v. Delgadillo, 2012 COA 33. A conflict of interest exists when counsel's ability to represent defendant is materially limited by counsel's own interests. An actual conflict of interest is one that is real and substantial, whereas a potential conflict of interest is one that is possible or nascent, but in all probability will arise. *Here*: counsel suffered an actual conflict of interest when he was forced to simultaneously respond to questioning from the court and prosecutor, justify his earlier advice to defendant, and remain a zealous advocate. A conflict of interest does not, by itself, create a constitutional violation; defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. If defendant successfully shows that the conflict affected the adequacy of representation, he need not demonstrate prejudice as a prerequisite for relief. *Here*: counsel engaged in conduct that demonstrates that the conflict adversely affected the adequacy of defendant's representation; specifically, he failed to advise defendant of the conflict and disclosed privileged attorney-client communications and defense strategy to the court and the prosecutor. A trial court has a duty to inquire into the propriety of continued representation if it knows or should reasonably know that a conflict exists. *Here*: court should have recognized the existence of a conflict of interest and should have explained to defendant on the record the nature of the conflict and that he was entitled to conflict-free counsel.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). No error in denying defendant's request for substitution of counsel where counsel acknowledged there have been a lot of communication breakdowns, but maintained that he was continuing to represent defendant's interests and had a number of visits with defendant; the record did not indicate a complete breakdown in communication.

People v. Bergerud, 223 P.3d 686 (Colo. 2010). Conflicts between counsel and defendant over issues of trial strategy should be brought to the trial court's attention at the earliest possible time. A motion for substitution of counsel because of such a dispute waives the attorney-client privilege as to the underlying facts. Counsel must make a record of such facts and respond to trial court inquiries about them. When evaluating defendant's motion for substitution of counsel based on an attorney-client conflict over trial strategy—in addition to considering the facts underlying defendant's request for new counsel—courts must consider the need for the "orderly and expeditious administration of justice" by addressing: the motion's timeliness; the adequacy of the trial court's inquiry into defendant's complaint; whether the conflict resulted in a total lack of communication; or whether defendant substantially and unreasonably contributed to the underlying conflict with counsel.

People v. Curren, 228 P.3d 253 (Colo. App. 2009). Defendant alleged counsel told him to flee to Mexico before trial; counsel denied any such action. The issue was summarily resolved, and defendant proceeded to trial with counsel. Defendant did not testify at trial. In a later Crim.P. 35(c) motion, defendant alleged that counsel had an actual conflict of interest and should have withdrawn from the case. The 35(c) court found (1) counsel had not

advised defendant to abscond, but (2) the allegation alone created an actual conflict of interest. The court held that counsel should have withdrawn and ordered a new trial. COA held there was evidence in the record to support the conclusion that trial counsel had an actual conflict of interest, and defendant could have been adversely affected (the court reasoned that counsel may not have called defendant to testify because he feared defendant's allegations might be revealed to the jury).

People v. Hagos, 250 P.3d 596 (Colo. App. 2009). Rule 3.7 of the Colorado Rules of Professional Conduct requires that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. *Here*: trial court acted within its discretion in concluding defendant would likely have a compelling need to call his attorney in an effort to rebut a witness's claims of intimidation. Where trial court fails to inquire into a potential conflict of interest, a case will be reversed only if defendant shows that counsel was subject to an actual conflict of interest that adversely affected counsel's performance. *Here:* although trial court should have explained to defendant the nature of potential conflicts concerning counsel's prior representation of members of the prosecutor's office, defendant did not show the existence of an actual conflict that adversely affected counsel's performance since the specific prosecutor involved left the DA's office before trial, and a similarly situated investigator did not testify. If a trial court denies counsel's motion to withdraw based on an irreconcilable conflict with the client, counsel should make a record of the disagreement outside the presence of the trial court for purposes of appellate review. *Here:* counsel declined to provide additional information to the judge or to the court reporter alone, and accordingly, there was no basis on appeal for concluding that the trial court abused its discretion.

People v. Samuels, 228 P.3d 229 (Colo. App. 2009). A conflict of interest under the Rules of Professional Conduct does not necessarily equate with a violation of defendant's right to effective assistance of counsel. Defense counsel does not have a conflict of interest where he represented a prosecution witness in unrelated cases and his representations of that witness ended before his representation of the defendant began.

In re People v. Shari, 204 P.3d 453 (Colo. 2009). Trial court abused its discretion in disqualifying the entire State PD's Office from representing defendant where some individual attorneys from the PD's Office had previously represented three prosecution witnesses. No direct conflict of interest existed because neither individual PD representing defendant was involved in the prior representation of the witnesses. The conflicts that may have existed with regard to other PDs within the statewide office could not be imputed to the individual attorneys in this case under Colorado Rule of Professional Conduct 1.11. Finally, defendant knowingly, intelligently, and voluntarily waived any conflict that may have existed after being informed of the potential conflicts by the trial judge.

In re People v. Maestas, 199 P.3d 713 (Colo. App. 2009). A defendant may waive the right to conflict-free counsel, and the trial court should accept a valid waiver, unless defendant's preference is outweighed by evidence in the record that affording defendant this 6th Amendment right to counsel of choice will frustrate the administration of justice. Comment 21 of Rule 1.7 (of the Colorado Rules of Professional Conduct) does not permit defendant to revoke his waiver at will; defendant's desire to do so is subject to the court's inquiry and approval.

People v. Gonyea, 195 P.3d 1171 (Colo. App. 2008). When an indigent defendant voices objections to court-appointed counsel, the court must inquire into the matter. If defendant establishes good cause, such as conflict or a complete breakdown of communication, the court must appoint substitute counsel. *Here:* record supported trial court's determination that substitution was not warranted. Thus, the court did not abuse its discretion in declining to dismiss the PD and appoint substitute counsel.

Dunlap v. People, 173 P.3d 1054 (Colo. 2007). A defendant need not object at trial or prove prejudice where an actual conflict of interest-such has counsel aligning himself with the prosecution-affected counsel's

performance. However, speculation of such an alignment is not sufficient to support this claim. A conflict of interest impacting defendant's right to effective assistance of counsel can arise where a defense attorney previously represented a prosecution witness. Such a conflict can be waived by defendant or the former client.

People v. Kelling, 151 P.3d 650 (Colo. App. 2006). An actual conflict of interest is one that is "real and substantial," whereas a potential conflict is one that is "possible," is "nascent," or "in all probability will arise." Where a trial court is on notice but neglects to inquire into a potential conflict, defendant must show that counsel was subject to an actual conflict of interest that adversely affected counsel's performance on behalf of the defendant. *Here*: where counsel was wholly unconcerned during the habitual criminal hearing with defending his earlier acts or omissions, he was not operating under an actual conflict of interest that adversely affected his performance during that phase of the case.

People v. Bostic, 148 P.3d 250 (Colo. App. 2006). Defendant's expressed dissatisfaction with her privately retained counsel immediately before trial did not constitute an assertion of a conflict of interest or a complete breakdown in communication.

People v. Finley, 141 P.3d 911 (Colo. App. 2006). When plea counsel testifies as a witness for the prosecution at a motion to withdraw guilty plea in direct contradiction to defendant's testimony and adversely to the position and interests of defendant, defendant is entitled to conflict-free counsel for purposes of sentencing, unless defendant waives the conflict.

People v. Hodges, 134 P.3d 419 (Colo. App. 2005). The trial court was not required to conclude, based on counsel's statement that he was "concerned that we're not truly communicating," that there was a complete breakdown of communication between defendant and counsel. Nor was the court required to substitute counsel based on counsel's statement that he could not provide effective assistance of counsel.

People v. Jenkins, 83 P.3d 1122 (Colo. App. 2003). Although *Arguello* requires a more fact-specific inquiry than the court made here, trial court did not abuse its discretion in denying defendant's *pro se* motion for substitution of counsel, where defendant did not allege a conflict of interest and failed to show a complete breakdown in communications.

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). Defendant validly waived the conflict of interest that arose when defense counsel began dating the prosecutor. The record showed that the court engaged in a colloquy with defendant that consisted of more than pro forma questions and answers, and defendant stated that he had discussed the matter with his attorney and wished to retain him.

People v. Campbell, 58 P.3d 1148 (Colo. App. 2002). Trial court's ruling that defendant proceed to trial without an attorney where defendant never expressly waived his right to counsel or his right to conflict-free counsel, constitutes reversible error. Defendant's attorney created a conflict of interest when he took a legal position regarding defendant's implied waiver of counsel, which was adverse to defendant's interests.

People v. Garcia, 64 P.3d 857 (Colo. App. 2002). Defendant went *pro se* because appointed counsel refused to pursue a defense challenging the escape statute's applicability to mandatory parolees. No conflict of interest or breakdown in communication warranting appointment of substitute counsel.

Miscellaneous Right to Counsel

People v. McGlaughlin, 2018 COA 114. When defendant is represented by a student attorney under C.R.C.P. 205.7, a supervising attorney must be physically present in the courtroom during all critical stages of the criminal case. If the supervising attorney is not present during a critical stage, defendant is denied his Sixth Amendment right to counsel. All other violations of C.R.C.P. 205.7 are properly analyzed under the *Strickland* test for ineffective assistance of counsel.

People v. Mares, 263 P.3d 699 (Colo. App. 2011). A defendant lacks standing to challenge the court's failure to appoint counsel to a witness seeking to invoke his Fifth Amendment privilege not to testify.

People v. Griffin, 224 P.3d 292 (Colo. App. 2009). C.R.C.P. 221 authorizes an out-of-state attorney to appear as counsel pro hac vice in a Colorado criminal trial.

People v. Hodges, 134 P.3d 419 (Colo. App. 2005). When a private attorney is appointed as ADC, the Office of the ADC is appointed to represent defendant, even if the attorney is not on the ADC list. No statute expressly precludes appointment of an attorney not on the list. Thus, appointing a non-ADC attorney to an indigent defendant who has a conflict of interest with the PD does not violate any statutory provision.

Right to Testify

People v. Sauser, 2020 COA 174. An attorney should not ask a witness—including defendant—a question that will cause that witness to invoke his or her right to remain silent in front of the jury. *Here:* on cross-examination, prosecutor asked defendant a question unrelated to the topics addressed in direct examination, to which the prosecutor and the court knew defendant would respond by invoking his right to remain silent. While the court found error, it was harmless.

People v. Martin, 2014 COA 112. Trial court has discretion to allow a party to reopen the evidence after that party has rested his case. Defendant does not have an unconditional right to revoke his waiver of the right to testify, and trial court must exercise its discretion in determining whether to allow defendant to revoke this waiver. Where defendant waives his right to testify and rests his case, but then requests to reopen the case in order to testify, the court must consider the following factors in ruling on that request: (1) timeliness of the motion; (2) character of the testimony; (3) effect of granting the motion; (4) reasonableness of the party's explanation for failing to present the evidence in its case-in-chief; (5) circumstances of the *Curtis* advisement and initial waiver of the right to testify; and (6) defense counsel's position regarding the request to reopen the evidence.

People v. Krueger, 2012 COA 80. Defendant's right to decide whether to testify does not extend to a pretrial suppression hearing. The decision whether to move to suppress evidence is a strategic one for counsel to make in the exercise of professional discretion, as is the decision whether to present defendant's testimony at any such hearing.

People v. Walden, 224 P.3d 369 (Colo. App. 2009). Requiring defendant (who chose to testify in his defense) to testify before his delayed expert witness did not violate defendant's constitutional rights because: he exercised his right to testify; he chose to testify before there was any discussion about the timing of his testimony; he had already made the tactical decision to testify after consulting with counsel, and was given an opportunity to testify a second time after his expert, if he so desired.

People v. Skufca, 176 P.3d 83 (Colo. 2008). Relevant, otherwise admissible evidence is not rendered inadmissible simply because defendant may believe that, as a tactical matter, its admission would compel him to give the jury a response if he were to take the stand. This is a strategic decision that has no bearing on defendant's constitutional ability to choose whether to testify. While defendant's right to testify may be infringed when inadmissible evidence against him is erroneously admitted, it is not infringed when evidence is otherwise admissible. *Here:* in a drug prosecution, res gestae evidence of an earlier drug transaction for which separate charges were pending was admissible in the prosecution's case-in-chief to show defendant's knowledge regarding the drugs; allowing such evidence did not infringe the defendant's right to testify.

People v. Anderson, 954 P.2d 627 (Colo. App. 1997). Defendant wanted trial court to rule, before he decided to testify, whether his testimony would impliedly waive the physician-patient privilege; trial court properly

declined, because such a ruling would have to be based on speculation. Despite a tentative offer of proof, the specifics of his testimony could not be determined until defendant actually took the stand.

Right to Remain Silent

People v. Vigil, 2023 COA 12. As a matter of first impression, the State cannot revoke a sex offender's probation based on a valid invocation of the Fifth Amendment privilege against self-incrimination as to a sex offender treatment contract statement where the conviction is final (direct appeal completed) but defendant's three-year period for seeking postconviction relief has not run.

People v. Oday. 2022 COA 24. During a revocation hearing, defendant-probationer isn't entitled to the full range of constitutional guarantees afforded to a defendant in a criminal prosecution who faces substantive criminal charges. Defendant's privilege against self-incrimination isn't implicated when he is asked questions to determine whether he violated the conditions of his probation. *Here:* trial court did not violate defendant's Fifth Amendment privilege against self-incrimination by requiring him to answer questions in a DJ&S and probation revocation hearing. The questions —whether he had been charged with and convicted of crimes in another case — did not call for answers that could be used as evidence of guilt in this case or which could provide evidence of guilt in another pending or future criminal case.

Compos v. People, 2021 CO 19. By analogy to the booking exception, defendant's *Miranda* rights were not violated when, after taking him into custody but prior to providing him with *Miranda* warnings, the police asked him his name.

Deleon v. People, 2019 CO 85. A trial court must instruct the jury that it cannot consider defendant's refusal to testify in reaching a verdict, also known as a no-adverse-inference jury instruction, when requested to do so by defendant. Defendant adequately preserves for appellate review his claim that the trial court erred when it failed to provide a no-adverse-inference jury instruction where defendant exercised his Fifth Amendment right against self-incrimination and chose not to testify, even though defendant failed to object to the trial court's omission of the instruction, where defendant tendered a proposed no-adverse-inference instruction. *Here:* the trial court's introductory remarks regarding defendant's right not to testify did not constitute an effective no-adverse-inference jury instruction; the court's initial comment indicating defendant had no obligation to testify occurred during voir dire, the purpose of the comment was to determine whether potential jurors could act impartially and not to explain the law, and the trial court told the jury that it would eventually explain the law that the jury must apply, but then failed to instruct the jury on the law regarding the right to remain silent. The failure to provide a no-adverse-inference jury instruction was not harmless error; there was no physical evidence against defendant, so the outcome of the case rested on the credibility of the alleged victim versus defendant's theory that the victim fabricated the allegations, and there was no guarantee that the jury did not hold defendant's decision not to testify against him.

People v. Lewis, 2017 COA 147. DA did not improperly comment on defendant's silence. The prosecutor properly focused on the content of defendant's affirmative statements and what was missing from them. In addition, because defendant waived his *Miranda* rights there was no comment on silence. The court recognized that People v. Ortega, 597 P.2d 1034 (Colo. 1979), was superseded.

People v. Ortega, 2015 COA 38. The court did not violate defendant's Fifth Amendment rights against self-incrimination by requiring him to read a neutral statement to the jury. A voice exemplar is a physical characteristic and is non-testimonial. There is no difference between an in-court demonstration for a witness's benefit, and one conducted for the jury's benefit.

People v. Thomas, 2014 COA 64. Admission of defendant's silence in response to an accusation that he was the driver during a DUI-related crash did not violate his right against self-incrimination, because the silence occurred in a noncustodial setting.

People v. Smith, 275 P.3d 715 (Colo. App. 2011). Witnesses may not invoke Fifth Amendment right against self-incrimination prospectively. Witnesses may invoke Fifth Amendment right against self-incrimination only in response to questions that would incriminate the witness. Colorado courts review de novo question of whether witness properly invoked Fifth Amendment right against self-incrimination (acknowledging split in authorities). *Here:* defendant was convicted of conspiracy to commit theft. At trial, counsel called his co-conspirator, who had been convicted but not sentenced, to testify. The trial court permitted her to invoke her Fifth Amendment right against self-incrimination when asked if she knew defendant.

People v. Chavez, 190 P.3d 760 (Colo. App. 2007). Defendant's non-responsive reference to having exercised his right to remain silent held not error where prosecutor did not elicit the evidence and did not comment on it in closing argument.

People v. Taylor, 159 P.3d 730 (Colo. App. 2006). The use of pre-arrest silence or post-arrest, non-Mirandized, silence for impeachment does not violate defendant's constitutional rights. *Here:* evidence showing defendant's failure to notify authorities about a discrepancy in her useful public service form was not an improper comment on defendant's right to remain silent.

People v. Welsh, 80 P.3d 296 (Colo. 2003). CSC declined to reach the constitutional issue of whether use of pre-arrest silence violates the Fifth Amendment privilege against self-incrimination. However, defendant's failure to respond to questions, at the scene and at the hospital, regarding the shooting that took place several hours earlier was neither material nor probative of her sanity and should have been excluded under CRE 401. Moreover, under CRE 403, the unfair prejudicial impact of admitting the testimony so far outweighed any minimal probative value that the trial court abused its discretion in admitting the evidence. Furthermore, admission of the evidence constituted reversible error.

People v. Coit, 50 P.3d 936 (Colo. App. 2002). Co-defendant's privilege against self-incrimination is paramount to defendant's rights to present evidence and to compel witness testimony. There is no violation of defendant's due process right to a fair trial when a codefendant initially represents that he will testify to establish a joint alibi but changes his mind during the trial and elects not to testify.

People v. Gay, 24 P.3d 624 (Colo. App. 2000). Trial court committed plain error by granting the People's motion to use defendant's suppressed statement to impeach him on cross-examination, where it appeared that the court unintentionally reversed its prior ruling that the statement was actually involuntary, even though defendant ultimately chose not to testify.

People v. Young, 987 P.2d 889 (Colo. App. 1999). Court cannot infer lack of remorse from defendant's decision to invoke his right to silence at sentencing; such an inference is harmless only if the record clearly shows that the trial court would have imposed the same sentence even if it had not considered the constitutionally illegitimate factor.

People v. Reali, 950 P.2d 645 (Colo. App. 1997). Statute that authorizes the compulsion of testimony under a grant of use immunity does not violate the 5th Amendment privilege if it proscribes any use of both the compelled testimony and any information derived therefrom. *Here*: because defendant made a detailed, non-immunized statement before she gave her immunized testimony, prosecution's use of information contained in defendant's testimony was harmless. There was no direct or indirect use of immunized testimony.

People v. Rosa, 928 P.2d 1365 (Colo. App. 1996). Defendant's suppression hearing testimony cannot be used against him at trial.

Curtis Advisement

People v. Curtis, 681 P.2d 504 (Colo. 1984). Trial courts have a duty to advise a defendant on the record of his right to testify and the consequences of doing so. There are 5 essential elements of a *Curtis* advisement: (1) defendant has the right to testify and the right not to testify; the decision is personal and only the defendant may choose whether to testify; (3) if defendant testifies, the prosecution will be allowed to cross-examine him; (4) if defendant has a felony conviction, the prosecution may ask him about it and disclose it to the jury; and (5) the felony conviction can be used for the purpose of impeaching his credibility. It is a better practice to tell defendant that the jury can be instructed to consider the felony conviction only for impeachment purposes.

People v. Ziglar, 45 P.3d 1266 (Colo. 2002). When defendant testifies at trial, his prior convictions may be used only to impeach his credibility. But when defendant testifies in a habitual criminal proceeding and admits prior convictions, his admissions may be considered as substantive evidence. A trial court may, but is not required to, give an amended *Curtis* advisement in the habitual phase.

People v. Allen, 973 P.2d 620 (Colo. 1999). No *Curtis* advisement is necessary in a proceeding to revoke a DJ&S.

People v. Blehm, 983 P.2d 779 (Colo. 1999). Trial courts must continue to give *Curtis* advisements. But the sufficiency of advisements will no longer be evaluated on direct appeal. Instead, in a Rule 35(c) action, the court must determine whether defendant made a knowing, voluntary, and intelligent waiver of his right to testify. If the *Curtis* advisement is complete, there is no need to conduct a hearing on defendant's "right to testify" claim. If the advisement is incomplete, then the trial court must hear evidence to consider whether defendant knew (from any source) that he had a right to testify, that he knew the consequences of testifying, and that he could testify notwithstanding the contrary advice of counsel.

People v. Deskins, 927 P.2d 368 (Colo. 1996). An advisement is adequate if it informs defendant, that prior convictions can be considered for the purposes of assessing credibility. It is unnecessary to say "only" for impeachment.

People v. Davis, 2018 COA 113. In postconviction proceedings, defendant argued that the absence of an on-the-record waiver of his right to testify mandated reversal of his convictions. Distinguishing People v. Moore, 2014 CO 8, COA rejected that argument because the trial court gave defendant an adequate *Curtis* advisement, and defendant did not present any evidence that his implicit waiver of his right to testify was not knowing, voluntary, or intelligent.

Moore v. People, 2014 CO 8. Postconviction review is sole remedy for defendant's claim that waiver of right to testify was not knowing, voluntary, and intelligent (abrogating People v. Gomez, 211 P.3d. 53 (Colo. App. 2008). On post-conviction review of claim that waiver of right to testify was invalid, defendant had initial burden of pleading facts demonstrating that waiver was not knowing, voluntary, and intelligent, and if he met that burden, State then had burden of proving that it was knowing, voluntary, and intelligent (overruling People v. Harding, 104 P.3d 881 (Colo. App. 2006).

People v. Apodaca-Zambori, 2013 COA 29. References in testimony and closing argument to defendant's failure to come forward with information before and after *Miranda* warnings is not for the purpose of inferring guilt from silence if it refutes the theory of defense. *Here*: since defendant's theory of defense was that she tried to control her dog rather than commanding it to attack the victim, testimony that she asked if she could change

her mind about making a statement, and that she told police the location of the dog but did not volunteer that the bite was an accident and/or she tried to control the dog, was to refute the defense theory.

People v. Emert, 240 P.3d 514 (Colo. App. 2010). When a defendant asserts that his decision to exercise his right to testify was not knowing, voluntary, and intelligent because he was misadvised as to the consequences of testifying, he is entitled to a *Blehm*-type hearing (People v. Blehm, 983 P.2d 779 (Colo. 1999)) on whether he detrimentally relied on the insufficient advisement. If such reliance is established, defendant is entitled to a new trial. *Here:* defendant faced drug and POWPO charges in a bifurcated proceeding, standard *Curtis* advisement at drug trial was insufficient to alert defendant that any relevant admissions he made during that trial could be used as substantive evidence in the POWPO trial.

People v. Walden, 224 P.3d 369 (Colo. App. 2009). Requiring defendant (who chose to testify in his defense) to testify before his delayed expert witness did not violate defendant's constitutional rights because: he exercised his right to testify; he had chosen to testify before there was any discussion about the timing of his testimony; he had already made the tactical decision to testify after consulting with counsel, and was given an opportunity to testify a second time after his expert, if he so desired.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Where defendant's direct appeal was final before the 1999 announcement of People v. Blehm, 983 P.2d 779 (Colo. 1999), and he did not raise a *Curtis* claim on direct appeal, he waived any *Curtis* claim and he may not assert it in a postconviction motion. He may, however, assert a claim that appellate counsel rendered ineffective assistance by failing to raise a *Curtis* claim on direct appeal.

People v. McDaniel, 74 P.3d 454 (Colo. App. 2003). The scope of an evidentiary hearing pursuant to People v. Blehm, 983 P.2d 779 (Colo. 1999), is whether - notwithstanding error or omission in the *Curtis* advisement - defendant was fully aware of the relevant consequences of testifying. If he was aware, then his waiver was voluntary, knowing, and intelligent, regardless of whether he was in fact advised of all of the *Curtis* elements. *Here:* since defendant was aware of the consequences of testifying, he voluntarily, knowingly, and intelligently waived his right to do so notwithstanding omission of the "impeachment" portion of the advisement because the prosecution stated on the record it would not use any prior conviction for any purpose.

People v. Peay, 5 P.3d 398 (Colo. App. 2000). Trial court failed to advise the defendant that the jury would be instructed that evidence of prior felony convictions could be considered only for credibility impeachment. Although it is better to include this information, it is not one of the 5 elements.

People v. Forester, 1 P.3d 758 (Colo. App. 2000). Trial court failed to advise defendant that, if he testified, the prosecutor would be allowed to cross-examine him about his prior felony conviction for the purpose of impeaching credibility. Remanded for an evidentiary hearing.

People v. Chou, 981 P.2d 668 (Colo. App. 1999). There is no need for a *Curtis* advisement in the sanity phase of a bifurcated trial; the failure to mention that defendant could be impeached with prior convictions is harmless when defendant had no criminal record.

People v. Martinez, 987 P.2d 884 (Colo. App. 1999). Even though the judge now decides habitual criminality, the same *Curtis* advisement is appropriate.

People v. Rivera, 964 P.2d 561 (Colo. App. 1998). A standard *Curtis* advisement is improper in that narrow class of cases where a prior felony conviction is an element of the crime charged. (POWPO); prior felonies are considered for more than credibility in such cases.

Intrusion on Right to Testify

People v. Bergerud, 223 P.3d 686 (Colo. 2010). Counsel may not usurp defendant's right to testify by

presenting a defense that "completely contradicts" or "wholly undermines" the defendant's expected testimony.

Apodaca v. People, 712 P.2d 467 (Colo. 1985). Refusing to rule, in advance of trial, whether a prior conviction was constitutionally obtained.

Intrusion on Right to Silence

People v. Vialpando, 2022 CO 28. Prosecutor's comments during closing argument concerning defendant's continued flight at trial were not an improper comment on defendant's Sixth Amendment right to jury trial in prosecution for aggravated motor vehicle theft, vehicular assault, vehicular eluding, and driving under restraint, since prosecutor did not impermissibly imply that defendant was guilty because she requested a jury trial; comments were contextually related to evidence in the case, including that defendant fled from scene of crash and knowingly eluded a police officer while being pursued by officer, such that comments could be considered oratorical embellishment and metaphoric nuance.

People v. Knapp, 2020 COA 107. Prosecutor's questions about information that defendant omitted from a prior statement did not suggest that defendant's post-arrest silence should be construed as evidence of guilt. Instead, they attempted to impeach his trial testimony by pointing to his prior inconsistent statement that the fight had been only verbal. The questions were proper.

People v. Rios, 2020 COA 2. Because defendant was not under arrest or in custody when he told police he did not want to answer questions, his pre-arrest silence could be used to impeach him.

People v. Burnell, 2019 COA 142. Prosecutor stated that defendant answered several questions, and then chose to exercise his right to remain silent. In reciting this sequence of events, the prosecutor did not directly argue that defendant's silence reflected guilt.

People v. Thames, 2019 COA 124. Prosecutor may comment on defendant's demeanor while testifying, particularly because jurors receive an instruction that they may consider courtroom demeanor in assessing a witness's credibility.

Howard-Walker v. People, 2019 CO 69. By drawing attention to the fact that the stolen goods were still missing and suggesting that the only person who knew their location was defendant, who didn't testify, the prosecutor suggested that defendant chose not to testify because he was guilty. That was blatantly prejudicial because it penalized defendant for exercising his constitutional right to remain silent.

People v. Coleman, 2018 COA 67. Declining to resolve whether a testifying defendant's pre-arrest silence can be used to impeach, neither the USSC nor CSC has decided whether the Fifth Amendment prohibits use of this silence as substantive evidence of guilt.

Fitzgerald v. People, 2017 CO 26. The admission of refusal evidence at defendant's DUI trial does not violate the Colorado Constitution's guarantees of freedom from self-incrimination and the right to due process.

People v. Ortega, 2015 COA 38. Trial court did not violate defendant's Fifth Amendment rights against self-incrimination by requiring him to read a neutral statement to the jury. A voice exemplar is a physical characteristic and is non-testimonial. There is no difference between an in-court demonstration for a witness's benefit, and one conducted for the jury's benefit.

People v. Williams, 100 P.3d 565 (Colo. App. 2004). Trial court is not required to give standard instruction stating that defendant is never compelled to testify under circumstances where defendant testifies. The purpose of this instruction is to protect defendant's constitutional privilege against self-incrimination, and not to bolster defendant's credibility as a witness.

Right of Access & Indigent Services

People v. Owens, 2018 CO 55. The public does not have a federal or state constitutional right of access to criminal justice records. *Here:* the court affirmed the trial court's refusal to unseal portions of the post-conviction motions practice in a death penalty case.

People v. Thompson, 2017 COA 56. Indigent defendants do not have a constitutional right to use state funds to pay for attorneys or for ancillary services of *their* choosing.

People v. Waller, 2016 COA 115. Trial court need not enter an order to ensure a defendant has adequate law library access when he is represented by counsel but considering whether to proceed pro se.

People v. Stroud, 2014 COA 58. Defendant may prove indigency without applying for representation by the public defender. *Here:* defendant successfully demonstrated that he was indigent and trial court should have appointed a medical expert at state expense pursuant to CJD-O4-04; any error was harmless beyond a reasonable doubt because defendant did not make an offer of proof as to what the expert would testify to and the evidence of defendant's guilt was overwhelming.

People v. Orozco, 210 P.3d 472 (Colo. App. 2009). According to Chief Justice Directive 04-04 §IV, the cost of an expert may be paid by the judicial department even though defendant is not represented by state-funded counsel where defendant becomes indigent during the course of the case and the trial court determines there are insufficient funds to pay for court costs.

People v. James, 117 P.3d 91 (Colo. App. 2004). Although references to the fact that a defendant's lawyer is court-appointed should be avoided, the witness' brief reference did not substantially prejudice defendant and a mistrial was not warranted. Here: witness at trial identified defendant by stating that "he is over there with the public defender."

People v. Cardenas, 62 P.3d 621 (Colo. 2002). Under §18-1-403, the state is not obliged to pay the costs of defendant's representation unless he is represented by public defender's office, or in the case of a conflict, a state appointed alternate defense counsel. Trial court did not abuse its discretion in refusing to appoint an interpreter to serve as a translator between defendant and his *pro bono* attorney.

People v. Mossman, 17 P.3d 165 (Colo. App. 2000). Defendant requested appointment of investigators to assist him because he was in jail and was representing himself. No abuse of discretion to deny this motion, because defendant was permitted to make telephone calls to prospective witnesses and serve numerous subpoenas, and he failed to show why those measures were insufficient.

People v. Garcia, 981 P.2d 214 (Colo. App. 1998). Defendant requested funds to hire an expert on window tinting (to show that the officers could not have seen through the window, as they alleged). No abuse of discretion to deny this motion because defendant failed to demonstrate that the relevant facts couldn't be shown through alternative means, such as photo re-creation.

People v. Vialpando, 954 P.2d 617 (Colo. App. 1997). Defendant is not entitled to access to law library or law books when he is represented by counsel or proceeding *pro se* with standby counsel.

People v. Roy, 948 P.2d 99 (Colo. App. 1997). Trial court denied defendant's request to order the prosecution to conduct a fingerprint analysis of a plastic bag containing suspected cocaine. Denial of motion was not error because defendant could have a defense expert perform the same services and could request those services at state expense pursuant to §18-1-403.

People v. Nord, 790 P.2d 311 (Colo. 1990). The 14th amendment imposes upon the state the obligation to provide an indigent defendant with those basic instruments and services essential to his or her right to

adequately defend against a criminal charge.

Defendant's Presence & Appearance

People v. White, 870 P.2d 424 (Colo. 1994). Defendant has a constitutional right to be present during all critical stages of the prosecution. But this right is not absolute; due process does not require defendant's presence when it would be useless, or of nebulous benefit.

People v. Stephenson, 165 P.3d 860 (Colo. App. 2007). The trial court is responsible to ensure that any waiver of the right to be present is valid — i.e., knowing, intelligent, and voluntary. A waiver of the right to be present may be valid whether or not defendant "has been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence." Notwithstanding Taylor v. U.S., 414 U.S. 17 (1973), when a Colorado defendant wishes to absent himself from trial, and is available for inquiry, the "preferred approach" is for the trial court to advise defendant of the right to attend trial and determine whether defendant knowingly, intelligently, and voluntarily waives that right. This approach imposes a duty on the trial court to advise defendant on the record of the consequences of being absent from trial, and to determine whether he "knowingly intends (or intended) to waive his right to be present" (emphasis added). A prerequisite to a knowing and intelligent waiver of the right to presence is that defendant has had notice of the consequences of not appearing. The constitutional mechanism for proceeding with trial in defendant's absence is Crim.P. 43(b), which provides that a trial court has discretion to complete the trial, "and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present, voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial…." The fact that defendant's absence is knowing and intelligent does not establish that it is voluntary. Rather, an absence is voluntary if defendant knows that the proceedings are taking place and does not attend. Absence from trial compelled by medical necessity may generally be deemed voluntary, but the determination whether a defendant is "voluntarily absent" for medical reasons requires a fact-specific inquiry into the type of medical condition and the circumstances surrounding the absence, including an inquiry into the defendant's conduct and statements. *Here:* defendant repeatedly stated that he did not want to be present, even after the trial court offered him various alternatives and accommodations, including taking long breaks and delaying the proceedings or resetting the trial until his illnesses had abated. Defendant's statements were corroborated by his treating psychiatrist, who stated that defendant had made "well thought-out and considered decision not to be present in the courtroom and appeared to have been able to consider the pros and cons of that decision." The record supported the trial court's findings that defendant was aware of his right to be present and of the consequences of being absent; that he made a conscious, informed choice to be absent; and that his waiver was therefore knowing and intelligent.

People v. Wardell, 2020 COA 47. Defendant does not have a right to be present in person at a Crim.P. 35(c) hearing. This is true whether analyzed as a constitutional right or right by rule.

People v. Burnell, 2019 COA 142. On its face, the mere fact that defendant was absent at a time he was required to be present during the reading of the verdicts, without more, was insufficient to find a waiver of his right to be present. The trial court was required to find that defendant was voluntarily absent. But this error was harmless because when the court elected to proceed in defendant's absence, the jury had already arrived at its verdict, and nothing in the record suggested any juror was conflicted.

People v. Hernandez, 2019 COA 111. Defendant has a right to be present at a restitution hearing.

People v. Janis, 2018 CO 89. A formal advisement of the right to be present at trial is not a prerequisite to a valid waiver of that right, even when defendant is in custody. Ultimately, the touchstone is whether, under the totality of the circumstances, the waiver was knowing, intelligent, and voluntary. *Here:* the record supports the People's contention that defendant's waiver was knowing, intelligent, and voluntary.

People v. Aldridge, 2018 COA 131. Use of CCTV for presenting child witness testimony from child witnesses under §16-10-402 is permissible only if the statute is strictly followed. *Here:* the inability of the jury to see defendant during the victims' testimony violated his right to be present. The opinion suggests that following procedures permitted by §16-10-402 other than those approved of in *Maryland v. Craig*, 497 U.S. 836 (1990)—witness and counsel in another room, judge, defendant, and jury in courtroom—may well be unconstitutional.

Zoll v. People, 2018 CO 70. Defendant may waive the right to be present at critical stages of criminal proceedings; defense counsel cannot waive this right on defendant's behalf. *Here:* even if the COA erred in determining that replaying a small portion of a recording in the courtroom during deliberations was not a critical stage of the proceeding that required defendant's presence, any error in failing to secure defendant's attendance was harmless beyond a reasonable doubt.

People v. Faussett, 2016 COA 94; People v. Helms, 2016 COA 90. If defendant is not in custody and voluntarily absents himself/herself from trial, or if defendant persists in disruptive conduct after being warned, defendant effectively waives the constitutional right to be present. If defendant is in custody, trial court must advise defendant of that right and obtain his or her personal waiver of that right on the record. When defendant is in custody, defense counsel cannot waive defendant's constitutional right to be present for a critical stage of trial by informing trial court that defendant does not wish to be present.

People v. Guzman-Rincon, 2015 COA 166. Defendant's right to be present is violated when trial court instructs a deliberating jury that their lives have been threatened outside defendant's presence. Defendant's exclusion from a phone conversation between counsel and the court regarding how to respond to a jury question did not require reversal because it pertained to a purely legal question.

People v. Cardenas, 2015 COA 94M. Hearing concerning defense counsel's motion to withdraw is a critical stage of the trial at which defendant has the right to be present.

People v. Wingfield, 2014 COA 173. Competency review hearing is a critical stage of the trial and counsel may not waive that right on defendant's behalf. But due process requires defendant's presence only "to the extent that a fair and just hearing would be thwarted by his [or her] absence." *Here*: where defendant failed to show how his presence would have been useful to his defense, the court did not violate his constitutional right to be present by holding the competency hearing in his absence.

People v. Payne, 2014 COA 81. Defendant has a right to be present when a modified-*Allen* instruction is read to the jury in open court because of the psychological influence defendant's absence or presence may have on the jury. NOTE: The court specified that this ruling does not apply to a court's decision to communicate with a jury in writing.

People v. Hoang, 2014 CO 27. When restraints are not clearly visible, the burden is on defendant to establish that a juror saw or heard the restraints. If defendant does not meet that burden, the presumption of innocence is unaffected, and the general harmless error standard applies.

People v. Roberts, 2013 COA 50. Defendant is not denied Sixth Amendment right to counsel because he lacks assistance at a Crim.P. 5 advisement hearing; the right to counsel attaches at the hearing but defendant is not entitled to the assistance of counsel at the hearing itself.

People v. Fuentes, 258 P.3d 320 (Colo. App. 2011). Trial court granted a prosecution motion to continue without defendant being present. Defendant's contention that he could have objected to the court's order (without stating any basis for his objection or any reason that it should have been granted) was insufficient to establish a violation of his right to be present.

People v. Garcia, 251 P.3d 1152 (Colo. App. 2010). Defendant has a right to be present at all critical phases of a criminal trial, including a suppression hearing. This right is guaranteed by due process "if the fundamental fairness of the proceedings would be undermined by the defendant's absence." Defendant's presence is not required if it would be useless or only slightly beneficial. Accordingly, defendant must establish how his absence from a portion of the hearing affected his ability to defend against the charges. *Here*: defendant's late arrival to the suppression hearing did not so undermine the fundamental fairness of his trial as to cast serious doubt on the reliability of his conviction.

People v. Price, 240 P.3d 557 (Colo. App. 2010). Defendant may waive his right to be present at trial by his actions, including voluntary absence, after the trial has been commenced in his presence; defendant can waive his right to be present by creating a medical necessity that results in his absence from trial. *Here*: defendant attempted suicide on the second day of trial; as his suicide noted reflected that he intended to permanently absent himself from trial, the trial court could find that he voluntarily waived his right to be present under Crim.P. 43(b)(1).

People v. Mumford, 275 P.3d 667 (Colo. App. 2010). Defendant's absence from a mid-trial conference on evidentiary and instructional issues had no effect on the trial's fairness or outcome; it was not error to conduct the conference with only counsel present.

People v. Ragusa, 220 P.3d 1002 (Colo. App. 2009). Harmless error analysis applies to claims of denial of defendant's right to be present at trial. *Here*: where defendant's privately-retained attorneys met with the court and prosecutors in defendant's absence, disclosed client confidences, and concealed the disclosure from defendant, defendant's right to be present was violated.

People v. Gallegos, 226 P.3d 1112 (Colo. App. 2009). Where defendant was not present during the beginning of the suppression hearing, defense's failure to request a recess when she arrived discredited any claim of prejudice from her absence.

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008), aff'd operation of law, 238 P.3d 1283 (Colo. 2010). Error in removing defendant from the courtroom to view her daughter's testimony by CCTV, without effective means of instantly communicating with counsel, did not require reversal. Neither the abuse suffered by the daughter nor defendant's role in it were disputed; daughter's testimony was consistent with the theory of defense (duress); and defendant failed to establish that she was prejudiced by the lack of constant electronic communication with counsel.

People v. Anderson, 183 P.3d 649 (Colo. App. 2007). Although defendant has right to be present (and to have his attorney present) at critical stages of a proceeding, replacing a juror with an alternate is more in the nature of an administrative task. *Here:* on the second day of trial, the trial court received a telephone call from a juror that her teenaged son was arrested and taken from her home in handcuffs; based on the traumatic nature of this event, the court summarily excused the juror without notice to defendant or his counsel. A failure to afford defendant the opportunity to be present and be heard before a juror is excused is not a ground for reversal without a showing of prejudice.

People v. Martinez, 166 P.3d 223 (Colo. App. 2007). Defendant's failure to appear at a restitution hearing waives only the right to be present, not the right to object to the restitution amount.

People v. Wilford, 111 P.3d 512 (Colo. App. 2004). Even if it was error for the court to have answered a jury question during deliberations without obtaining defendant's presence, any error was harmless because defendant's counsel was present and had an opportunity to review and object to the response, and the response given was proper.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Where defendant was not present during a portion of voir dire proceeding but acquiesced in the proceeding being conducted in his absence, he impliedly waived his right to be present at the proceeding.

People v. Jenkins, 83 P.3d 1122 (Colo. App. 2003). Even if court responded to jury questions while defendant and counsel were absent, any error was harmless because defendant failed to show any resulting prejudice.

People v. Auman, 67 P.3d 741 (Colo. App. 2002), rev'd other grounds, 109 P.3d 647 (Colo. 2005). Trial court erred in not involving counsel and defendant in the response to jury's written request (during deliberations) to view defendant's videotaped statements. But the error was harmless because the trial court properly allowed the jury to watch the videotape. No error that defendant was absent during the viewing of the videotape because it is not a critical stage of the proceedings. No error that counsel was absent because there was no potential taint by any other circumstance, nor was the tape vulnerable to manipulation or confusion.

Right to Public Trial & Courtroom Closures

People v. Turner, 2022 CO 50. In this consolidated opinion, the CSC concludes that all courtroom closures-whether total, meaning the exclusion of all individuals from the courtroom for some period, or partial, meaning the exclusion of one or more, but not all, individuals for some period -implicate the Sixth Amendment public trial right and the test established in Waller v. Georgia, 467 U.S. 39 (1984). There is no exclusion-for-cause exception. Although respectful of a trial court's authority to maintain order and safety in the courtroom, and the reality that *Waller* findings may need to be made after a disruptive individual has been removed, CSC holds that when the removal of a disruptive spectator constitutes a non-trivial closure, the closure must satisfy the *Waller* test. Although express findings are preferred, where a trial court fails to make them, a reviewing court may review the record for clear error to determine if the closure order nonetheless satisfied the *Waller* test. The concurring opinion agrees that defendants' public trial right wasn't violated here and agrees that the division's judgments reversing the convictions should be reversed. But it would hold that a trial court's removal of a disruptive spectator—an exclusion for cause—doesn't implicate the Sixth Amendment or the *Waller* test. The dissent agrees with the majority that the exclusion constitutes a non-trivial, partial closure that implicates the Sixth Amendment and the *Waller* test. The dissent believes that the lack of express *Waller* findings should result in a reversal of defendants' convictions and a remand for a new trial. *Here:* the trial court's exclusion of a spectator, who is the co-defendant's wife and the other co-defendant's friend, from the majority of the trial based on her alleged harassment of the victim advocate and a prosecution witness constituted a non-trivial, partial closure. Although the trial court failed to expressly apply the *Waller* test, its findings and the record support the conclusion that the closure order was justified under *Waller* and didn't, therefore, violate defendants' Sixth Amendment public trial right. CSC affirms the portion of the COA's judgments concluding that the exclusion constituted a non-trivial, partial closure and reverses the portion of the judgments reversing the convictions and remanding for a new trial. The court also remands the cases for further proceedings consistent with this opinion.

People v. Sloan, 2024 COA 52. As a matter of first impression in Colorado, a courtroom is not closed so as to violate a defendant's right to a public trial, despite problems with the livestreaming technology that precluded

remote observers from hearing and seeing the entire trial, so long as the court makes seats in the courtroom available for members of the public and no member of the public who wishes to watch the trial is turned away. *Here:* no closure of the courtroom occurred because, despite the problems with the livestreaming of the proceedings, any member of the public who wished to attend the trial in person was able to do so. The court made a limited number of seats available for members of the public at all phases of defendant's trial and no member of the public who wished to watch the trial was turned away from the courtroom. (Defendant did not challenge the court's decision to limit seating in the courtroom to achieve social distancing.)

People v. Montoya, 2024 COA 37. Defendant's right to a public trial was violated when the trial court conducted the trial virtually and made no findings under *Waller*. The COA found a remand for further *Waller* findings would be futile because the prosecuting attorneys are no longer licensed, and the record was devoid of any evidence to support the *Waller* factors.

People v. Rios, 20CA2054. In this UNPUBLISHED opinion, the COA found a partial closure of the courtroom where the public was put in another room and was able to view the trial via live video and audio streaming during COVID. Because the *Waller* factors were met, unlike in *Bialas*, there was no structural error. *[Cert Accepted (3/11/24) in case #23SC571: (1) Whether the trial court violated Mr. Rios's right to a public trial by excluding all spectators from the physical courtroom during the COVID 19 pandemic, where proceedings remained accessible to the public on WebEx and via video streaming in an overflow courtroom (SAAG Brittany Zehner)]*

People v. Roper, 2024 COA 9. If a trial court's findings under *Waller* are not sufficient to support a partial courtroom closure, but a remand for further findings doesn't appear to be futile, a limited remand is an appropriate remedy.

People v. Gonzalez-Quezada, 2023 COA 124. As a matter of first impression, the COA determines that the exclusion of a disruptive observer from a Webex electronic broadcast of the trial is not a partial closure of the courtroom for purposes of defendant's right to a public trial when the physical courtroom remains open to the public. Even if the exclusion of the observer was a partial closure, the trial court made adequate findings to justify the partial closure under *Waller*. The concurring opinion emphasizes that the exclusion of a disruptive observer from an electronic broadcast should not be considered a partial closure that necessitates findings under *Waller*.

People v. Garcia, 2023 COA 58. The first issue is whether, pursuant to Stackhouse v. People, 2015 CO 48, defendant waived his right to a public trial by failing to object to a known closure. The second issue is whether, pursuant to People v. Rediger, 2018 CO 32, defendant waived his right to be tried in conformity with the charging instrument by failing to object to a constructive amendment. Reconciling *Stackhouse* and *Rediger*, the division concludes defendant waived the first right and forfeited the second. While several published COA opinions have negotiated the guidance in *Stackhouse* and *Rediger*, this appears to be the first published opinion to simultaneously resolve waiver issues in each context.

People v. Bialas, 2023 COA 50. As a matter of first impression, removal of members of defendant's family from the courtroom and seating them in an auxiliary courtroom to view a video livestream of the trial was a nontrivial partial courtroom closure. Because the closure was not justified under the *Waller* factors, reversal is required. *[Cert Accepted (3/11/24) in case #23SC520: (1) Whether moving defendant's family from the physical courtroom to a livestream viewing room constituted a closure under the Sixth Amendment when the defendant agreed that the viewing room was an appropriate accommodation for the public; (2) Whether the COA erred in determining that a courtroom closure was nontrivial when the persons "excluded" maintained access to the proceedings through real-time video and audio livestreaming (AAG Jaycey DeHoyos)].*

People v. Jones, 2020 CO 45. Both the US and Colorado constitution's guarantee a criminal defendant the right to a public trial. That right is not absolute. To justify a closure: (1) "the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced"; (2) "the closure must be no broader than necessary to protect that interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"; and (4) the "trial court must make findings adequate to support the closure." Even a partial closure can have constitutional significance. The exclusion of even a single person, depending on the circumstances, can violate a defendant's public trial right. However, a closure may be so brief or inadvertent as to be trivial. A violation of the public trial right is structural error requiring reversal.

People v. Lujan, 2020 CO 26. Trial court cleared the courtroom to the public and parties, leaving only the judge, bailiff, and court reporter; the judge then brought in the jury and reread the limiting instruction that it had previously read twice in open court. Adopting the triviality exception for the first time, the CSC holds the closure was trivial. Factors to be considered include the duration of the closure, the substance of the proceedings that occurred during the closure, whether the proceedings were later memorialized in open court or placed on the record, whether the closure was intentional, and whether the closure was total or partial.

People v. Irving, 2019 COA 1. The right to a public trial is not absolute; it may yield to competing interests, including the government's interest in inhibiting disclosure of sensitive information and defendant's right to a fair trial. In order to close the courtroom without violating defendant's Sixth Amendment rights: (1) the party seeking to close the proceeding must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceedings; and (4) the trial court must make findings adequate to support the closure. The need to protect witnesses from intimidation constitutes an overriding interest for purposes of the requirement from *Waller* that the party seeking to close the courtroom without violating the defendant's Sixth Amendment rights must advance an overriding interest that is likely to be prejudiced by an open courtroom. The proponent of a courtroom closure must demonstrate not only an overriding interest that will be prejudiced by an open courtroom, but also a substantial probability that the identified interest will be prejudiced by an open courtroom. *Here:* although the prosecutor argued possible witness intimidation, the trial court erred in excluding defendant's mother from the courtroom during the testimony of defendant's girlfriend where trial court failed to make findings that were adequate to support partial closure of the courtroom.

People ex rel. GB, 2018 COA 77. The exclusion of all spectators under age eighteen from a significant portion of the trial was a structural error that required reversal.

People v. Robles-Sierra, 2018 COA 28. Prosecutors are not required to publish all exhibits in such a manner that the audience can see the exhibit. The decision not to publish an exhibit to the audience does not implicate the Sixth Amendment right to a public trial. *Here:* allowing the prosecutor to show portions of exhibits containing video recordings and still images of children to the jurors on a screen that could not be seen by people in the courtroom gallery did not violate the right to a public trial.

People v. Hassen, 2015 CO 49. A trial court's closure of the courtroom over defendant's objection without an analysis pursuant to Waller v. Georgia, 467 U.S. 39 (1984) is structural error warranting automatic reversal. *Here:* the court closed the courtroom during the testimony of two undercover officers over defendant's objection without conducting a *Waller* analysis. The error was not trivial, but instead denied defendant his Sixth Amendment protections.

Stackhouse v. People, 2015 CO 48. Defendant waived his public trial claim by failing to object to the closure of the courtroom during jury selection. The public trial right can be waived by counsel.

Rizo v. People, 2013 CO 23. Referring to the jurors by number did not violate the right to a public trial.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). In the interest of justice, the trial court may impose reasonable limitations on public access to a trial. Restrictions are particularly supported where the case involves the testimony of young victims of sex crimes. Any closure of a courtroom requires an analysis of the *Waller* factors. *Here*: during her initial testimony, the child victim was distracted and afraid of the various people coming and going from the courtroom while she was speaking; the trial court instructed the gallery that whoever wanted to watch the testimony was welcome to come inside and take a seat but that no one would be allowed to enter or leave once the child's testimony started.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Defendant waived his right to a public trial during voir dire when the defense requested that individual voir dire of prospective jurors occur in chambers outside the presence of the general public.

Right to Present a Defense

People v. Madison, 176 P.3d 793 (Colo. App. 2007); People v. Grant, 174 P.3d 798 (Colo. App. 2007). The right to present a defense requires only that the accused be permitted to introduce all relevant and admissible evidence.

People v. Krutsinger, 121 P.3d 318 (Colo. App. 2005). A defendant's right to present witnesses in his or her own defense is not unlimited. To show that he/she was unconstitutionally denied the right to present relevant evidence, defendant must demonstrate that: (1) the importance of the evidence to the defense outweighed the interests of the state in excluding the evidence, and (2) defendant was denied fundamental fairness, such that the act complained of necessarily prevented the defendant from having a fair trial. Under the second criterion, defendant must show the materiality of the excluded evidence; specifically, that the evidence would have affected the outcome of the trial.

People v. Cuevas, 2024 COA 84. Defense counsel's unilateral decision to concede guilt on three lesser charges after defendant pleaded not guilty to the charges did not violate defendant's Sixth Amendment right to autonomy in deciding the objectives of his defense under McCoy v. Louisiana, 584 U.S. 414 (2018) because defendant's not guilty plea alone is not tantamount to an express assertion of innocence.

People v. Johnson, 2022 COA 2. As a matter of first impression, a competent defendant has the right to forgo a defense and, in so doing, effectively gives up his right to effective assistance of counsel during trial. In McCoy v. Louisiana, 138 S. Ct. 1500 (2018), the USSC addressed the tension between McCoy's autonomy to decide the object of the representation and his counsel's contrary actions admitting McCoy's guilt in a death penalty case, ultimately concluding that there was structural error mandating reversal where counsel overrode McCoy's autonomy. CSC sees no principled reason why *McCoy's* rationale does not apply outside of the death penalty context. *Here:* defendant unambiguously, voluntarily, intelligently, and knowingly, instructed his counsel not to mount a defense; defendant's right to not mount a defense is an objective of representation. Having exercised that right, he cannot now fault his counsel for respecting that wish by not mounting a defense.

People v. Battigalli-Ansell, 2021 COA 52. Trial court did not impermissibly limit right to present a defense by prohibiting defense expert from opining on sexual fantasies and role playing.

People v. Liggett, 2021 COA 51. Right to present a defense is not violated because defendant's refusal to cooperate with a competency evaluation precludes presenting any expert evidence concerning his mental condition, which thereby lowers the prosecution's burden of proof. §16-8-106(2)(c).

People v. Sauser, 2020 COA 174. Right to present a defense not violated when trial court excluded some of defendant's proffered testimony about threats against him because the jury still heard sufficient evidence to find that defendant acted under duress in complying with a third party's orders

Fisher v. People, 2020 CO 70. The timing of the amendment, coupled with the fact that it negatively affected defendant's alibi defense, prejudiced his substantial right to present and prepare his defense.

People v. Payne, 2019 COA 167. The order of closing arguments did not affect the right to present a defense.

People v. Johnson, 2019 COA 159. Trial court did not abuse its discretion by excluding evidence that the alternate suspect murdered her husband, the only other person in the home the night the victim died because her involvement in the death of her husband was (1) not relevant to her motive or bias in this case, (2) not relevant to defendant's alternate suspect defense, and (3) was properly excluded under CRE 403.

People v. Thames, 2019 COA 124. Trial court did not violate defendant's right to present a defense by excluding evidence that the alternative suspect had been convicted of a similar crime because it allowed defendant to present other evidence pointing to the alternative suspect.

People In Int. of E.G., 2016 CO 19. Right to present a defense not violated because under the discovery rules, the court lacked authority to grant defendant access to his grandmother's home.

People v. Brown, 2014 COA 155. Trial court limited defense cross-examination of the prosecution's DNA expert about the limitations on one type of DNA testing. COA found no violation of the right to present a defense because there was sufficient evidence presented to the jury about the test's limitations, and defendant was able to argue about those limitations in closing. Here: trial court did not allow defendant to introduce evidence, through his own investigator, about the police failing to investigate a suspicious vehicle in the victim's neighborhood prior to the murder. No error because defendant was able to put this information before the jury and to argue about it in closing.

People v. Paglione, 2014 COA 54. Unnecessary strong admonitions against perjury by the prosecution aimed at discouraging defense witnesses from testifying may deprive a criminal defendant of his or her Sixth Amendment right to present witnesses.

People v. Bergerud, 223 P.3d 686 (Colo. 2010). Defendants have no fundamental constitutional right to choose whether to present an "innocence-based defense."

People v. Villa, 240 P.3d 343 (Colo. App. 2009). Colorado's rape shield statute, §18-3-407, 009, does not violate equal protection by restricting defendant's freedom to introduce evidence where no similar restriction is imposed upon the prosecution.

People v. Ellis, 148 P.3d 205 (Colo. App. 2006). Limiting the testimony of defendant's expert witness to the topics covered in his pretrial notice did not deprive defendant of his right to present a defense. The expert was still able to testify regarding the aging of DNA samples, so defendant suffered no prejudice.

People v. Vanrees, 125 P.3d 403 (Colo. 2005). Except with respect to strict liability crimes, the prosecution must prove not only that defendant committed the proscribed act but that he acted with the culpable mental state required for the crime charged. Because the culpable mental state is an essential element of a crime, due process requires that the prosecution prove mental culpability beyond a reasonable doubt. It is a violation of due process to prohibit defendant from presenting evidence to contest the mens rea element of a crime charged. Prohibiting defendant from contesting, or disproving, the mental culpability of a crime charged would create an impermissible presumption of culpability which would unconstitutionally render the prosecution's evidence on that issue uncontestable as a matter of law, and thus lower the prosecution's burden of proof. Although defendant has a constitutional right to offer evidence to contest the culpable mental state of a crime, he is not

allowed to present evidence in support of an affirmative defense when such defense has not been raised in accordance with the applicable statutory requirements for raising that defense. It is within the general assembly's authority to formulate statutory affirmative defenses, or defenses based on principles of justification or excuse, and place appropriate limitations on the assertion of those defenses.

People v. Owens, 97 P.3d 227 (Colo. App. 2004). Trial court properly acted within its discretion in excluding evidence of an alternative suspect, where allegations raised only speculation and not a direct connection of either of the "alternate suspects" to the crime.

People v. Strean, 74 P.3d 387 (Colo. App. 2002). Defendant's right to present a defense was not impermissibly chilled when the trial court advised him that evidence of his prior bad conduct might become admissible should he elect to present certain defenses, such as recent fabrication by the victim, thereby "opening the door" to that evidence. Trial court's warning permitted defense counsel to make informed tactical decisions, and there was no error.

People v. Coit, 50 P.3d 936 (Colo. App. 2002). A co-defendant's privilege against self-incrimination is paramount to defendant's rights to present evidence and to compel witness testimony. There is no violation of defendant's due process right to a fair trial when a codefendant initially represents that he will testify to establish a joint alibi but changes his mind during the trial and elects not to testify.

Right to Confrontation [6]

People v. Reynolds-Wynn, 2024 COA 33. Applying the reasoning of *Margerum*, the COA holds that it is constitutional error to prohibit the defense from cross-examining the witness about the charge because the fact that a witness is being prosecuted in the same judicial district is always relevant to show that the witness's testimony might be influenced by a promise for, or hope or expectation of, immunity or leniency. Because the trial court violated defendant's right to confrontation and because the People failed to show harmlessness, judgment is reversed.

People v. Collins, 2021 COA 18. Permitting a witness to testify in the presence of a courthouse facility dog does not violate defendant's confrontation rights. Defendant's right to confrontation does not carry with it the right to impose discomfort on an accusing witness. No showing of necessity, in the absence of a statute imposing such a requirement, is required prior to the use of a courthouse facility dog; rather, requiring a lesser showing is consistent with the Victims' Rights Act and a judge's considerable latitude to control courtroom decorum. Here: in a child sex assault trial, trial court allowed a child victim to have a court facility dog at her feet while she testified; defendant argued this violated his confrontation right because the dog's presence mitigated the child victim's discomfort about naming him as her abuser in court, lessening her testimony's reliability. COA held the confrontation right doesn't carry with it a right to impose discomfort on an accusing witness.

People v. Garcia, 2021 CO 7. Because a return of service is not a testimonial statement, the county court did not violate defendant's constitutional right to confront a witness against him. A return of service is not testimonial simply because it includes an affidavit. Although affidavits can sometimes be testimonial statements, the primary purpose of the return document was record-keeping, not prosecution. A return of service for a protection order is not "testimonial" under the Confrontation Clause. The primary purpose for the return of service is to give notice of the upcoming hearing and it confers jurisdiction over the respondent. Simply because the return of service might be relevant in a future prosecution does not make it testimonial. The federal and state

[6] Crawford v. Washington, 541 U.S. 36 (2004). A hearsay statement of an unavailable witness is inadmissible under the confrontation clause if it is testimonial in character and defendant has not had an opportunity to cross-examine the statement.

Confrontation Clauses provide equivalent protections and the analysis under each is the same. In determining whether a statements "primary purpose" is testimonial for Confrontation Clause purposes, courts examine the statement's primary purpose when it is made, not its primary purpose when it is introduced at trial. To determine whether a statement is "testimonial" under the Confrontation Clause, courts analyze whether, in light of all the circumstances, viewed objectively, the primary purpose of procuring the statement was to create an out-of-court substitute for trial testimony. Whether the admission of evidence violates a defendant's confrontation right is subject to de novo review.

Margerum v. People, 2019 CO 100. When a prosecution witness is on probation in the same sovereign (Colorado), confrontation requires that cross examination on probationary status be allowed.

People v. Johnson, 2019 COA 159. Deceased victim's statements were not testimonial; they were not made to law enforcement, and none of them appear to have been made by the victim with an eye toward future use in court.

People v. Cohen, 2019 COA 38. The "opening the door" doctrine is limited; any otherwise inadmissible evidence introduced after one party opens the door must be confined to preventing any unfair prejudice or misleading impression that might otherwise result. *Here:* certain statements introduced in defendant's trial went far beyond anything allowed by the opening the door doctrine; were inadmissible on hearsay, relevance, and undue prejudice grounds; and violated her right to confrontation.

Zapata v. People, 2018 CO 82. Denial, on basis of physician-patient or psychologist-patient privilege, of defendant's request for disclosure of records included in competency evaluation report issued in codefendant's trial for purposes of determining codefendant's competency to stand trial on charges for attempted first-degree murder and related offenses, or in alternative for in camera review, did not violate due process, under *Brady*, in defendant's separate trial on same charges; defendant made only vague assertions that codefendant's statements might include impeachment material and that codefendant may have said something in context of privileged relationship that was at odds with his anticipated testimony at defendant's trial, State, which had received copy of report in codefendant's case, provided defendant with proffer of codefendant's expected testimony, namely, that he did not remember anything about day of crimes, and prosecutor represented that there was nothing in competency evaluation that was not included in proffer.

People v. Aldridge, 2018 COA 131. Trial court properly implemented the exception to the right to confrontation by separating him from the alleged child victims but erred by doing so at the expense of defendant's right to be present during their testimony, by requiring him to watch the children's testimony from the judge's chambers, along with the judge, outside the presence of the jury.

People v. Jackson, 2018 COA 79, aff'd other grounds, 2020 CO 75. Defendant forfeits his right to confront a witness at any proceeding in which the witness's statements are otherwise admissible where a court finds that: (1) the witness is unavailable; (2) defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) defendant acted with the intent to deprive the criminal justice system of evidence. *Here:* trial court properly admitted statements of the uncharged co-conspirator under the doctrine of forfeiture by wrongdoing. Defendant had a jail inmate (and gang member) ask the co-conspirator if he intended to take the stand and to relay that he was the prosecution's star witness. In a second call, defendant directed the inmate to ask the co-conspirator to contact the defense investigator and see if he was willing to recant.

Nicholls v. People, 2017 CO 71. Colorado Confrontation Clause only applies to testimonial hearsay statements and does not apply to non-testimonial ones. Overruled Compan v. People, 121 P.3d 876 (Colo. 2005).

People v. Leverton, 2017 COA 34. *Crawford* did not overrule pre-*Crawford* case law regarding witnesses who testify at trial but suffer from memory loss.

People v. Ortega, 2016 COA 148. Cricket phone records were not testimonial because they were business records created for an administrative purpose; fact that the records were produced in a different format than they were kept by the phone company did not transform them into testimonial statements, because "in the context of electronically-stored data, the business record is the datum itself, not the format in which it is printed out for trial." Custodian's declaration accompanying the phone records was also not testimonial because it was created only to authenticate an otherwise admissible record, not to prove any fact at trial. Admission of pen packs and court records at defendant's habitual trial without proof of the declarants' unavailability did not violate defendant's federal or state confrontation rights.

People v. Hebert, 2016 COA 126. Pursuant to §18-6.5-103.5(1), trial court granted DA's to take a deposition from an at-risk victim who was very ill; the victim died before trial, and the deposition was admitted at defendant's trial; defendant had opportunity to cross-examine the victim via Skype, and COA determined that her right to confrontation was satisfied because the procedure was necessary to protect the victim's health and the procedure ensure the reliability of the victim's testimony.

People v. Vasseur, 2016 COA 107. Confrontation Clause provides a trial right and does not apply to sentencing proceedings, including restitution hearings.

People v. Mcfee, 2016 COA 97. A note written by the victim predicting that defendant would follow through on his threats to kill her was testimonial because it was not made during an emergency and its purpose was to aid in defendant's prosecution. However, victim's prior statements to family members regarding defendant's threats to kill her were properly admitted under CRE 807 (residual) because they were spontaneously made to close family and were not self-serving; victim had no motive to lie as well as personal knowledge of the threats; statements were probative of a material fact; and admitting them served the interests of justice.

People In Int. of E.G., 2016 CO 19. Because the trial court lacked the authority to grant defense counsel access to the private home of a third party, denial of access did not violate defendant's right to confront.

People v. Hard, 2014 COA 132. Information from Drugs.com was not testimonial for purposes of the Sixth Amendment's Confrontation Clause because the information on the website was not created primarily for the purpose of establishing facts relevant to later criminal prosecution.

People v. Miranda, 2014 COA 102. Confrontation Clause permits the admission of testimonial hearsay after the declarant has testified and been released from her subpoena if: (1) the declarant testified and was subject to cross-examination regarding the matters contained in the declaration; and (2) the defendant did not ask to recall the witness.

People v. Thomas, 2014 COA 64. Despite victim's lack of memory of the events surrounding a DUI-related crash, there was no violation of defendant's confrontation rights, because the victim testified at trial and defendant was given an opportunity to cross-examine her.

Marshall v. People, 2013 CO 51. The admission of the lab report did not violate the Confrontation Clause because even though the lab technician did not conduct the test of the defendant's urine sample herself, she supervised the testing process, reviewed all the data generated by the test, made the determination that the data accurately determined that the defendant had methamphetamine present in her urine, and certified the test results.

People v. Rogers, 2012 COA 192. Defendant waives his confrontation right if he intentionally opens the door to testimonial evidence; that action is a limited waiver allowing prosecution to introduce further evidence on the same topic. *Here:* defense counsel intentionally introduced testimonial hearsay statements of a witness during cross-examination of a police officer and waived any confrontation right.

People v. Phillips, 2012 COA 176. Defendant's confrontation rights under US and Colorado Constitutions are not violated by a child witness testifying by means of CCTV if: (1) the trial court makes the findings required by Maryland v. Craig, 497 U.S. 836 (1990); and (2) the testimony is presented pursuant to the procedures set forth in §16-10-402. Statements a child made in response to individual questioning by school employees, a police officer, and a social worker were non-testimonial because the primary purpose of the questioning was to assess the child's physical state and welfare. A person's status as a mandatory child abuse reporter under §19-3-304(1)(a) or §19-3-307(1) does not necessarily make the person either an agent of law enforcement or the statements made to him or her testimonial. *Here:* statements made to school employees and a social worker were non-testimonial because they were not acting on behalf of law enforcement officers.

People v. Warrick, 284 P.3d 139 (Colo. App. 2011). Booking reports and mittimus were non-testimonial because they were created for routine administrative purposes before defendant was criminally charged.

People v. Ray, 252 P.3d 1042, 1049 (Colo. 2011). Right to confront did not require disclosure of witnesses' addresses where witness intimidation was an issue.

People v. Cropper, 251 P.3d 434 (Colo. 2011). *Hinojos-Mendoza* continues to be viable after *Melendez-Diaz v. Massachusetts*. *Here*: defendant waived his right to confront lab technician on the results of his forensic tests because he failed to comply with the requirements of §16-3-309(5). Colorado's notice-and-demand statute does not fail for lack of a specific notice provision because providing the report through discovery is sufficient to put the defendant on notice that, absent a specific request under §16-3-309, a lab report can be introduced without live testimony.

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008), aff'd operation of law, 238 P.3d 1283 (Colo. 2010). Error in removing defendant from the courtroom to view her daughter's testimony by CCTV, without effective means of instantly communicating with counsel, did not require reversal. Neither the abuse suffered by the daughter nor defendant's role in it were disputed; daughter's testimony was consistent with the theory of defense (duress); and defendant failed to establish that she was prejudiced by the lack of constant electronic communication with counsel.

People v. Gibson, 203 P.3d 571 (Colo. App. 2008). The admission of an unidentified bystander's hearsay statement did not violate defendant's right to confrontation where defense counsel first elicited the statement.

People v. Espinoza, 195 P.3d 1122 (Colo. App. 2008). Proofs of service admitted as part of defendant's driving record, which was kept and maintained by the DMV in the regular course of business, were not "testimonial" hearsay statements.

People v. Villano, 181 P.3d 1225 (Colo. App. 2008). Out-of-court statements by a co-conspirator made to an undercover officer during the course of and in furtherance of a conspiracy are not "testimonial" because a reasonable person in the co-conspirator's position would not make incriminating statements if he believed they would later be used against the accused in the investigation or prosecution of a crime.

People v. Sharp, 155 P.3d 577 (Colo. App. 2007). The admission of the child's videotaped forensic interview at trial violated *Crawford* because the hearsay statements were the functional equivalent of a police interview. The detective set up the interview, the detective was consulted about the questions asked of the child, and the interview was conducted for the purpose of eliciting the child's statements for trial. The admission of the videotape was plain error where there was no physical evidence and the DA relied on the videotape extensively during closing arguments and encouraged the jury to review the tape during their deliberations.

Vasquez v. People, 173 P.3d 1099 (Colo. 2007). Forfeiture by wrongdoing applies when a court finds: (1) witness is unavailable; (2) defendant was involved in, or responsible for, procuring the unavailability of the

witness; and (3) defendant acted with the intent to deprive the criminal justice system of evidence. The forfeiture applies to confrontation rights under both federal and state constitutions.

Coleman v. People, 169 P.3d 659 (Colo. 2007). Defense counsel's failure to timely notify the prosecution, pursuant to §16-3-309(5), that Coleman desired the in-court testimony of the technician waived his right to confront the technician.

Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. 2007). Laboratory reports are testimonial statements subject to *Crawford*.

People v. Moreno, 160 P.3d 242 (Colo. 2007). Demonstrating that a child-victim of sexual assault was medically unavailable to testify because of defendant's sexual assault on her was insufficient to invoke the doctrine of forfeiture by wrongdoing because there was no showing that defendant intended to subvert the criminal justice system by depriving that system of the evidence upon which it depends.

Arteaga-Lansaw v. People, 159 P.3d 107 (Colo. 2007). Statements made to a police officer dispatched to a report of a theft were testimonial because there was not an emergency in progress when the statements were made. The victim who, had just returned home following a month of rehabilitation, was reporting a crime that had taken place days, if not weeks before, and was not being victimized or threatened when she was speaking to police.

People v. Owens, 183 P.3d 568 (Colo. App. 2007). The court's exclusion of evidence of victim's alleged romantic and sexual relationship with a third party infringed upon defendant's constitutional right to confront witnesses.

People v. Mosley, 167 P.3d 157 (Colo. App. 2007). A court may not erect a physical barrier between a testifying child victim and the defendant to protect the victim from the trauma of testifying in the defendant's presence. Rather, the court must follow the procedure set forth in the statute allowing testimony via CCTV at §16-10-402.

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). Court's refusal to require "other act" witness to disclose her address did not infringe defendant's confrontation rights because defendant had previously been convicted of sexually assaulting the witness and investigating her current reputation for truthfulness would have been of marginal utility.

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). A letter properly authenticated as being written by defendant does not offend the Confrontation Clause because the defendant is the declarant. Defendant had the opportunity to explain or deny the letter's contents.

Raile v. People, 148 P.3d 126 (Colo. 2006). Statements made to a police officer dispatched to a burglary in progress were testimonial because there was not an emergency in progress when the statements were made. The officers had control over the situation, there was no threat to the declarant at the time, and the situation was not frantic or unstable.

People v. Vigil, 127 P.3d 916 (Colo. 2006). Child victim's statements to a doctor conducting a sexual assault exam, as well as the child's statements to his father, and his father's friend, were nontestimonial under *Crawford*. Doctor's questioning was not the functional equivalent of police interrogation; fact that doctor was a member of a child protection team did not in and of itself make him a government official. Statements to the father and his father's friend were made at home while the child was speaking informally; statements were not an attempt to develop testimony for trial.

People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). Background voice in a 911 tape of an unidentified bystander was not testimonial because the caller was seeking immediate help for the victim, the circumstances were exigent, and the statement was neither elicited by not made to anybody with authority.

People v. Boykins, 140 P.3d 87 (Colo. App. 2005). Trial court erred when it failed to take adequate measures after some jurors informed the court that they could not see defendant or the witnesses. Simply inviting jurors to move to gain a better view of the witnesses was not enough. The court should have inquired further and gotten an affirmative response that each juror could see. The jurors' inability to observe defendant and the witnesses' demeanor violated the defendant's right to confrontation. However, this was trial error, not structural error. Because defendant did not object, the Court reviewed for plain error and found that reversal was not required.

People v. Couillard, 131 P.3d 1146 (Colo. App. 2005). Admission of co-defendant's statements from his providency hearing (as statements against penal interest) violated defendant's right to confrontation, citing *Crawford*.

People v. Golden, 140 P.3d 1 (Colo. App. 2005). In discovery, defense learned that the sex assault victim claimed to be in a "committed romantic relationship" with one of her roommates but did not seek to admit that fact through rape shield procedures. On cross-examination, the victim denied being in a "committed romantic relationship" with any of her roommates. Trial court violated defendant's right of confrontation when it precluded the defense from impeaching victim's denial with prior inconsistent statement that she was in a "committed romantic relationship" with one of her roommates. Though the impeachment might have revealed that the relationship was a homosexual one, the trial court could have redacted "any allusion to the victim's sexual orientation" from questions, answers or prior statements without diminishing the effectiveness of the attack on her credibility. So limited, the impeachment would not fall under the rape shield statute. To win a new trial based upon a trial court limitation on cross examination, defendant need not show that the limit affected the outcome of trial, but that the limit on a challenge to the witness's credibility was not harmless beyond a reasonable doubt. Lists factors bearing on that determination. *Here:* trial court's erred in precluding the defense from impeaching victim's denial with prior inconsistent statement was not harmless, because (1) victim's testimony was critical to prosecution's case and defense of consent, which the defense sought to establish through cross examination alone; and (2) it was impossible to estimate the effect of the impeachment on the victim's credibility.

People v. King, 121 P.3d 234 (Colo. App. 2005). Where a victim makes an excited utterance to a police officer, in a noncustodial setting, and without indicia of formality, the statement is nontestimonial interrogation under *Crawford*.

People v. Argomaniz-Ramirez, 102 P.3d 1015 (Colo. 2004); People v. Gookins, 111 P.3d 525 (Colo. App. 2004); People v. Mullins, 104 P.3d 299 (Colo. App. 2004). When a hearsay declarant testifies at trial and is subject to cross-examination, admission of his or her out-of-court statements does not violate the Confrontation Clause.

People v. Turley, 109 P.3d 1025 (Colo. App. 2004). *Crawford* does not bar the admission of hearsay testimony in probation revocation proceeding because probationer's right to confrontation flows from due process, not confrontation clause.

People v. Garrison, 109 P.3d 1009 (Colo. App. 2004). Statements made by victim to his training manager were not testimonial and not barred by Confrontation Clause where there was no indication manager was acting as a police agent.

People v. Shreck, 107 P.3d 1048 (Colo. App. 2004). DOC pen packs and material from other states evidencing prior convictions are not testimonial; triple attestations by the judge and court clerks are not testimonial because

they are not “past events or facts” but rather are affidavits verifying the chain of custody or authenticity of the business records.

People v. Fry, 92 P.3d 970 (Colo. 2004). Prior testimony meets Confrontation Clause concerns only if: (1) the witness is unavailable; and (2) the defendant had an adequate opportunity for cross-examination.

People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003). Admission into evidence of defendant’s adoptive admission does not violate Confrontation Clause because defendant himself is the declarant.

People v. Harris, 43 P.3d 221 (Colo. 2002). Police officer testified that defendant made contradictory statements when challenged with another witness’ statements. *Here*: witness’ statements were hearsay and violated defendant’s confrontation right because jury could infer the content of the statements, and they were used to prove the truth of the matter asserted.

Interpreter

People v. Chavez, 2012 COA 61. When defendant does not speak or understand English, he is entitled to an interpreter under Chief Justice Directive 06-03. However, a judge is not required to advise every defendant that he can request an interpreter. Defendant may request an interpreter or, if it is obvious that he has significant language difficulties, the trial court may have a duty to inquire if an interpreter is needed. *Here*: no error where trial court was not on notice that defendant had any language difficulties because he readily communicated with the court in English. It was the defense’s responsibility to request an interpreter if one was needed.

Miscellaneous Trial Rights

People v. Rainey, 2023 CO 14; People v. Davis, 2023 CO 15. CSC considers whether defendants have a Sixth Amendment right to continued representation by a particular PD, and under what standard a trial court should determine a defendant's continuance request to enable continued representation with appointed counsel. CSC holds that, although indigent defendants have an interest in continuity of counsel that must be considered by a court, it is not a right guaranteed under the Sixth Amendment. Any Sixth Amendment right to continuity of counsel is a component of the right to choose counsel, and it is settled law that defendants do not have a right to choose a particular appointed attorney. However, a court considering a requested continuance to allow appointed counsel to represent a defendant at trial should consider whether the denial of the continuance and substitution of counsel would prejudice the defendant. *Here Rainey:* The defendant in this case was represented by the PD; defendant requested a continuance so that his second appointed PD, who had represented him for about two weeks, could represent him at trial. Trial court denied the request, noting that the case was straightforward and that a new trial date could not be set for many months if the continuance was granted. *Here Davis:* defendant was represented by the PD and requested a continuance so that his appointed PD could represent him at trial. The trial court denied the request, stating that because of the simple nature of the case, it perceived no prejudice in denying the continuance, though that required substitution of counsel.

People v. Arellano-Avila, 20 P.3d 1191 (Colo. 2001). Where a court cannot order a witness to attend due to jurisdictional limitations, failure to so order does not violate due process or equal protection.

PROSECUTORS

Disqualification: Colo. RPC 3.7; §20-1-107

People v. Garcia, 698 P.2d 801 (Colo. 1985). Whether a DA and his staff should be disqualified is within the discretion of trial court. Court should consider whether disqualification is reasonably necessary to ensure the integrity of the fact-finding process, the fairness of the trial, the orderly administration of justice, and public confidence in the criminal justice system. Factors to consider are the nature, relevance, and necessity of the witness's testimony, the size and degree of integration of the district attorney's staff, and the degree to which the testimony is contested.

People v. Perez, 201 P.3d 1220 (Colo. 2009). The Capital Crimes Unit of the Colorado Department of Law is not a DA and may not be disqualified pursuant to §20-1-107. §20-1-107, authorizes disqualification of a DA only: (1) at the request of the DA; (2) if the court finds that that the DA has a personal or financial interest in the case; or (3) if the court finds special circumstances that would render it unlikely that the defendant would receive a fair trial. "Appearance of impropriety" is no longer a valid ground for disqualification of a DA. Before a special circumstance under §20-1-107, justifying disqualification of an attorney can lead to disqualification of an entire DA's office, defendant must establish facts demonstrating that the attorney had confidential information that could not be screened from other members of the office. There is no separate standard for DA disqualification in death penalty cases; the disqualification standards set forth in §20-1-107, apply. When sanctioning prosecutors for discovery violations, courts must impose the least restrictive sanctions that preserve the truth-finding process, restore a level playing field, and deter prosecutorial misconduct. Disqualification of a DA's office is not a least restrictive sanction.

In Re: People v. Honstein, 2024 CO 34. The advocate-witness rule, Colo. RPC 3.7 generally forbids counsel from maintaining dual roles as advocate and witness in the same matter before the same tribunal. Relatedly, when asked to disqualify a prosecutor or prosecutor's office when they are called as a witness, a trial court should disqualify the prosecutor if their testimony is "of sufficient consequence to prevent a fair trial." A defendant who wishes to call a participating prosecutor as a witness must demonstrate a compelling and legitimate reason to do so. This standard requires the testimony in question to be both vital to the case and unobtainable from other sources. Trial courts have discretion to determine whether the proffered reason is compelling and legitimate and should quash subpoenas eliciting testimony when this standard is not met. *Here:* the CSC finds that defendant lacked a compelling and legitimate reason because the testimony he sought constituted impeachment evidence and was obtainable from another witness; trial court erred in ordering the prosecutor to testify and makes the rule to show cause absolute.

People v. Solis, 2022 CO 53. In a interlocutory appeal, the DA appealed the trial court's order disqualifying the entire DA's office because an attorney who had previously represented defendant in the underlying case as a PD had recently been hired by the DA's office. The CSC held that there was no evidence that the screening process and other safeguards the DA's office had implemented to keep the attorney from disclosing confidential information or participating in the case was inadequate, so it reversed the trial court's disqualification order.

People v. Kent, 2020 CO 85. CSC has jurisdiction to hear an interlocutory appeal from an order disqualifying a DA's office. §6-12-102(2) allows the People to file an interlocutory appeal from a ruling on a motion to disqualify the DA pursuant to §20-1-107. Animosity alone is insufficient to warrant disqualification of DA. Although trial court believed that the circumstances depicted a DA who had made the prosecution personal because of a conflict with defendant, this, alone, was insufficient to warrant disqualification under §20-1-107(2). DA disqualification was not required because the DA lodged a complaint against defendant with

the Department of Regulatory Affairs. The DORA complaint was not a special circumstance warranting disqualification. Disqualification was also not required based on two discovery violations. Trial court must impose the least restrictive sanction that preserves the truth-finding process, restores a level playing field, and deters future misconduct by the prosecution. Disqualification of the entire DA's office is a drastic remedy and certainly not the least restrictive sanction available for a discovery violation. Disqualification was also not required based on employee's testimony. Potential testimony of an employee of the DA's office that is cumulative of other evidence and only relevant to an uncontested matter is not of sufficient consequence to render it unlikely that defendant could receive a fair trial. Although CSC has not identified the circumstances that qualify as "special circumstances," the circumstances must be extreme to justify disqualifying the DA.

People v. Arellano, 2020 CO 84. Trial courts have broad discretion in determining whether to disqualify a DA's office from prosecuting a case; decision to disqualify a DA's office reviewed for abuse of discretion. §20-1-107(2) authorizes the disqualification of DA in a particular case if the court "finds special circumstances that would render it unlikely that defendant would receive a fair trial." The party moving to disqualify the DA based on "special circumstances" bears the burden of showing that absent disqualification, he or she will not receive a fair trial. To establish the requisite special circumstances, the movant must provide "actual facts and evidence in the record" supporting his or her contention, not merely hypothetical information. *Here:* trial court acted within its discretion when it disqualified a DA under §20-1-107(2) where a named victim (the murder victim's estranged wife) was an employee of the DA's office and would be a critical witness at trial because her testimony would go to defendant's motive or state of mind and to a claim of self-defense. Given these and other unique factors, the disqualification was proper.

People v. Ehrnstein, 2018 CO 40. Trial court's decision to appoint special prosecutor is reviewed for an abuse of discretion; this standard is satisfied when, among other things, court misapplies or misconstrues the law. Under Colo. RPC 3.7(a), a lawyer shall not advocate at a trial in which the lawyer is likely to be a necessary witness; this rule is directed at the lawyer's courtroom activity, preventing the lawyer from acting as an advocate at trial; basic reason for this limitation is to protect the integrity of the adversary process by separating the lawyer's role as an advocate from that of a witness. Appointment of a special prosecutor is not required under Colo. RPC 3.7 where members of DA's might be called as witnesses at a post-trial hearing on a motion for new trial. Overriding purpose of Colo. RPC 3.7, is to avoid prejudice associated with jury confusion. Such concerns are generally not implicated, however, in the context of pre- and post-trial litigation in front of a judge. Trial courts retain discretion, however, to preclude an attorney from playing a role in the presentation short of a trial when such activity could be admissible at trial and would therefore reveal the attorney's dual role to the jury.

People v. Epps, 2017 CO 112. Under §20-1-107(2), trial court may only disqualify a DA in a particular case (1) at the request of the DA, (2) upon a showing that the DA has a personal or financial interest in the prosecution, or (3) if the court finds special circumstances that would render it unlikely that defendant would not receive a fair trial. Where a deputy DA would be called as a witness, the record does not support a finding of disqualification under §20-1-107(2) based on the DA having a personal or financial interest in the prosecution; record only shows that the DA was performing his professional duty to execute the laws of the State of Colorado. To justify disqualification of a DA under "special circumstances," §20-1-107(2), the special circumstances must be extreme. *Here:* court incorrectly found that DA did not object to the motion to disqualify the DA's office and, based on this incorrect finding, incorrectly ruled that this was the equivalent of a request by the DA to be disqualified rather than being ordered to appear as a witness at trial; the ruling was unsupported by the record, and does not support DA's disqualification. DDA was to be called as a witness solely to impeach another witness; this was not a special circumstance; DDA was not being called to prove an element, and the matter to which he would testify was admitted to by the other witness; further, the prosecution was willing to

stipulate to the other witness's statement, and the DDA was not necessarily the only witness to the other witness's statement.

People v. Kendrick, 2017 CO 82. Special circumstances that would require disqualification of DA must be "extreme." Appearance of impropriety is not a valid basis for disqualifying a DA, as a matter of law.

People v. Aryee, 2014 COA 94. Trial court properly granted the DA's motion to disqualify herself; plain language of §20-1-107 does not require DA to make any showing in support of her motion; filing of the motion itself is all that is required.

People v. Perez, 238 P.3d 665 (Colo. 2010). A DA can be disqualified under §20-1-107(2) if she has a "financial interest" in a case which would render it unlikely that defendant would receive a fair trial. *Here:* there was no showing that the funding arrangement between DA's office and DOC affected that right.

People v. Jimenez, 217 P.3d 841 (Colo. App. 2008). Prosecutors were not required to be disqualified based on defendant's allegations that they violated a federal confidentiality statute when they obtained his mental health records because accusing prosecutors of wrongdoing did not automatically create a conflict of interest, and prosecutors did not have a personal or financial interest in prosecuting defendant.

People v. Espinoza, 195 P.3d 1122 (Colo. App. 2008). A DA must be disqualified in a criminal case where that attorney or a member of his or her staff will appear as a witness and give testimony of sufficient consequence to prevent a fair trial. However, such circumstances do not exist where DA's testimony will be cumulative or relevant only to an uncontested manner. *Here*: no disqualification where a proof of service signed by the DA was admitted only to show defendant's knowledge that his license had been revoked.

People v. Lincoln, 161 P.3d 1274 (Colo. 2007). Prosecuting attorneys had previously represented 3 potential witnesses in private practice on a variety of unrelated matters. Based on possibility that they obtained exculpatory information during their representation of the witnesses, trial court found they were barred from revealing that information and were thus faced with an irresolvable ethical conflict that precluded their participation (and that of the entire DA's office) in defendant's cases. CSC reversed the disqualification of the entire office and set forth standards and procedures for evaluating on remand whether "special circumstances" might subject the individual prosecutors to disqualification.

Dunlap v. People, 173 P.3d 1054 (Colo. 2007). A prosecutor cannot be disqualified from a case because of an "appearance of impropriety." The key issue in determining whether to disqualify a DA is whether defendant will receive a fair trial.

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). A defendant may force disqualification of a DA on either of two grounds: (1) DA has a personal or financial interest in the case; or (2) there are "special circumstances that would render it unlikely defendant would receive a fair trial. §20-1-107(2). *Here*: testimony of attorney from prosecutor's office who was called as defense witness was not a special circumstance rendering a fair trial unlikely because it was entirely favorable to defendant, its significance would not have been enhanced had a different office prosecuted the case, and it was not material.

People ex rel N.R., 139 P.3d 671 (Colo. 2006); People v. Chavez, 139 P.3d 649 (Colo. 2006). 2002 amendment to §20-1-107 eliminated "appearance of impropriety" as a basis for disqualification of DAs. Under that statute, disqualification is proper only when (1) DA requests his own disqualification; (2) DA has a personal or financial interest in the prosecution; or (3) special circumstances exist that would render it unlikely that defendant would receive a fair trial if prosecuted by the DA. A DA does not have a personal interest in a prosecution that warrants disqualification unless he stands to receive some personal benefit (or suffer some detriment) from the outcome of the prosecution that is unrelated to his duty to enforce the law.

People v. Scott, 116 P.3d 1231 (Colo. App. 2004). Colorado Constitution and statute require that a DA file an oath of office and public official's surety bond with the secretary of state. A DA's failure to do so upon the commencement of the DA's term does not result in a permanent vacation of the office and does not disqualify the DA from curing the defect. Any defect in qualification is temporary and is cured when DA subsequently files the oath and bond with the secretary of state. A DA who proceeds with performing the duties of his or her office while a temporary or technical defect in qualification exists acts as a "de facto officer," whose acts are valid and binding. Because an information filed by a DA acting as a "de facto officer" is valid, a defendant's challenge to a DA's authority to prosecute based on the district attorney's failure to file an oath of office and surety bond with the secretary of state does not raise an issue of subject matter jurisdiction; by pleading guilty, defendant waives any objection to the DA's authority to prosecute, and cannot raise the issue in a subsequent postconviction motion.

People v. Lee, 93 P.3d 544 (Colo. App. 2003). If a DA is running for election, she need not be disqualified as a prosecutor. A change of venue cures any pre-trial publicity problem. Further, there is no appearance of impropriety because the DA's potential political benefit from defendant's conviction is not sufficiently distinct from her professional responsibilities to warrant a finding of an improper interest in the outcome of the case.

People v. C.V., 64 P.3d 272 (Colo. 2003). Trial court abused its discretion in disqualifying the DA where defendant was charged with breaking into and destroying property in a church of which DA was a member. The D.A.'s church membership and fact that he had seen defendant at the church some time prior to the crime, rendering him a possible witness, were too attenuated to constitute either an interest in the case sufficient to impede his responsibility to uphold the law or to create an appearance of impropriety sufficient for disqualification.

People v. Palomo, 31 P.3d 879 (Colo. 2001). Disqualification is too severe a sanction for a situation that will arise only if the prosecution calls a particular witness; court can use alternative remedies if the problem arises.

Misconduct Generally

People v. Dinapoli, 2015 COA 9. Use of the term "the victim" was not plain error. Any error was not obvious. No statute, well-settled legal principle, or published Colorado case discusses the propriety of referring to the complaining witness as "the victim." Courts in other jurisdictions disagree on the issue. References did not cause defendant sufficient prejudice to constitute plain error because jury was properly instructed on the presumption of innocence.

People v. Pernell, 2014 COA 157, aff'd other grounds, 2018 CO 13. In sexual assault case, neither a witness nor a prosecutor is barred from using the term "rape" simply because the term no longer appears in the criminal statutes. Consistent with CRE 701, there is no error when a witness uses the term "rape" as a convenient shorthand term for the act of forcible, nonconsensual intercourse; such use of the term does not invade the province of the jury or undermine a defendant's presumption of innocence, nor is the use of the term unfairly prejudicial. Prosecutor does not err in using the term "rape" in opening statement or closing argument; a prosecutor may reference or comment on the evidence in terms used by the witnesses themselves.

People v. Rhea, 2014 COA 60. Trial court has discretion to decide a post-trial motion alleging prosecutorial misconduct and all preserved claims of error underlying that decision, including the trial court's findings regarding harmless error, are reviewed for an abuse of discretion.

People v. Santana, 255 P.3d 1126 (Colo. 2011). Prosecutor's comments and questions implying that defendant has burden of proof do not necessarily shift the burden of proof. CSC set forth three factors (non-exhaustive list) to be considered, in light of the entire record, to assess whether the burden was actually shifted. These included consideration of the degree to which: (1) prosecutor specifically argued or intended to establish that

defendant carried the burden of proof; (2) prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) jury is informed by counsel and court about defendant's presumption of innocence and prosecution's burden of proof.

People v. Mares, 263 P.3d 699 (Colo. App. 2011). Where prosecutor calls witness knowing witness will invoke his privilege not to testify, or jury is instructed that witness invoked privilege, reversal is only warranted in two situations: (1) where prosecution engaged in misconduct consisting of "conscious and flagrant attempt to build its case out of inferences arising from use of testimonial privilege"; or (2) when inferences arising from refusal to answer add "critical weight to prosecution's case in form not subject to cross-examination." Following factors are relevant to these inquiries: (1) prosecutor's intent in calling witness; (2) number of questions asked; (3) their importance to state's case; (4) whether prosecutor draws any inference in closing argument from refusal to answer; and (5) whether trial court gives a curative instruction. *Here*: prosecutor did not commit misconduct in asking that jury be instructed that witness had refused to testify and was held in contempt because: (1) prosecutor did not ask jury to draw any inference from refusal and did not specifically reference witness's privilege against self-incrimination;(2) no leading questions were asked during trial; and (3) prosecutor's stated purpose of request was to alleviate any concern that prosecution had failed to call witness when he was so frequently mentioned during trial. Because two inferences could have been drawn from refusal, one that benefitted prosecution and one that benefitted defendant, inferences arising from instruction did not add "critical weight" to prosecution's case.

Wend v. People, 235 P.3d 1089 (Colo. 2010). Use of the word "lie" or any of its other forms to refer to defendant's or a witness's veracity is categorically improper.

Crider v. People, 186 P.3d 39 (Colo. 2008). It is improper for lawyer to use any form of the word "lie" in characterizing a witness's testimony or truthfulness. This remains true regardless of the extent to which that testimony is contradicted by demonstrative or scientific evidence. Such usage is prohibited: because it poses a risk of communicating the lawyer's personal opinion about the veracity of a witness and implying that the lawyer is privy to information not before the jury, and because the word "lie" is an inflammatory term likely to evoke strong and negative emotional reactions against the witness.

People v. Walters, 148 P.3d 331 (Colo. App. 2006). Prosecutor may not refer to facts not in evidence, make statements reflecting his personal opinion or knowledge, or inflame a jury's passions or prejudices.

Liggett v. People, 135 P.3d 725 (Colo. 2006). It is categorically improper for an attorney to ask a witness to opine on the veracity of other witnesses at trial. *Here*: in bench trial, trial court did not commit plain error by permitting prosecutor to ask testifying defendant whether other witness were "lying" or "mistaken" when they gave testimony that contradicted his own.

Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005). Oral arguments may not mislead or unduly influence the jury or contain expressions of personal opinion and knowledge, especially on defendant's guilt or the truth or falsity of witness testimony. Use of the word "lie" is such a strong expression and resonates so powerfully that it necessarily reflects the maker's personal opinion. Counsel can argue that testimony should not be believed. Reference to prosecution process for "screening out" weak cases is improper. By reminding jurors that they had to rely on their own collective memories of the evidence, and that her arguments were arguments and not evidence, the prosecutor refuted any notion that the jury should put any weight on her personal opinions, distanced her office from those opinions, and helped prevent error from being held plain.

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). Prosecutor's improper arguments did not require reversal where trial court sustained objections to the argument and gave the jury curative instructions and where trial court properly instructed jury on the standard for reasonable doubt.

People v. Ray, 109 P.3d 996 (Colo. App. 2004). Prosecutor's ambiguous remarks not directly referring to a defendant's decision not to testify do not implicate defendant's constitutional rights and are not grounds for reversal, and in any case, curative instructions are generally sufficient to overcome any prejudice created by an improper argument.

People v. Perry, 68 P.3d 472 (Colo. App. 2002). It is improper for prosecutor to advance argument that is contrary to facts personally known to prosecutor, even if those facts are not in evidence.

Opening Statement & Closing Argument

People v. Washington, 179 P.3d 153 (Colo. App. 2007), aff'd. 186 P.3d 594 (Colo. 2008). Where defendant does not object to prosecutor's closing argument, review is limited to plain error. To constitute plain error, prosecutorial misconduct must be flagrant or glaringly or tremendously improper. Prosecutorial misconduct in closing argument rarely constitutes plain error. In reviewing a closing argument for prosecutorial misconduct under plain error, the appellate court looks at the severity and frequency of the misconduct, any curative measures taken to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to the defendant's conviction. The trial court is in the best position to evaluate the propriety of counsel's argument and its potential impact on jurors in the context of the entire proceedings. In closing argument, a prosecutor may comment on the evidence admitted at trial, the reasonable inferences that can be drawn therefrom, and the instructions of law given to the jury. A prosecutor may also employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance, so long as he or she does not thereby induce the jury to determine guilt on the basis of prejudice or passion, inject irrelevant issues or evidence into the case, or accomplish some other improper purpose. In reviewing a prosecutor's closing argument for misconduct, the lack of an objection may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging. Prosecutor's comments in closing argument that defendant's theory of the case was, in part, "sheer utter nonsense," and "silly;" and subsequent comment on failure of defense counsel to explain sexual assaults as part of theory, if improper, was not plain error.

People v. Ujaama, 2012 COA 36. In order to qualify as plain error, prosecutorial misconduct in closing argument must be flagrantly, glaringly, or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Here*: although improper, not plain error because: statement that "[W]ith all the evidence you have heard, [defendant] has shattered his presumption of innocence;" statement that "[The] only way to obtain justice in this courtroom, to seek what [you, the jurors] . . . sought when [you] took that oath as jurors, is to find [defendant] guilty of the murder that he committed."

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). Prosecutor's opening statement is limited to the evidence that will be adduced at trial. Remarks later proven unsupported by the evidence will ordinarily constitute reversible error if there has been an affirmative showing of bad faith and manifest prejudice.

People v. Harmon, 284 P.3d 124 (Colo. App. 2011). Trial court has discretion to determine what will be permitted during opening statements; trial court did not abuse its discretion in permitting prosecutor to display during opening statement, over objection, a photograph of injured victim.

Wilson v. People, 743 P.2d 415 (Colo. 1987). The obligation of prosecutors to strike hard blows, but not foul ones, arises from the fact that the prosecutor represents the state, whose interest "is not that it shall win a case, but that justice shall be done."

Walker v. People, 932 P.2d 303 (Colo. 1997). To evaluate propriety of counsel's argument, you must consider the disputed statements in the context of the whole argument and in light of the evidence presented at trial.

People v. Salazar, 2023 COA 102. While the DA's closing remarks to the jury, telling them to send a message that they believed the victims was very close to the line of what would be considered improper, any error was not plain.

People v. Cuellar, 2023 COA 20. COA considers whether a prosecutor commits misconduct in closing by arguing that the jury may acquit defendant only if it believes that a prosecution witness lied throughout her testimony; such an argument is improper because it misstates the law and has the potential to lower the prosecution's burden of proof. However, under the circumstances of this case, the prosecutorial misconduct was harmless.

People v. Robinson, 2019 CO 102. CSC engages in a two-step analysis to review claims of prosecutorial misconduct: (1) it must determine whether the prosecutor's conduct was improper based on the totality of the circumstances; and (2) If court concludes that the conduct was improper, then it must decide whether such actions warrant reversal according to the proper standard of review. Each step of test for prosecutorial misconduct is analytically independent of the other; thus, a reviewing court may conclude that a prosecutor's conduct was improper but nonetheless uphold the trial court's judgment because, for example, the error was harmless. In the context of plain error review of prosecutorial misconduct, appellate court will only reverse when the misconduct was flagrantly, glaringly, or tremendously improper. Here: prosecutor's opening statement race-based comments in sexual assault prosecution, noting the victim's "pasty white" skin tone, emphasizing twice how defendant was an African American of "dark" complexion, and that purported witness looked over and saw "a dark penis going into a white body," were unnecessary and therefore improper; at no time did prosecutor directly explain that contrast in skin tones between defendant and victim was relevant to the issue of penetration, to how witness was able to see the penetration, or to any other evidentiary consideration, and probative value of those comments was speculative at best and was substantially outweighed by danger of unfair prejudice to defendant.

People v. Tibbels, 2019 COA 175, rev'd other grounds, 2022 CO 1 Any impropriety in prosecution's appeal to jury to hold defendant accountable for a jail lockdown was harmless and did not require reversal.

People v. Payne, 2019 COA 167. Colorado law does not require prosecutor to give the initial closing statement, or necessitate that prosecutor waives rebuttal remarks by forgoing the initial closing. Trial court abuses its discretion by allowing prosecutor to reserve her closing statement until rebuttal only when prosecutor's rebuttal remarks prejudice defendant, and court fails to remedy such prejudice, such as by striking the argument or allowing surrebuttal by the defense. *Here:* COA found no prejudice because prosecutor's rebuttal statement responded only to defense counsel's closing arguments.

People v. Galvan, 2019 COA 68, vacated other grounds, 2019 CO 68. To extent prosecutor's statements implied that the alleged victims' rights were equal to or greater than defendants, prosecutor should not have made, and trial court should not have permitted, such statements.

People v. Sandoval, 2018 COA 156. Prosecutor's use of the term "teammates" to describe the concept of complicity in closing arguments was appropriate shorthand and not misleading.

People v. Koper, 2018 COA 137. COA determined that reversal was required because prosecution plainly erred by "ask[ing] defendant some forty-four times whether another witness's testimony was incorrect, wrong, or untrue, or whether the witness had lied." Because these questions were pervasive and "squarely" violated *Liggett,* reversal was warranted.

People v. Jamison, 2018 COA 121. While it was improper to characterize the toothbrush shank at issue as a "dangerous instrument" in opening statement and while questioning witness because it was an opinion on an ultimate issue, plain error reversal was not warranted because evidence of guilt was overwhelming.

People v. Monroe, 2018 COA 110. Prosecutor's repeated argument that, although defendant had no duty to retreat, she had the ability to leave her encounter with victim if she were afraid for her safety, may have been understood by jury as an assertion that any person who does not take advantage of a path of retreat does not believe force will be used against her. This imposed a de facto duty to retreat, and trial court's instructions were inadequate to cure the error.

People v. Fortson, 2018 COA 46M. Prosecutor's introduction of inadmissible evidence of other acts of sexual assault committed by defendant along with prosecutor's opening/closing statements of a belief that defendant may have committed other acts constituted misconduct.

People v. Van Meter, 2018 COA 13. Prosecutor's use of a puzzle analogy and a space shuttle puzzle missing one-third of the pieces to explain the meaning of beyond a reasonable was error. Prosecutors must stop using puzzles to explain the burden of proof.

People v. Trujillo, 2018 COA 12. Prosecution did not impermissibly comment on a "screening process" by reminding a witness that it was the district attorney's office that sought charges.

People v. Camarigg, 2017 COA 115. Analogizing "reasonable doubt" to an incomplete puzzle can be permissible to explain the difference between proof beyond a reasonable doubt and proof beyond all doubt or how the evidence at trial comes together. Such analogies should not quantify reasonable doubt, trivialize the prosecution's burden, use iconic images (Abraham Lincoln or Statue of Liberty), or equate the burden to an everyday choice.

People v. Howard-Walker 2017 COA 81M, rev'd on cumulative error grounds, 2019 CO 69. Even if prosecutor's questions concerning perjury were improper, because prosecutor did not threaten, coerce, or otherwise "drive the witness off the stand," any misconduct was not reversible. Prosecutor's comments in closing argument that witness was not being honest and was not a credible witness were proper because the evidence supported a reasonable inference that the witness's testimony was false. Prosecutor improperly commented on defendant's decision not to testify when prosecutor said defendant was the only person who knew the location of the fruits of the burglary, and "he won't testify." However, no plain error because (1) the reference was minimal and (2) jury was properly instructed that defendant had a right not to testify and there is no suggestion that jury did not heed this instruction. Prosecutor's closing argument characterization of defendant's statement – "if I tell you who this other person was, then what would I get? What would the DA do for me?" – as a confession was a proper reasonable inference.

People v. Nardine, 2016 COA 85. Prosecutorial misconduct in closing argument constituted plain error where the prosecutor improperly: diverted jury's attention away from evidence and invoked community sentiment by arguing that jury should find defendant guilty based on wrongful acquittals in other sexual assault cases caused by defense attorneys who had manipulated juries and vulnerable victims; mischaracterized the defense theory as being synonymous with the belief that religious people are necessarily mentally ill or delusional and arguing that the defense theory was a condemnation of religious people; stated that he presumed that all the witnesses he had presented were telling the truth; argued defense counsel had conceded to the jury that he did not believe the defense's case was meritorious because in impeaching the victim with one of her prior statements, the defense had admitted that the victim's prior statement accusing defendant was credible; and argued facts not in evidence.

People v. Manyik, 2016 COA 42. Prosecutor engaged in misconduct when he "channeled" the victim in opening statement – a technique where prosecutor talks to jury as if he was the victim. Such technique was likely to inflame the passions of the jurors. However, error was harmless.

People v. Bondsteel, 2015 COA 165. Prosecutor's statements about a DNA "match" were not misconduct. All of the comments were grounded in the evidence and properly characterized what "match" meant within the context of the case.

People v. Smalley, 2015 COA 140. Although a majority of prosecutor's statements were proper, on one occasion he improperly urged the jury to rely on the truth of a statement that had been offered for a nonhearsay purpose. Reversal was not required under plain error because the truth of the statement had no direct bearing on defendant's guilt.

People v. Marko, 2015 COA 139. Comments by prosecutor during voir dire and closing argument comparing concept of "after deliberation" with the decisions whether to throw a football or pick up a pen were improper, but no plain error where they were not "flagrant or glaringly or tremendously improper." Comments by prosecutor asking jurors to consider the wishes of the community, appealing to jurors' sympathy for victim, and suggesting that a guilty verdict was necessary to do justice for the community and victim were improper, but not plain error as they were only a small part of prosecutor's closing argument. Comments by prosecutor that there was no evidence victim consented to sexual contact was a proper statement on the evidence and did not explicitly shift the burden of proof to the defense; even if construed otherwise, statements were not plain error as defense argued there was no evidence of lack of consent and jury was otherwise instructed on the burden of proof.

People v. Serra, 2015 COA 130. Prosecutor's use of the words "lie," "BS," and "deceit" were improper and improperly denigrated defendant and defense counsel. Prosecutor's discussion that defendant was "wanting to send the victim a message" was "close to total speculation."

People v. Mendenhall, 2015 COA 107M. Prosecutor's closing-argument reference to a Bernie Madoff scheme, even if error, was not obvious error so not plain error, because it could have been understood as merely a synopsis of a victim's specific testimony that used those words rather than an expression of the prosecutor's own opinion, and any error in twice referring to the victims as members of the "greatest generation" did not rise to the level of plain error.

People v. Ortega, 2015 COA 38. Prosecutor's statements that jury should care because "[w]e do not want an open drug market in [the park] right in the heart of [the city]… [w]e do not want an open drug market directly across the street from [the high school]… [w]e do not want [people] to be drug dealers"—were improper but harmless.

People v. Nerud, 2015 COA 27. Prosecutor's argument that a witness was credible did not constitute plain error where statements were anchored in evidence presented at trial and reasonable inference could be drawn from that evidence. In each instance, prosecutor offered specific reasons based on evidence rather than personal opinion to explain why the testimony of the witnesses were credible.

People v. Conyac, 2014 COA 8M. Prosecutor's argument that victim was not sophisticated enough to "pull off" a lie she had to tell, repeatedly, to various officials, for 14 months and his use of examples from the testimony were not error but simply responsive to defense counsel's closing argument. Prosecutor's comment in rebuttal close, that defendant's "presumption of innocence was now gone" was improper but not plain error because the trial took place before the *McBride* and *Villa* opinions were issued. Prosecutor's argument that his and the judge's jobs were now done, and jury needed to go back and "find justice" for victim was improper but not reversible.

People v. Pollard, 2013 COA 31M. A person's refusal to consent to a search may not be used by prosecution – either through the introduction of evidence or by explicit comment – to imply the person's guilt of a crime. Recurring references to defendant's refusal to consent to the search, and prosecution's explicit use of that

evidence to imply guilty knowledge on defendant's part, cast serious doubt on the reliability of his conviction, necessitating reversal.

People v. Apodaca-Zambori, 2013 COA 29. References in testimony and closing argument to defendant's failure to come forward with information before and after *Miranda* warnings is not for the purpose of inferring guilt from silence if it refutes the theory of defense. *Here*: since defendant's theory of defense was that she tried to control her dog rather than commanding it to attack the victim, testimony that she asked if she could change her mind about making a statement, and that she told police the location of the dog but did not volunteer that the bite was an accident and/or she tried to control the dog, was proper to refute the defense theory.

People v. Munoz-Casteneda, 2012 COA 109. It was improper, but not reversible, for prosecutor to admit evidence about Mexican drug organization when there was no evidence presented to jury that defendant was involved with one; by raising the issue, prosecutor risked improperly implying that he had access to evidence not presented to jury.

People v. Randell, 2012 COA 108. Generally, golden rule arguments – those placing jurors in victim's shoes – are improper. In cases of theft or embezzlement of public funds, it is generally improper for prosecutor to argue to jury that defendant stole from "us" or "you." *Here:* any error was not sufficiently prejudicial to constitute plain error, because: reasonable jurors could distinguish between money that was "taken from them individually" and money taken from the "big bucket" of taxes paid by all citizens; the point of prosecution's references to theft from "us" and "you" was that defendant stole from "each and every one of [Colorado's] citizens," not particular jurors; consequently, prosecution's comments did not encourage jurors to assume a role "more hostile to defendant or sympathetic to other victims," but rather, asked jurors to acknowledge the role they already occupied as taxpayers and citizens; and evidence of guilt was overwhelming, such that any appeal to jurors' emotions could not have undermined trial's fairness or reliability.

People v. Krueger, 2012 COA 80. Prosecutor did not commit misconduct during voir dire or opening statement when noting that a co-defendant would not be testifying at trial, as she did not explicitly refer to the co-defendant's privilege against self-incrimination, and her remarks did not suggest that the co-defendant's absence required defendant to present more evidence to support his defense. Prosecutor did not commit misconduct when noting during voir dire that questions are not evidence, regardless of whether they are asked by pro se defendant or prosecutor; comments did not suggest that jurors should hold defendant's examination of witnesses to a higher standard than an attorney because of his pro se status.

People v. Garcia, 2012 COA 79. Prosecutor's reference in closing argument to fact that female defense attorney suggested female victims had "buyer's remorse" after having sex with defendant was an inappropriate comment on defense attorney's gender; trial is not a referendum on the conduct of attorneys, and disparagement of opposing counsel is improper, as are appeals based on racial identity or other attributes of counsel. Although improper, no plain error since it was not repeated and prosecutor did not insinuate that defense counsel lacked a good faith belief in her client's case.

People v. Estes, 2012 COA 41. Where prosecutor during opening statement described defendant "making up" a story to explain his presence in victims' yard, he was properly referring to evidence that would be adduced at trial and drawing inferences therefrom; he did not describe defendant as a "liar" or use the word "lie." No misconduct. In closing argument, prosecutor has wide latitude and may refer to the strength and significance of the evidence, conflicting evidence, and reasonable inferences that may be drawn from the evidence. *Here*: prosecutor's comment that "there was no affirmative defense in this case" was not a legal assertion that jury could not consider self-defense but was appropriate comment on the strength of the evidence supporting self-defense. As a jury evaluates the evidence against a defendant, it must continue to presume him innocent until it concludes that the evidence proves defendant guilty beyond a reasonable doubt. Consequently, prosecutor's

comment in closing argument that, after the evidence had come in, the presumption of innocence is gone, wrongly suggested that jury need not presume defendant innocent as it deliberated upon that evidence. *Here*: prosecutor's comment was error but not plain error: although error was obvious, prosecutor made the comment only once, jury was instructed on the presumption of innocence, evidence of guilt was overwhelming, and it was unlikely a reasonable juror would have accepted defendant's theory of self-defense.

People v. Cordova, 293 P.3d 114 (Colo. App. 2011). Witness's single use of the term "gang" in response to prosecutor's question was not improper and did not amount to prosecutorial misconduct; term was not specifically elicited by prosecutor, and prosecutor steered witness back to terms "club" and "association." Although prosecutor's characterization of defendant as an "outlaw" during opening argument might have been permissible oratory, his statements implying that, as an outlaw, defendant "respected few and feared none" were improper attributions of traits of character. Did not rise to plain error where evidence of defendant's guilt was strong; defense counsel made no contemporaneous objection; and prosecutor's challenged comments were a small part of his argument, were infrequent, and were not unduly prejudicial in light of the entire record.

People v. Santana, 255 P.3d 1126 (Colo. 2011). Prosecutor's comments and questions implying that defendant has burden of proof do not necessarily shift the burden of proof. CSC set forth three factors (non-exhaustive list) to be considered, in light of the entire record, to assess whether the burden was actually shifted. These included consideration of the degree to which: (1) prosecutor specifically argued or intended to establish that defendant carried the burden of proof; (2) prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) jury is informed by counsel and court about defendant's presumption of innocence and prosecution's burden of proof. *Here*: trial court did not abuse its discretion in denying defendant's motion for mistrial because prosecutor's actions were more likely meant to highlight the strength of prosecution's case and to dispel any negative implications raised by defense counsel's questioning of the expert, than they were an attempt to shift the burden of proof.

People v. Davis, 280 P.3d 51 (Colo. App. 2011). During closing, prosecution presented a PowerPoint slideshow that discussed the stages a victim of trauma goes through and compared those to the victim's reactions. There was no evidence, expert or otherwise, discussing the stages of trauma, which correlated with "rape trauma syndrome." Defendant repeatedly objected to the closing argument. Reviewing for non-constitutional harmless error, prosecutor's argument was improper, suggested specialized knowledge and expertise based on evidence not introduced in trial, was not harmless error, and warranted reversal.

Martinez v. People, 244 P.3d 135 (Colo. 2010). Prosecutors may not make a generic tailoring argument - argument that attacks defendant's credibility simply by drawing jury's attention to defendant's presence at trial and his resultant opportunity to tailor his testimony. A prosecutor may make a specific tailoring argument that cites to an evidentiary basis in the record. Prosecutors are not required to follow a rigid or formulaic method when referencing such evidence. *Here:* prosecutor's generic tailoring argument was improper, but any error was harmless because there were multiple instances where the defendant during direct examination commented on and expressly incorporated the testimony of prior witnesses, and although the prosecutor did reference these instances, the jury likely would have understood the argument in the context of the defendant's testimony.

People v. Strock, 252 P.3d 1148 (Colo. App. 2010). Prosecutor did not improperly appeal to jury's sympathies during closing in a vehicular homicide/DUI case when he: (1) argued that a witness who thought defendant was going to crash into him "easily could have been lying on that slab in the coroner's office;" or (2) referred to defendant as a "loaded gun" for everyone on the highway that night. The former was a fair inference from the evidence and the latter was a permissible oratorical embellishment. Prosecutor misstated the law regarding proximate cause during closing argument by saying that defendant would have been guilty of vehicular homicide even if someone else ran a red light and hit defendant's car, "because [defendant] was drunk and

behind the wheel." Not plain error. Prosecutor misstated the law regarding proximate cause by saying "even if ten phantom cars collided with [defendant's] vehicle" before he crashed and killed his passenger, defendant would still be the proximate cause of the victim's death. Not plain error because of ample evidence that defendant's driving while intoxicated proximately caused the victim's death and the jury was properly instructed re: proximate cause. Commenting on the lack of evidence supporting defendant's factual allegations or theory does not shift the burden of proof. Not plain error where prosecutor during closing pointed out that defendant did not (1) prove that the victim was wearing her seat belt, survived the crash, and was hit and killed by an unknown vehicle; or (2) present evidence that he was not driving at the time of the crash.

People v. Medina, 260 P.3d 42 (Colo. App. 2010). Where evidence as to which confederate actually shot a victim is disputed, it is not improper for prosecution to argue that a defendant should be convicted under "alternative legal theories" (that he was liable as either the principal or complicitor).

Wend v. People, 235 P.3d 1089 (Colo. 2010). Use of the word "lie" or any of its other forms to refer to defendant's or a witness's veracity is categorically improper. *Here:* prosecutor erred in repeatedly using the words "lies," "lied," and "liar" during opening and closing statements; error was reversible because: defendant's credibility was essential to her claim of self-defense; there was no weaker language used like "did not tell you the truth"; there was no context surrounding the statements that would ameliorate the prejudicial impact of repeating the word "lie"; and although defense counsel also used the word, he did so only in response to the interrogation video, which the prosecution had stressed throughout the trial and repeatedly raised in opening and closing statements.

People v. Gallegos, 260 P.3d 15 (Colo. App. 2010). Prosecutor's statement asking jury to "send a message to the community" is improper in the guilt phase of a trial.

People v. Collins, 250 P.3d 668 (Colo. App. 2010). Prosecutor did not commit misconduct when she stated, "Counsel talks a lot about reasonable doubt. What she is asking you to do is find an unreasonable doubt. It is absurd." Taken in context, the remark was not a personal attack on defense counsel but merely a response to defense counsel's assertions during her closing argument that jury could not find defendant guilty beyond a reasonable doubt, by suggesting that defendant's theory as to why the jury should find a reasonable doubt was so unlikely as to strain credibility.

People v. McBride, 228 P.3d 216 (Colo. App. 2009). Prosecutorial misconduct in closing constitutes plain error where he/she: accuses a defendant of having "lied over and over" which "shows his guilt" and "running from this horrible truth;" refers repeatedly to what was and was not "true;" bases "liar" accusations not just on defendant's own statements but also on legitimate opening statements and cross-examinations by the defense attorney; argues defendant was "not only guilty" but was also "a coward," in reference to evidence admitted under CRE 404(b), thus making a "blatantly improper character attack" ("[w]here I come from, any time you beat a woman, it's a cowardly act"); makes repeated personal attacks on a defense expert, including referring to him as a "hired gun expert" who had to "come up with something" and made up his testimony; refers to the expert as being "full of it" and his testimony "garbage;" exhorts jurors to "do justice for other strangers;" misstates the presumption of innocence; and distorts a key element of attempted first degree murder.

People v. Martinez, 224 P.3d 1026 (Colo. App. 2009). Colorado Constitution does not prohibit prosecutor from arguing that defendant shaped or "tailored" his testimony in response to trial testimony of other witnesses. Prosecutor was entitled to argue that defendant "had an advantage that nobody else did, which is that he was able to tailor his statement with what everybody else had to say because he's been here," as there was evidence in the record to justify the argument.

People v. Beilke, 232 P.3d 146 (Colo. App. 2009). Although prosecutor improperly stated the law as to the "reasonableness" standard for the affirmative defense to violating a custody order, the error did not require reversal because jury was properly instructed on the affirmative defense, and because prosecutor's other references to the standard were correct.

People v. Lucas, 232 P.3d 155 (Colo. App. 2009). Prosecutor's statement that this case is a "single woman's worst nightmare" was harmless error where there is no reasonable probability that it contributed to defendant's conviction.

People v. Gomez, 211 P.3d 53 (Colo. App. 2008). Prosecutor's references to evidence as being "uncontradicted" did not shift the burden of proof to defendant or implicate his right to remain silent.

People v. Gibson, 203 P.3d 571 (Colo. App. 2008). Prosecutor's reference to defendant as "the unluckiest man on the planet" and to "coincidences" was not a personal opinion as to guilt or an effort to shift the burden of proof, but rather a comment on the circumstantial nature of the evidence. Comment on the lack of evidence explaining the circumstances of defendant's conduct was not a comment on his failure to testify.

People v. Rogers, 220 P.3d 931 (Colo. App. 2008), overruled other grounds, 2022 CO 6. Prosecutor's opening statement that "the People's opinion support[s] those charges having been filed and support[s] our request for a guilty verdict from you" was a comment on the evidence when read in context and was not an improper expression of personal opinion.

People v. Rojas, 181 P.3d 1216 (Colo. App. 2008). No error where DA said defendant "smeared" and "smashed" the victims' credibility; it was fair rebuttal argument to defendant's opening salvo. Where DA said "there is only one conclusion…victim told the truth," there was no error; DA was simply telling jury that, based on the evidence, there is only one reasonable outcome.

People v. Chavez, 190 P.3d 760 (Colo. App. 2007). Prosecutor's comments in closing regarding defendant's refusal to allow police to search his apartment were proper where evidence of the refusal to consent to search was properly admitted, to impeach defendant's testimony that he was not living at the apartment.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). Prosecutor's comments during closing were clearly improper but did not amount to reversible error. The improper statements included: (1) telling jury about a prior sexual assault case she had tried where jury acquitted the defendant and then later regretted it; (2) referring to an unrelated child murder case in Florida; (3) telling jury she was appalled by defense counsel's argument, she spoke for the victims, she knew the victims were telling the truth; and (4) referring to the pre-filing, case screening process.

People v. Welsh, 176 P.3d 781 (Colo. App. 2007). Prosecutor's reference to an instruction as the "theory of defense instruction" was not misconduct. Prosecutor's comment on the absence of a suicide note was not misconduct. Prosecutor's other statements assertedly denigrating defendant's insanity defense and arguing that defendant was "trying to blow smoke at" the jury were arguably within prosecutor's leeway to point to evidence and inferences that cast doubt on the defense theory or show that evidence on which the defendant was relying lacked substance. To the extent that any statements were improper, they did not give rise to plain error. Prosecutor's reference to defendant as an "obsessive liar" was improper but did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the jury's verdict. Prosecutor's suggestion to jury, during cross examination and in closing argument, that jury should reject testimony by court-appointed psychiatric expert was not improper.

People v. Grant, 174 P.3d 798 (Colo. App. 2007). It is improper to argue that the deliberation element of first degree murder only requires the time necessary for "one thought to follow another."

People v. Taylor, 159 P.3d 730 (Colo. App. 2006). Prosecutor's comment in closing on defendant's post-*Miranda*-advisement silence was improper. Given that prosecutor's case was not particularly strong, COA could not say that jury's verdict was "surely unattributable to" prosecution's reference to defendant's post-advisement silence. Prosecutor's comments on defendant's failure to contact the police or the county agency about discrepancies in her useful public service forms were proper attacks on defendant's credibility and not an improper comment on her right to remain silent.

People v. Walters, 148 P.3d 331 (Colo. App. 2006). Prosecutor may not refer to facts not in evidence, make statements reflecting his personal opinion or knowledge, or inflame a jury's passions or prejudices. *Here*: prosecutor injected his own credibility into the case by stating that he saw defendant laugh and smile as the victim left the stand, referred to facts not in evidence by stating that his own boss had multiple sclerosis and that it did not cause sexual assault or prevent sexual desire, and inflamed the passions of jury by asking why defendant was "lurking around at elementary schools," which was not supported by the record and tended to suggest that defendant lingered near schools for a sinister purpose such as sexual predation or dealing drugs.

People v. Perea, 126 P.3d 241 (Colo. App. 2005). Prosecutor's closing argument comments that defendant "was blowing smoke" to divert you from what's going on in this case, and that certain witnesses were "not credible" or were "truthful," when viewed in context, were not improper.

People v. Hall, 107 P.3d 1073 (Colo. App. 2004). During closing argument, prosecutor referred to an officer's testimony that, when advised of his rights at the scene of the accident, defendant only responded by blowing kisses at the officer. Prosecutor's argument did not constitute impermissible commentary on defendant's right to silence, because purpose of the argument was to emphasize defendant's level of intoxication on the night in question.

People v. Larkins, 109 P.3d 1003 (Colo. App. 2004). Prosecutor's closing argument that defendant could be convicted of second degree burglary if jury determined "he decided he was going to take the money before he got into the room or when he got into the room" was an accurate statement of the law and not misconduct.

People v. Ray, 109 P.3d 996 (Colo. App. 2004). Prosecutor's ambiguous remarks not directly referring to a defendant's decision not to testify do not implicate defendant's constitutional rights and are not grounds for reversal, and in any case, curative instructions are generally sufficient to overcome any prejudice created by an improper argument. *Here*: prosecutor's statement that defendant was "running away from taking responsibility from acts that happened" was too ambiguous to implicate the defendant's constitutional rights, and in any case was cured by curative instruction.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Improper "golden rule" argument was not plain error where it was isolated and made in context of arguing that evidence proved the elements of the crime.

People v. Clemons, 89 P.3d 479 (Colo. App. 2003). Prosecutor's argument quoting Edmund Burke that "the only thing necessary for the triumph of evil is for good men to stand by and do nothing" was an improper attempt to persuade jury to convict to carry out the wishes of the community but was harmless error as an isolated incident in an otherwise proper closing argument.

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). Defendant claimed that prosecution had repeatedly characterized a decree by National Association of Securities Dealers as "barring defendant from the securities industry." An expert later testified that in fact the NASD decree: (1) did not bar defendant from trading securities, but only barred him from associating with NASD members; and (2) was not final until long after defendant sold the securities upon which prosecution was based. Following the expert's testimony, defendant moved for a mistrial. Mistrial properly denied. Even assuming prosecution had referred to defendant as being "barred from the securities industry" when he sold the securities in question, all parties believed that defendant

was barred from the industry, and that the bar was final, until the expert testified. Prosecution did not mischaracterize the evidence in bad faith. Trial court found jury understood the true legal effect and ramifications of the NASD decree.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). No plain error in prosecutor's closing remarks: "I believe the evidence has been proven beyond a reasonable doubt" referred to evidence, not defendant's guilt. "Oliver was honest with you, he didn't remember a lot" and "the witnesses' stories had slight discrepancies, but were consistent, that speaks of honesty" were related to reasonable inferences as the witnesses' credibility. Prosecutor did not mischaracterize "critical evidence" by stating that a witness recalled telling police she saw defendant hitting the victim. After she stated she did not remember, she agreed that her memory was better on the night of the assault. No plain error in prosecutor's remark, "how do you think it was to come in here yesterday and sit in front of a group of strangers and tell your story again?" While it was improper for the prosecutor to comment on the ramifications of testifying, it was brief and made in the context of discussing the evidence. No plain error in arguing that the victim was beaten with a baseball bat even though the bat was not listed in the information, which listed other weapons. The evidence showed defendant hit the victim with a baseball bat. It was a simple variance of the offense listed in the information and not a basis for reversal.

People v. Gilmore, 97 P.3d 123 (Colo. App. 2003). Prosecutor's statement that defense witness was a liar was not plain error, but a fair comment on the evidence; since the witness testified that she had previously lied to police. In addition, prosecutor's reference to the witnesses' testimony as a "story" was an acceptable reference. Prosecutor's comment that the officer had been "honest" with jury was a fair comment on the evidence where officer had testified that he had made certain mistakes during the investigation.

People v. Allee, 77 P.3d 831 (Colo. App. 2003). Prosecutor said that victim suffered a broken arm, but it was her hand that was broken. No plain error where misstatement was brief, and jury heard testimony and other evidence that showed victim suffered a broken bone in her hand, not her arm.

People v. Dashner, 77 P.3d 787 (Colo. App. 2003). No misconduct by prosecutor when she stated that defendant lied on the stand because that was a reasonable inference based upon the evidence in the record, and prosecutor made reference to that evidence as support for her assertion. No plain error when prosecutor referred to defendant as "amnesia boy" and the tea he allegedly drank as "magical tea." Defense was defendant drank tea earlier in the day that caused sufficient impairment of his faculties, such that he was unaware of his own conduct during the aggravated robbery.

People v. Salyer, 80 P.3d 831 (Colo. App. 2003). No reversible error for prosecutor's remarks referring to Columbine shootings, to which no objection was raised, since they were grounded in the evidence and largely responsive to defense arguments intended to elicit sympathy from the jury.

People v. Trujillo, 75 P.3d 1133 (Colo. App. 2003). During closing argument, prosecutor's reference to "witnesses saying that Mr. Trujillo did this" was not reversible error even though only one witness identified defendant at trial. Prosecutor's remark that defendant "gave a story, a couple of stories which turn out not to be true" was not reversible because it referred to statements defendant made when initially contacted by the police.

People v. Kerber, 64 P.3d 930 (Colo. App. 2002). In closing argument, counsel may point to circumstances casting doubt on a witness's testimony and may draw reasonable inferences from the evidence regarding the credibility of witnesses. *Here*: because testimony of the numerous witnesses was contradictory and in some respects irreconcilable, it was proper for prosecutor to highlight inconsistencies in the statements of defense witnesses. It was not improper for prosecutor to argue that testimony of People's witnesses was irreconcilable with that of defendant, and therefore one side was not telling the truth.

People v. Griffith, 58 P.3d 1111 (Colo. App. 2002). In a small part of a lengthy closing argument, prosecutor improperly remarked on what she or the People believed about the evidence. No reversible error, either individually or in combination. Upon defendant's objections, prosecutor voluntarily withdrew some of the remarks, and trial court sustained the objections and admonished prosecutor as to the remainder.

People v. Darbe, 62 P.3d 1006 (Colo. App. 2002). Prosecution's statement in summation that defendant made a personal choice to shoot her father was not an inappropriate attempt to inflame the passions or prejudice of jury.

People v. Perry, 68 P.3d 472 (Colo. App. 2002). It is improper for prosecutor to advance argument that is contrary to facts personally known to prosecutor, even if those facts are not in evidence. *Here:* since prosecutor did not know defendant was aware of an unrelated arrest warrant, it was permissible to argue that defendant fled from police due to consciousness of guilt for the instant offense.

People v. Jensen, 55 P.3d 135 (Colo. App. 2001). Prosecutor's closing argument describing the murder as a "slaughter," and his gratuitous agreement with defendant's statement that he had done nothing smart, was not so egregious as to constitute plain error.

People v. Kenny, 30 P.3d 734 (Colo. App. 2000). Argument that "every fox will find a way to get into the hen house" and reference to defendant's home as his "lair" diverted jury's proper focus and denigrated defendant's human status but were not plain error because the remarks were isolated. Request that jury bring justice to victim and the People of the State of Colorado, "that has been [eluding] all of us since August of 1988 [referring to the age of the case]" was inadvisable because it improperly referred to the wishes of the community and arguably injected the prosecutor's personal opinion; but did not rise to the level of plain error.

Rebuttal Argument

People v. Vialpando, 804 P.2d 219 (Colo. App. 1990). A prosecutor is afforded considerable latitude in replying to an argument by opposing counsel. In considering whether prosecutorial remarks are improper, the reviewing court must weigh the impact of the remarks on the trial but must also take into account defense counsel's "opening salvo."

People v. Gladney, 250 P.3d 762 (Colo. App. 2010). Evaluated in context of argument as a whole and defense counsel's arguments, prosecutor's remarks in rebuttal were all reasonable responses to defense counsel's arguments and were based on reasonable inferences from the evidence.

People v. Collins, 250 P.3d 668 (Colo. App. 2010). Prosecutor did not commit misconduct when she stated, "Counsel talks a lot about reasonable doubt. What she is asking you to do is find an unreasonable doubt. It is absurd." Taken in context, the remark was not a personal attack on defense counsel but merely a response to defense counsel's assertions during her closing argument that jury could not find defendant guilty beyond a reasonable doubt, by suggesting that defendant's theory as to why jury should find a reasonable doubt was so unlikely as to strain credibility.

Crider v. People, 186 P.3d 39 (Colo. 2008). In rebuttal, prosecutor repeatedly characterized defendant as lying or having lied. Remarks were improper but harmless, since there was strong evidence supporting jury's verdicts, and prosecutor directly related the characterizations to specific physical evidence and carefully structured his argument to avoid any suggestion that he was offering his personal opinion or that he had some greater knowledge of what actually occurred.

People v. Kendall, 174 P.3d 791 (Colo. App. 2007). Prosecutor's statement to jury that "you should be insulted" was not a personal opinion on the defense theory of the case and did not amount to plain error. Prosecutor

comment on victim's demeanor on the stand ("did it sound like he was faking it?") was not improper vouching, an improper appeal to the emotions of the jury, or an improper expression of prosecutor's personal opinion because it was consistent with the instruction to jury to consider each witness's demeanor on the stand. It was not plain error for prosecutor to comment on the credibility of all prosecution witnesses. It was not reversible error for prosecutor to comment on victim's fear of defendant because jury could have drawn that inference from victim's demeanor on the stand.

People v. Krutsinger, 121 P.3d 318 (Colo. App. 2005). When a case turns on which witnesses jury believes, each side is entitled to argue that its witnesses testified truthfully while witnesses for the opposing side testified falsely. Prosecutor's comments regarding the "pit of hell" and his use of the word "diabolical" during rebuttal closing did not constitute an improper appeal to the jury's sympathies. Comments were rhetorical flourishes, rather than a reference to victim's religious beliefs.

People v. Darbe, 62 P.3d 1006 (Colo. App. 2002). Prosecutor's remark that he was not inventing facts or lying improperly urged jury to rely on prosecutor's credibility instead of evaluating the evidence for itself. No plain error where prosecutor's remark that defense counsel was counting on the jury both to dislike the victim and feel sympathy for defendant did not improperly denigrate defense counsel.

People v. Williams, 996 P.2d 237 (Colo. App. 1999). Responding to defense counsel's suggestion that jury "send a message," prosecutor used the same phrase. Comment proper under the circumstances.

People v. Fears, 962 P.2d 272 (Colo. App. 1997). Speaking in the first person singular does not necessarily amount to vouching for credibility of witnesses. Most of the comments were legitimate responses to defense counsel's closing argument.

Outrageous Governmental Conduct

People v. Burlingame, 2019 COA 17. Trial courts determine whether there has been outrageous government conduct by reviewing the totality of the facts in a given case. Trial court's dismissal of a case based on a finding of outrageous government conduct is reviewed for an abuse of discretion. However, outrageous government conduct has always been recognized as a violation of due process and an appellate court reviews due process violations de novo. Outrageous governmental conduct is conduct that violates fundamental fairness and is shocking to the universal sense of justice. Instances where trial courts have found outrageous government conduct in Colorado are vanishingly rare, and the threshold for such a finding appears to be exceedingly high. *Here:* there was no outrageous government conduct where defendant in a false reporting case was videotaped during a police interview concerning her report that she had been the victim of a sexual assault.

People v. Walker, 2022 COA 15. Defendant failed to show actual prejudice stemming from prosecutor's conduct in requesting jailhouse recordings of defendant's phone conversations with an attorney and thus prosecutor's conduct did not constitute outrageous governmental conduct necessitating dismissal of charges against defendant, in prosecution for second degree burglary; prosecutor was told calls might contain privileged information and thereafter did not listen to them again, distribute them, or use them at trial, trial court granted defendant's motion to suppress the calls, defendant did not argue information on calls led to evidence admitted at trial, and record did not show calls had any bearing on case.

People v. Perez, 2019 COA 48, aff'd other grounds, 2021 CO 5M. COA would review for plain error defendant's claim that trial court erred when it failed to dismiss case based on finding of outrageous governmental conduct, where defendant raised claim for first time on appeal. Instances in which trial courts have found outrageous governmental conduct are rare (listing cases). *Here:* nothing in defendant's allegations

indicates the police encouraged or participated in defendant's commission of the crimes; he gave what appeared to the officer to be a false name, then fled; officers pursued him and eventually apprehended hi; upon apprehension, defendant fought the officers, assaulting one of them; defendant chose to flee by running across a major thoroughfare in busy traffic and elected to fight the arresting officers; these were decisions entirely of his own making.

Effland v. People, 240 P.3d 1199 (Colo. 2010). "Outrageous government conduct," which bars prosecution under due process principles, is conduct that violates fundamental fairness and is shocking to the universal sense of justice. *Here*: DA's statement to interrogating officers that defendant, who was not in custody, was not entitled to an attorney did not rise to the level of outrageous government conduct so as to require suppression of statement under due process principles; prosecutor was merely explaining his opinion on an undecided question of law.

People v. McDowell, 219 P.3d 332 (Colo. App. 2009). To successfully assert the defense of outrageous governmental conduct, defendant must show that his constitutional due process rights have been violated by the actions of government officials to such a degree as to violate fundamental fairness and shock the universal sense of justice. When the claim of outrageous governmental conduct is appropriately raised, a trial court must determine if there has been outrageous government conduct by reviewing the totality of the facts in a given case; this determination lies within the trial court's discretion and will not be overturned on appeal absent an abuse of that discretion. When such a claim is predicated upon police interrogation practices, the law and policies that require suppression of involuntary and unwarned statements are very similar, if not identical, to the law and policies that guide trial courts in determining whether such conduct constitutes outrageous governmental conduct that requires dismissal of the entire case.

People v. Sprouse, 983 P.2d 771 (Colo. 1999). It is important to distinguish between the statutory defense of entrapment and the constitutional defense of outrageous governmental conduct. The latter provides a mechanism by which this court may curtail overzealous police activity that we find shocking to the conscience. In contrast, judicial pronouncements of law regarding the propriety of police conduct are not appropriate in the context of the entrapment defense, as this defense rests upon a determination of the defendant's state of mind, which is a factual issue for the jury. *Here:* defendant raised an outrageous governmental conduct defense at the trial court and to the COA. In light of its reversal of defendant's conviction on the grounds of entrapment, the COA did not address the outrageous governmental conduct claim. Therefore, we have directed the COA to address that claim on remand.

Presentation Perjured Testimony

People v. Medina, 260 P.3d 42 (Colo. App. 2010). It is fundamental that prosecutors may not present or allow perjured testimony. To establish claim of prosecutorial misconduct based on the presentation of perjured testimony, defendant must show: (1) prosecution's case included perjured testimony; (2) prosecution knew or should have known of the perjury; and (3) perjury was material-there was a reasonable likelihood that the false testimony could have affected the judgment of jury. The first two requirements—involving perjured witness testimony and prosecution culpability—are heavily fact dependent and because those issues normally cannot be resolved from a cold trial record, these types of claims "usually" must be "made on a collateral attack."

Witness Interference

People v. Paglione, 2014 COA 54. Intentional, concerted effort by the prosecution to deprive defendant of exculpatory testimony through witness intimidation may deprive the defendant of a fair trial. Unnecessarily strong admonitions against perjury aimed at discouraging defense witnesses from testifying may violate defendant's Sixth Amendment right to present witnesses. Comments amounting to a threat beyond what the record indicates is necessary and appropriate may suggest the prosecutor sought to coerce a witness into silence. The use of perjury warnings by a prosecutor and perjury advisements by a court have a substantial potential of skewing the truth-finding process by deterring witnesses from giving relevant testimony and such warnings should be the exception, not the rule. Courts should examine the totality of the circumstances to determine whether the prosecution's actions constituted substantial governmental interference with a defendant's right to present a defense. Among the factors to consider are: (1) the manner in which the prosecutor raises the issue, including the warning's extent and timing, the language employed, and whether the prosecutor communicated directly with the witness or through an attorney; (2) the prosecutor's basis in the record for believing the witness might lie; (3) the warning's effect on the witness's willingness to testify; (4) whether the court attempted to remedy any misconduct; (5) whether the prosecutor capitalized on the witness's absence by directing the jury's attention to it during closing arguments; and (6) the significance of the witness's testimony to the defense (which was not a factor listed in *Blackwell*.

People v. Blackwell, 251 P.3d 468 (Colo. App. 2010). Claim that People intentionally interfered with defense witness or intimidated witness into not testifying is considered under the totality of the circumstances. Among the factors to consider are: (1) manner in which prosecutor raised the issue, including the warnings' extent and timing, the language employed, and whether the prosecutor communicated directly with the witness or through an attorney; (2) prosecutor's basis in the record for believing the witness might lie; (3) warnings' effect on the witness's willingness to testify; (4) whether the court attempted to remedy any misconduct; and (5) whether the prosecutor capitalized on the witness's absence by directing the jury's attention to it during closing argument. An intentional, concerted effort to deprive defendant of exculpatory testimony through witness intimidation may deprive defendant of a fair trial. To prevail on such a claim, defendant must show, by a preponderance of the evidence, governmental interference with a defense witness's choice to testify. Unnecessarily strong admonitions against perjury aimed at discouraging defense witnesses from testifying, or comments amounting to a threat beyond what the record indicates is necessary and appropriate, may deprive a criminal defendant of his or her Sixth Amendment right to obtain witnesses. A prosecutor's perjury warnings are not per se improper and may be appropriate.

Vindictive Prosecution

People v. Butler, 224 P.3d 380 (Colo. App. 2009). A trial court's denial of discovery on a claim of vindictive prosecution is reviewed for abuse of discretion. Threshold showing of vindictive prosecution necessary to enable defendant to obtain discovery is necessarily lower than the quantum of evidence needed to establish a claim of vindictive prosecution. Defendant cannot rely on conclusory allegations to meet this threshold. Defendant must provide some credible evidence tending to show the existence of the essential elements of a vindictive prosecution. *Here:* defendant failed to provide some credible evidence tending to show existence of essential elements of vindictive prosecution to entitle him to discovery to support defense of vindictive prosecution by prosecutor adding special offender count; defendant did not submit affidavits from anyone in support of claim, his conclusory allegations showed only series of events from which vindictive prosecution was but one inference, defendant's drug case had been pending for 16 months when murder trial concluded, he requested that drug case trail murder case, prosecution presented evidence that it considered adding special

offender count from beginning as noted on his intake sheet, and because defendant's intake sheet was provided to defense counsel during discovery, he was on notice of its possible intent to add special offender count.

Miscellaneous Misconduct

People v. Carlson, 72 P.3d 411 (Colo. App. 2003). When prosecutor cross-examines a witness about a prior felony conviction, the prosecutor must ask the question in good faith. *Here*: prosecutor based his question on an NCIC report (which apparently contained an error), and trial court acted within its discretion in finding that prosecutor acted in good faith.

In re Attorney C, 47 P.3d 1167 (Colo. 2002). Colo. RPC 3.8(d) requires prosecutors to disclose constitutionally material exculpatory evidence, including impeachment evidence, to the defense in advance of any critical stage of the proceeding. It is an ethical violation if non-disclosure was intentional.

In re Pautler, 47 P.3d 1175 (Colo. 2002). In a phone conversation, prosecutor pretended to be a state public defender to gain the surrender of a serial murderer. Prosecutor's conduct violated Colo. RPC 4.3 and 8.4(c); circumstances did not support a justification defense.

People v. Wiley, 51 P.3d 361 (Colo. App. 2001). Prosecutor, in the presence of jury, asked trial court to take judicial notice of the fact that defendant's suppression motion was denied. *Held*: constitutional error but harmless beyond a reasonable doubt.

People v. Avila, 944 P.2d 673 (Colo. App. 1997). To insinuate during cross-examination that defendant had "bought" an expert to testify in his favor might well be extreme and inappropriate. Here: no plain error because questioning was more an inartful attempt to show bias than a suggestion that the defense was undertaken in bad faith.

JURY TRIALS

RIGHT TO A JURY: CRIM.P. 23

People v. Taylor, 2021 COA 133. COA considers whether a trial court conducting a felony trial may, under §18-1-406(7), and over defendant's objection, remove a juror for "just cause" and accept a verdict from the remaining eleven jurors. COA concludes that under the CSC's interpretation of our state constitution a court may not do so. Case remanded for a new trial.

Linnebur v. People, 2020 CO 79M. The legislature intended to treat felony DUI as a distinct offense that included prior convictions as elements to be tried to a jury and found beyond a reasonable doubt, rather than as a sentencing enhancer to be found by the court. Where this element was incorrectly decided by the court, the case should be remanded to allow the prosecution to elect between resentencing on the misdemeanor offense or retrial on the felony charge. Overruled People v. Quezada-Caro, 2019 COA 155; People v. Gwinn, 2018 COA 130.

People v. In the Interest of T.B., 2016 COA 151. Trial court reasonably exercised its discretion under §19-2-107 when denying juvenile's request for a jury trial on sexual exploitation charges.

People v. Laeke, 2012 CO 13. When defendant enters NGRI plea and prosecution concedes defendant was insane at time he committed offense, defendant does not have a statutory or constitutional right to jury trial on affirmative defense of insanity of the merits of the charged offense. Fact that NGRI plea was entered upon motion of defense counsel, and over defendant's personal objection, does not change this result. Sixth Amendment right to jury trial is not violated when court finds defendant NGRI based on defendant's affirmative defense of insanity. Right to a jury trial requires that criminal convictions rest upon a jury determination that

defendant is guilty of every element of a crime. NGRI judgment does not constitute a conviction, but rather operates as an acquittal of charged offenses.

In Re People v. McKeel, 246 P.3d 638 (Colo. 2010). Defendant does not have constitutional right to waive a jury trial, and he may override People's objection to bench trial only if he establishes that a jury trial would violate his right to due process. *Here*: defendant's concerns that he would be impeached with his prior felony convictions, and that jury would learn of his prior drug use and his status as a CI, did not establish that jury trial would be constitutionally unfair proceeding.

People in the Interest of A.B.-B., 216 P.3d 581 (Colo. App. 2009). Although SAOC-PATT is a per se COV, it is not a COV as defined in §18-1.3-406(2) unless: (1) juvenile is charged with causing SBI to victim, or (2) assault involved the use of threats, intimidation, or force. *Here*: the juvenile was not charged with COV as defined in §18-1.3-406 and was not entitled to a jury trial.

People v. Robinson, 187 P.3d 1166 (Colo. App. 2008). Defendant was charged with 2 drug possession counts and 2 counts of POWPO; defendant moved for separate trial before a different jury on the weapon counts but was denied that option; defendant then moved to waive his right to jury trial and have all counts tried to the court. People objected and court denied the motion, instead ordering a bifurcated proceeding. *Here*: no error because defendant failed to show how he was prejudiced by bifurcated proceeding; trial court did not abuse its discretion in denying defendant's motion to waive jury trial.

People v. Rodriguez, 112 P.3d 693 (Colo. 2005). Article II section 23 of Colorado Constitution only extends the right to a jury of 12 in felony cases, so legislature, §18-1-406(1), and court, Crim.P. 23, may provide for fewer jurors in misdemeanor cases.

A.C. v. People, 16 P.3d 240 (Colo. 2001). Under Children's Code, US and Colorado Constitutions, juvenile accused of committing a delinquent act which, if committed by an adult, would be a felony, does not have a statutory right to a jury trial, except in the case of a few serious charges enumerated by statute. In view of the significant differences between adult and juvenile systems, it violates neither due process nor equal protection to treat a juvenile differently and deny him a jury trial for charges on which an adult would have constitutional right to a jury trial.

People v. District Court, 953 P.2d 184 (Colo. 1998). Facing POWPO charges, defendant requested bench trial so that jury would not hear - as an element of the offense - that he previously was convicted of felonies (menacing/POWPO); prosecution objected. *Held*: just because jury will hear evidence of prior offenses does not violate due process and does not permit a bench trial over prosecutor's objection.

WAIVER OF RIGHT TO JURY

Rice v. People, 565 P.2d 940 (Colo. 1977). Counsel may not waive the right to a jury trial on defendant's behalf.

People v. Norman, 703 P.2d 1261 (Colo. 1985); People v. Evans, 612 P.2d 1153 (Colo. App. 1980). The right to a jury trial is a fundamental constitutional right that may only be waived voluntarily and deliberately. The waiver must be made personally by defendant, and must be established as a matter of certainty, not implication.

People v. Oliver, 2018 COA 146. Parties agreed to submit some, but not all, of the elements of the crime (POWPO) to jury, and to have jury return a verdict by interrogatory instead of by general verdict; they agreed that jury should not know defendant was a previous offender, which is a required element of POWPO; jury also

was never instructed that defendant was charged with POWPO. COA concluded that entry of POWPO conviction violated defendant's constitutional right to trial because defendant did not personally waive his right to have jury find every element of the crime and to have the jury return a verdict on POWPO charge.

People v. Walker, 2014 CO 6. Defendant may not litigate the validity of a jury trial waiver on direct appeal; COA should not have reviewed the validity of defendant's jury trial waiver. To determine whether defendant has affected a valid waiver of the right to a jury trial, the post-conviction court must determine whether defendant personally waived that right knowingly, voluntarily, and intelligently. An inadequate advisement that does not follow Crim.P. 23(a)(5)(II) does not automatically entitle defendant to an evidentiary hearing; defendant bears burden of establishing waiver's invalidity and must allege specific facts identifying how the waiver was not knowing, voluntary, and intelligent. Trial court may deny defendant's post-conviction motion alleging an inadequate jury trial waiver advisement without a hearing. Defendant does not have to contemporaneously object to a trial court's waiver advisement in order to subsequently challenge the advisement. Overruled People v. Montoya, 251 P.3d 35 (Colo. App. 2010).

People v. Thompson, 121 P.3d 273 (Colo. App. 2005). Defendant may, with prosecution's consent, waive right to a jury trial, either in writing or orally in court. Colorado law does not require an extensive, on-the-record advisement in order to affect a valid waiver. On appeal, if prosecution is able to establish a prima facie case of effective waiver, the burden shifts to defense to present evidence from which it could be reasonably inferred that the waiver was not voluntary, knowing, and intentional.

People v. Baird, 66 P.3d 183 (Colo. App. 2002). Every person accused of a felony has a statutory right to be tried by jury of 12, but that right may be waived if juror becomes unable to serve, and as a statutory right, it may be waived by counsel's statements. The requirement of Crim.P. 23(a)(7) that the stipulation be in writing is met when defense counsel stipulates to a jury of less than 12 in open court and on the record.

CHALLENGES FOR CAUSE: §16-10-103, CRIM.P. 24(B)

Clark v. People, 2024 CO 55. CSC addresses whether a trial court's erroneous denial of a Black defendant's challenge for cause of a potential juror who expressed racial bias constitutes structural error. Following *Novotny* and *Vigil*, the court holds that where, as here the trial court's erroneous denial of a challenge for cause is made in good faith and does not result in the juror actually serving on the jury, the error is not structural (no 6th Amendment violation) and is subject to harmless error review. The CSC also concludes that the trial court's error did not violate defendant's right to equal protection because no state actor purposefully discriminated against defendant. Accordingly, the court affirms the judgment of the court of appeals.

People v. Vergari, 2022 COA 95. COA holds that defendant waives a claim of error arising from the denial of a challenge for cause to a juror when defendant declines to excuse that juror with a peremptory challenge and does not exhaust his peremptory challenges.

People v. Abu-Nantambu-El, 2019 CO 106. Consistent with principle that the erroneous denial of challenge for cause amounts to structural error if it results in an actually biased juror serving on jury, the erroneous seating of an impliedly biased juror is also structural error. For purposes of defendant's constitutional right to an impartial jury, juror who is presumed by law to be biased is legally indistinguishable from an actually biased juror.

Vigil v. People, 2019 CO 105. Trial court did not abuse its discretion in denying defendant's challenge for cause to juror who initially appeared equivocal as to his ability to remain impartial due to his acquaintance with victim's family, because juror expressly gave his assurance that he thought he could evaluate victim's testimony "just like all the other witnesses who will testify." Trial court did not have to query prospective juror in precise terms of bias/impartiality and to receive his express assurance that he was not biased and both could and would render an impartial verdict. Aim of jury section is to produce an unbiased/impartial jury, but neither the US or

Colorado Constitution requires a "catechism for voir dire." Trial court's ruling granting prosecution's challenge for cause as to another juror, even if it amounted to an abuse of discretion, did not require reversal because neither prosecution nor defendant is granted any right to "shape" the composition of jury through the use of peremptory challenges.

People v. Garcia, 2018 COA 180. Party who unsuccessfully challenges juror for cause need not use a peremptory challenge to excuse that juror in order to preserve right to have the challenge reviewed on appeal; invited error doctrine does not preclude review under these circumstances. Trial court is in superior position to evaluate juror's credibility and demeanor as well as the level of sincerity demonstrated than a reviewing court, which has access only to a cold record for its determination. Trial court may properly deny challenge for cause because facts of the case do not sufficiently intersect with juror's potential area of bias. *Here:* where prospective juror indicated that it might be difficult for him to separate his feelings for his own children from his judgments about child witnesses but also stated that he could be fair and comply with court's instructions, challenge for cause was properly denied.

Marko v. People, 2018 CO 97. Prospective juror's expression of concern or indication that he possesses a preconceived belief as to some aspect of the case does not mandate exclusion of that juror for cause. In determining whether to remove prospective juror for cause, trial court must evaluate the juror's state of mind by assessing: (1) juror's responses to questions posed by either counsel or the court and (2) demeanor and body language of juror throughout voir dire. If trial court ultimately concludes that prospective juror's state of mind evinces enmity or bias toward defendant or state, trial court must exclude juror for cause. Prospective juror should not be excused for cause if court is ultimately convinced that juror will impartially follow the law. *Here:* removal of prospective juror for cause was unwarranted in prosecution for first degree murder, even though prospective juror's initial comments during voir dire reflected both skepticism about whether defendants exploit NGRI defenses to avoid punishment; court sufficiently rehabilitated prospective juror through its questioning, and prospective juror ultimately assured court and counsel that he could apply the law as instructed**.**

People v. Lopez, 2018 COA 119. Under People v. Clemens, 2017 CO 89, juror's silence, "in response to court's final questioning of panel asking any juror who did not feel he or she could be fair and impartial and apply the law to the facts of the case to affirmatively respond, sufficiently rehabilitated her on this ground" because juror was articulate in explaining her views; when she did not respond to court's final questions, it was reasonable for court to conclude that she would follow that law, including presumption of innocence on which court had previously instructed.

People v. Clemens, 2017 CO 89. Prospective juror's silence in response to rehabilitative questioning constitutes evidence sufficient to support trial court's conclusion that juror has been rehabilitated.

People v. Marko, 2015 COA 139. COA did not address propriety of trial court's ruling denying defendant's challenge for cause to juror because juror did not sit on jury, and therefore defendant could not establish reasonable probability that any error contributed to the verdict.

People v. Maestas, 2014 COA 139M. *Novotny* applies only where defendant uses peremptory challenge to excuse previously challenged juror and eventually used all of his peremptory challenges. *Here:* because a biased juror ultimately served on jury, defendant's constitutional right to an impartial jury was violated.

People v. Pifer, 2014 COA 93. Potential juror's suggestion during voir dire that he might become impatient during deliberations did not indicate that he was biased against defendant, nor that he was unable or unwilling to render an impartial verdict according to the law and the evidence. No error in denying challenge for cause.

People v. Marciano, 2014 COA 92. When trial court abuses its discretion in denying a challenge for cause and challenged juror sits on jury, defendant's right to an impartial jury may be violated. *Novotny* does not apply to this situation.

People v. Richardson, 2014 COA 50. Any inconsistencies between the juror's answers on her questionnaire and her responses during voir dire questioning were for the trial court to resolve. *Here:* SAOC case, trial court properly exercised its discretion in denying challenge for cause to juror who indicated on questionnaire that a relative was the victim of a sexual assault and this would affect her ability to be fair and impartial, but upon questioning, stated that she could base her verdict on the evidence, hold the prosecution to its burden, and would not convict simply because of nature of the accusations.

People v. Novotny, 2014 CO 18; People v. Vigil, 2014 CO 18; People v. Roldan, 2014 CO 22. Office of the state attorney general is a public law enforcement agency for purposes of §16-10-103(1)(k). Expressly overruled its prior precedents (*Macrander*) that dictate automatic reversal as remedy for erroneous rulings on challenges for cause: "reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate, or an appropriate case specific, outcome-determinative analysis, can no longer be sustained; and allowing defendant fewer peremptory challenges than authorized, or than available to and exercised by prosecution, does not, in and of itself, amount to structural error.

People v. Conyac, 2014 COA 8M. Record supported trial court's finding that juror, who was a witness in a criminal trial when her brother-in-law murdered her sister, was not biased towards prosecution and was clear that her personal experience would not impede her ability to be fair and impartial in this case.

People v. Flockhart, 2013 CO 42. Trial court retains discretion to conduct challenges for cause in open court, though it must proceed with caution in doing so. Trial court may abuse its discretion depending on the reason underlying the challenge for cause, content of the questioning leading up to the challenge, the overall tenor or contentiousness of the voir dire examination, and any other facts or circumstances pertinent to the issue. *Here:* nothing in record suggests that challenged jurors harbored any actual bias against defendant as a result of challenges for cause, and even assuming that they did, rial court successfully rehabilitated them by instructing each on the duty to render an impartial verdict based solely on the evidence.

People v. Fleischacker, 2013 COA 2. §16-10-103(1)(b) does not require disqualification of prospective juror related within third degree to DA paralegal.

People v. Samson, 2012 COA 167. Prospective juror's close associations with law enforcement are not alone sufficient to require dismissal for cause. *Here:* although prospective juror said he knew detective who was endorsed as prosecution witness, and that he had some doubt as to his own ability to be fair, trial court did not abuse its discretion in denying defendant's challenge for cause because juror also said he would follow the court's instructions, hold prosecution to its burden of proof, evaluate detective's testimony as he would that of any witness, and would do his best to be fair and impartial and listen to all the evidence.

People v. Taylor, 2012 COA 91. Trial court did not abuse its discretion in denying defendant's challenge for cause to juror who made equivocal comments regarding presumption of innocence because: (1) trial court was in best position to assess whether any of juror's responses warranted dismissal for cause; (2) despite some confusion in his initial statements, when juror's responses are viewed as a whole, they do not reveal an unyielding bias that defendant was guilty; and (3) in his final response to trial court's questioning, juror unequivocally applied correct burden of proof.

People v. Collins, 250 P.3d 668 (Colo. App. 2010). Propriety of trial court's denial of challenge for cause need not be considered where prosecution used peremptory challenge to excuse that juror. *Here:* challenge for cause

properly denied where juror stated that she would express her convictions and opinions during deliberations, she would tell the other jurors if she "saw it a different way," and that she would advise other jurors of her opinion.

People v. Mumford, 275 P.3d 667 (Colo. App. 2010). Defendant waived any challenge to juror by not raising any objection until after jury was sworn. Crim. P. 24(b)(2). *Here*: defendant relied on rule's exception providing that trial court for good cause shown or upon motion for mistrial or other relief may hear such evidence [pertaining to sworn jurors] during trial out of the presence of the jury. However, whether to allow further questioning is discretionary with the trial court, and defense counsel's concerns were too little and too late to justify either further questioning or mistrial.

People v. Hancock, 220 P.3d 1015 (Colo. App. 2009). Denying defendant's challenge for cause was an abuse of discretion where trial court neither rehabilitated juror nor explained why juror's statements of unwillingness or inability to follow court's instructions regarding presumption of innocence and prosecution's burden of proof should be disregarded.

People v. Phillips, 219 P.3d 798 (Colo. App. 2009). Challenge for cause properly denied where juror indicates that – although juror might have concern, that defendant had something to hide if defendant chose not to testify – juror indicated a desire to be fair and impartial and would be able to follow the law. Challenge for cause properly denied where juror indicates that – although juror might have difficulty in giving defendant the presumption of innocence - juror would be able to follow the law.

People v. Lucas, 232 P.3d 155 (Colo. App. 2009). Challenge for cause is properly denied where juror is properly rehabilitated or indicates that -- although he might struggle with the court's instructions -- he could follow them.

People v. Mondragon, 217 P.3d 936 (Colo. App. 2009). Trial court did not abuse its discretion in denying defendant's challenge for cause to prospective juror who had aversion to blood because prospective juror stated that he could consider the evidence in the case and would not be rendered so uncomfortable by it that he would lose focus.

People v. Shover, 217 P.3d 901 (Colo. App. 2009). Trial court properly denied challenges for cause to 3 jurors who expressed concerns about sitting on a meth-related case based on their personal experiences and indicated that they would not want themselves on the jury, but who later indicated they could separate their personal experiences from their role as jurors to be fair and hold the prosecution to its burden of proof.

People v. Romero, 197 P.3d 302 (Colo. App. 2008). Unless a party is aware that his initial opportunity to challenge a prospective juror will be his only opportunity to do so, a party need not make his objections to juror's qualifications and competency when court initially questions the juror. To preserve the issue for appeal, party need only raise the objection before jurors are sworn in. Defendant may waive challenge for cause if counsel does not use reasonable diligence during jury selection to determine whether grounds for such a challenge exist. *Here:* juror described her place of employment and job responsibilities, and defense counsel did not ask the juror any additional questions; but he challenged her for cause before jurors were sworn in and preserved the claim for appeal.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Defendant abandons challenge for cause by failing to request that trial court grant/deny it before exercising peremptory challenge to excuse the juror. *Here:* defendant abandoned his challenge for cause to prospective juror when he made the challenge, the court declined to rule at that point and indicated that it would question that juror further, and the next day the court did not further question the juror, but the defendant did not renew his challenge for cause.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). Prospective juror's association with a victim advocacy agency was not enough to remove her for cause where: (1) juror was not familiar with case; (2) she did not have

a working relationship with law enforcement; (3) her current involvement with the agency was administrative; and (4) she did not participate in criminal prosecutions on behalf of victim other than to take a victim to court or to the DA's office.

People v. Merrow, 181 P.3d 319 (Colo. App. 2007). When potential juror's statements compel inference that he cannot decide the crucial issues fairly, a challenge for cause must be granted in the absence of rehabilitative questioning or other counterbalancing information.

People v. Asberry, 172 P.3d 927 (Colo. App. 2007). Because defendant did not use reasonable diligence to determine whether trial court's sua sponte dismissal of juror for cause was proper, he did not preserve the issue for appellate review.

Dunlap v. People, 173 P.3d 1054 (Colo. 2007). Reversible error can occur where trial court erroneously denies challenge for cause, defendant use a peremptory challenge against the objectionable juror, and defendant exhausts his peremptory challenges. Reversible error can also occur where trial court erroneously denies challenge for cause, defendant did not use a peremptory challenge against him, defendant did not exhaust his peremptory challenges, and prospective juror deliberated on the jury.

People v. Blessett, 155 P.3d 388 (Colo. 2006). Prospective juror made problematic statements with respect to presumption of innocence after she was asked a question premised on a hypothetical confession. Once that hypothetical was eliminated, her assertion that she could apply the presumption of innocence sufficed to rehabilitate her.

Ma v. People, 121 P.3d 205 (Colo. 2005). Army Military Police Corps is a law enforcement agency for the purposes of §16-10-103(1)(k). *Here:* defendant did not waive challenge for cause by declining to exercise it at the time that trial court invited him to do so; CSC held that "we cannot conclude that defense counsel failed to use reasonable diligence unless the record is clear that his initial opportunity to challenge the prospective juror would be his only opportunity to do so."

Medina v. People, 114 P.3d 845 (Colo. 2005). The decision whether to grant a challenge for cause is reviewed for abuse of discretion which is a very high standard.

People v. Baca, 109 P.3d 1005 (Colo. App. 2004). Defendant argued that prospective jurors could not render a fair and impartial verdict because they indicated initially that they would give greater weight to testimony of police officer. No abuse of discretion in denying challenge for cause to these jurors, since, when court read the relevant jury instruction that applied same criteria to any witness --whether a police officer or a defendant-- and asked if any juror felt he or she could not follow the instruction, no juror raised a hand.

People v. Shreck, 107 P.3d 1048 (Colo. App. 2004). Trial court did not abuse its discretion in denying challenges for cause where two jurors were exposed to defendant's prior incarceration for an unrelated crime. *Here:* there was ample record support for court's appraisal of jurors' credibility and sincerity, and its conclusion that jurors could be fair and impartial.

People v. Frantz, 114 P.3d 34 (Colo. App. 2004). Challenge for cause was properly denied where a juror stated that it would be "impossible" for her to be fair if defendant did not testify, but she also indicated that she could follow court's instructions on this point even if she did not like them and the trial court found that she would do so.

People v. Coney, 98 P.3d 930 (Colo. App. 2004). It is incumbent upon challenging party to clearly state on record the particular ground on which challenge for cause is made, and trial court is not required to sua sponte excuse a juror for cause.

People v. Simon, 100 P.3d 487 (Colo. App. 2004). Trial court correctly refused to disqualify as a matter of law a potential juror who was an employee of the EPA because the EPA is an investigatory and rule making body, and not a law enforcement agency for the purposes of §16-10-103(1) (k). No abuse of discretion in denying defendant's challenge for cause to potential juror who stated that in spite of her bias as a mother and a victim of sexual molestation, she would base her decision on the evidence presented and would be able to find defendant not guilty if the prosecution failed to prove guilt beyond a reasonable doubt. No abuse of discretion in denying defendant's challenge for cause to potential juror who expressed a negative opinion regarding homosexuality yet told court she would base her decision on the evidence and the court's instructions of law.

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). No abuse of discretion in denying defendant's challenge for cause against juror whose answers to jury questionnaire indicated that he might have trouble fairly judging a sexual assault cause, because upon questioning he indicated that his personal experiences would not improperly influence his decision.

People v. Lee, 93 P.3d 544 (Colo. App. 2003). Trial court properly granted People's challenge for cause because, under Jury Service Act, juror who cannot read the English language may not serve.

People v. Woellhaf, 87 P.3d 142 (Colo. App. 2003), rev'd other grounds, 105 P.3d 209 (Colo. 2005). No abuse of discretion in decision to deny defendant's challenge for cause to juror who worked with child sexual assault victims and initially expressed doubt as to defendant's innocence, but subsequently stated she could be fair and decide the case based upon the evidence.

People v. Dashner, 77 P.3d 787 (Colo. App. 2003). Trial court did not err in relying on prospective juror's demeanor to conclude that his somewhat equivocal answers to questions did not require granting defendant's challenge for cause.

People v. Orozco, 49 P.3d 1212 (Colo. App. 2002). §13-71-105(2)(b) establishes qualifications for individual jurors, but it does not allow for those qualifications to be satisfied by reliance upon the abilities of other jurors. Here: case reversed where trial court denied a challenge for cause to a Korean juror who was unable to adequately understand the English language, reasoning that other jurors could help her understand the proceedings.

People v. Honeysette, 53 P.3d 714 (Colo. App. 2002). Denial of defendant's challenge for cause was proper where potential juror stated she "would like to hear both sides," but also reassured trial court that she could follow its instruction not to draw any adverse inference from defendant's exercise of his right to remain silent.

People v. Duncan, 33 P.3d 1180 (Colo. App. 2001). Trial court did not abuse its discretion in refusing to dismiss a potential juror to whom English was not a first language, as the record confirmed that the juror's fluency in English was sufficient for jury service under§13-71-105(2)(b).

People v. Pigford, 17 P.3d 172 (Colo. App. 2000). In challenge for cause based upon a juror's physical disability, trial court has discretion to determine whether the juror can adequately perform. *Here:* denial was proper because juror said that he would probably not have difficulty hearing the proceedings.

People v. Gilbert, 12 P.3d 331 (Colo. App. 2000). Challenges properly rejected: (1) juror who was a volunteer victim advocate indicated she could be fair; (2) juror, challenged on ground that she had "victim-type bias," said she could be fair; (3) juror, who had been kidnapped and assaulted 14 years ago, said she did not feel like a victim and did not feel any closer to prosecutors than defense attorneys.

People v. Wolfe, 9 P.3d 1137 (Colo. App. 1999). Trial court dismissed a juror sua sponte but failed to record the side bar conference. *Here:* no reversible error because it does not appear that defense counsel objected to

dismissal, asked to have the side bar conference recorded, tried to summarize the conference on the record, and defendant failed to show any prejudice from the dismissal or failure to record.

People v. Dore, 997 P.2d 1214 (Colo. App. 1999). Defendant challenged 4 prospective jurors based on their exposure to pretrial publicity about a bombing of a Focus on Family facility. *Here:* OK to deny challenges, because jurors all denied having preconceived ideas that would prevent them from being fair or from applying the law.

People v. Tally, 7 P.3d 172 (Colo. App. 1999). OK to keep prospective juror who said he had a high opinion of police officers, but also said that he could put aside his views, listen to testimony, and follow the court's instructions.

Carrillo v. People, 974 P.2d 478 (Colo. 1999). Juror was acquainted with murder victim's father; juror said he would not want himself for a juror if he were on trial. No abuse of discretion to deny challenge, even though other courts might have reached a different conclusion.

People v. Griffin, 985 P.2d 15 (Colo. App. 1998). Challenge properly denied where 2 prospective jurors indicated they might have difficulty. One had a daughter who was sexually assaulted; one had a friend who was sexually assaulted. Court was satisfied that jurors could be fair and follow instructions.

People v. Bernabei, 979 P.2d 26 (Colo. App. 1998). Reversal not required for improper granting of prosecutor's challenge for cause unless prosecution exhausted its peremptory challenges.

People v. Backus, 952 P.2d 846 (Colo. App. 1998). Trial court failed to instruct jury about the grounds for disqualification, as required by Crim.P. 24(a)(2). This was not plain error: (1) parties agreed to have prospective jurors complete a questionnaire in advance of voir dire; (2) defense was afforded a thorough opportunity to voir dire; (3) no claim that any juror selected should have been excused for cause; (4) no showing of actual prejudice.

Employee Public Law Enforcement Agency: §16-10-103(1)(k)

People v. Speer, 255 P.3d 1115 (Colo. 2011). By statute and rule, trial court is obligated to sustain challenge for cause to any prospective juror who is a compensated employee of a public law enforcement agency. An "agency" may be either division of government or some smaller subdivision of larger governmental agency. Even though primary function of a broader governmental agency may not be appropriately characterized as law enforcement, law enforcement may nevertheless be primary function or purpose of some smaller unit or subdivision of that governmental organization. In that case, although governmental department or agency is not a public law enforcement agency within contemplation of statute and rule, a narrower unit or subdivision of that department is. In that event, although all of the employees of the broader governmental department are not subject to challenge for cause, those employees serving in qualifying subdivision are subject to removal on basis of their employment. Unless a public agency has already been identified as public law enforcement agency by statute/published case law, any party asserting a law enforcement agency challenge must not only make timely objection but must provide court, through examination of prospective juror or request for judicial notice, with adequate evidence of nature of employing unit in question. *Here:* jurors were airport security screeners employed by the Transportation Security Administration (TSA), government agency under umbrella of the Department of Homeland Security; jurors were not subject to challenge for cause as members of law enforcement agency because airport security functions do not involve traditional law enforcement functions of investigation of crime, or arrest, prosecution or detention of criminal suspects; nor did anything before trial court suggest airport security screeners served in unit/subdivision of TSA with traditional law enforcement authority. Even if special units within DHS/TSA have authority to carry firearms, make arrests, and seek/execute warrants, their status does not affect classification of broader agencies of which they are sub-divisions/sub-agencies.

People v. Avila, 2019 COA 145, overruled other grounds, Tibbels v. People, 2022 CO 1. Prospective juror who is employed by Colorado Office of Prevention and Security's "fusion center" is not a compensated employee of a public law enforcement agency.

People v. Abu-Nantambu-El, 2017 COA 154. Case addressed whether reversal is required under *Novotny*, where trial court erroneously denies challenge for cause based on statutory disqualification as to prospective juror (Division of Criminal Justice employee) and that person sits on jury. COA majority reasoned that reversal was required because trial court violated §16-10-103(1)(k), which designates statutory category of prospective jurors legislature has deemed presumptively biased and must be excused upon request. Special concurrence agreed that reversal was warranted but reasoned that trial court committed structural error. Dissent would affirm under *Novotny's* outcome-determinative test.

People v. Bonvicini, 2016 CO 11. Under plain language of §16-10-103(1)(k), a public law enforcement agency is a division/subdivision of state/federal government that has the authority to investigate crimes and to arrest, prosecute, or detain suspects. *Here:* a prison owned and operated by private company is not a public law enforcement agency because it is not an official government entity. There is no reason to sustain challenges to potential jurors who have even a tenuous relationship to law enforcement and any prior dictum to the contrary is incorrect. CSC rejected defendant's proposed functional equivalence test.

Mulberger v. People, 2016 CO 10. For prospective juror to be a compensated employee of a public law enforcement agency, he or she must provide labor and services to, be paid by, and receive direction from the public law enforcement agency. Where juror contracts with private agency and performs work-related duties at public law enforcement agency, juror is not a "compensated employee" because she is not paid directly by

public law enforcement agency. This is particularly true where there is no evidence juror is subject to jail personnel's direction and control.

People v. Carter, 2015 COA 24M-2. Trial court did not err when it denied defendant's challenge for cause to prospective juror who was a "criminal investigator" for Colorado Public Utilities Commission (PUC); PUC is primarily an agency whose functions involve the civil regulation of public utilities, services, and rates, and not a public law enforcement agency for purposes of §16-10-103(1)(k).

People v. Novotny, 2014 CO 18; People v. Vigil, 2014 CO 18. Office of the state attorney general is a public law enforcement agency for purposes of §16-10-103(1)(k).

People v. Sommerfeld, 214 P.3d 570 (Colo. App. 2009). §16-10-103(1)(k) requires court to sustain challenge for cause to prospective juror who is "a compensated employee of a public law enforcement agency;" in this context, a "public law enforcement agency" is a "police-like division of government that has the authority to investigate crimes and to arrest, to prosecute, or to detain suspected criminals." Division of Youth Corrections and certain of its personnel investigate violations of the law; arrest juveniles suspected or accused of violating the criminal laws; and detain juveniles suspected, accused of, or found to have violated criminal laws; therefore DYC, like the DOC and COMCOR programs, is a public law enforcement agency within the meaning of §16-10-103(1)(k) and Crim.P. 24(b)(1)(XII).

People v. Romero, 197 P.3d 302 (Colo. App. 2008). The actual job responsibilities of the compensated employee of the public law enforcement agency are irrelevant to the determination whether disqualification is required. *Here:* a COMCOR employee is an employee of a public law enforcement agency within the meaning of §16-10-103(1)(k) and Crim.P. 24(b)(1)(XII).

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). Prospective juror's association with a victim advocacy agency was not enough to remove her for cause where: (1) juror was not familiar with case; (2) she did not have a working relationship with law enforcement; (3) her current involvement with the agency was administrative; and (4) she did not participate in criminal prosecutions on behalf of victim other than to take a victim to court or to the DA's office.

Ma v. People, 121 P.3d 205 (Colo. 2005). Army Military Police Corps is a law enforcement agency for the purposes of §16-10-103(1)(k).

People v. Simon, 100 P.3d 487 (Colo. App. 2004). Trial court correctly refused to disqualify as a matter of law a potential juror who was an employee of the EPA because the EPA is an investigatory and rule making body, and not a law enforcement agency for the purposes of §16-10-103(1) (k).

People v. Veloz, 946 P.2d 525 (Colo. App. 1997). Volunteer reserve police officer - who was just weeks from becoming paid police officer - was not a compensated employee at time of trial, so she was not statutorily disqualified; there was no abuse of discretion in denying challenge based on bias, given her assurances she could be fair.

Resides in County: §13-71-105

People v. White, 242 P.3d 1121 (Colo. 2010). Under §13-71-105(1) and (2)(e) of the Uniform Jury Selection and Service Act (UJSSA), a citizen who either resides in a county or lives in such county more than 50% of the time shall be qualified to serve as a juror in that county. However, under (2)(e), an otherwise qualified juror shall be disqualified if juror resides outside the county and has no intention of returning within the succeeding 12 months. While (2)(e) places a limitation on the period of time a person can be physically absent and still be considered to live in the county more than 50% of the time, it in no way alters the meaning of residency. A person is domiciled, or "resides," in a given county within the meaning of the UJSSA if his principal or primary

home or place of abode – the home or place in which his habitation is fixed and to which he had the present intention of returning after departure or absence, regardless of the duration of the absence – is situated there. Several factors may be taken into account in determining a person's principal or primary place of abode (§1-2-102).

Hardships

People v. Thomas, 2014 COA 64. Trial court properly granted prosecution's hardship challenge to 70-year-old prospective juror who had a wife at home battling leukemia and worked a midnight paper route 7 days a week, 365 days a year.

People v. Kinney, 148 P.3d 318 (Colo. App. 2006), rev'd other grounds, 187 P.3d 548 (Colo. 2008). A court may, within its discretion, excuse a prospective juror on grounds of hardship. *Here:* trial court properly exercised its discretion in excusing juror who was a teacher, could not get a substitute for more than 3 days, and was scheduled to do assessment testing that a substitute could not handle.

People v. Isom, 140 P.3d 100 (Colo. App. 2005). Trial court did not abuse its discretion in excusing a juror for hardship because trial court was not limited to grounds set forth in §16-10-103 for challenges for cause; it had discretionary authority to excuse juror for "hardship or inconvenience" under §13-71-121.

PREEMPTORY & BATSON CHALLENGES: §16-10-104, CRIM.P. 24(D)

People v. Romero, 2024 CO 62. The COA misapplied the clear error standard of review by failing to afford any deference to the trial court's ultimate ruling at step three of the *Batson* analysis. Relying on People v. Beauvais, 2017 CO 34, the COA determined that the trial court's decision to credit the prosecutor's race-neutral reason - that a prospective juror appeared disinterested - was clear error because that reason was neither accompanied by a specific factual justification (such as identification of the actual observed behavior on which it was based) nor supported by objective evidence confirming that it was true or accurate. But *Beauvais* doesn't support that proposition. Instead, *Beauvais* says that, to withstand clear error review at step three, the record both must reflect that the trial court considered all the relevant circumstances and must support (including possibly through implicit demeanor and credibility findings) the trial court's ultimate ruling regarding whether the objecting party has met the burden of showing purposeful racial discrimination. The COA compounded its misapprehension of *Beauvais* by misconstruing the record. Contrary to the division's conclusion, the record is not devoid of support for the trial court's decision to credit the prosecutor's race-neutral reason. Rather, the record reflects that the trial court implicitly found the prosecutor credible and her race-neutral reason sincere. Going a step further still, the division concluded that a comment by the trial court actually undermined the prosecutor's race-neutral reason. But the comment in question cannot be fairly characterized as an "explicit finding" (or any type of finding) undermining the prosecutor's race-neutral reason. Inasmuch as the record both reflects that the trial court considered all the relevant circumstances and supports the ultimate *Batson* ruling at step three, the division incorrectly held that the trial court committed clear error. The COA is reversed.

Clark v. People, 2024 CO 55. CSC addresses whether a trial court's erroneous denial of a Black defendant's challenge for cause of a potential juror who expressed racial bias constitutes structural error. Following *Novotny* and *Vigil*, the court holds that where, as here the trial court's erroneous denial of a challenge for cause is made in good faith and does not result in the juror actually serving on the jury, the error is not structural (no 6th Amendment violation) and is subject to harmless error review. The CSC also concludes that the trial court's error did not violate defendant's right to equal protection because no state actor purposefully discriminated against defendant. Accordingly, the court affirms the judgment of the court of appeals.

People v. Austin, 2024 CO 36. The prosecution's explanation that she used a peremptory strike to remove a potential juror because of the juror's activism to reform the Denver Police Department was facially race-neutral

under *Batson*. The CSC concludes, however, that the trial court's findings were insufficient for an appellate court to review whether the trial court had considered all the pertinent circumstances in concluding that that the strike was not made with a discriminatory purpose. CSC reverses the COA judgment and remands the case for further proceedings.

People v. Johnson, 2024 CO 35. Prosecutor's explanation that a peremptory challenge against a Black potential juror who said law enforcement had been disrespectful to her or those close to her based-on race was a facially race neutral reason sufficient to satisfy step two of the *Batson* framework. The CSC also holds that trial courts should use a substantial motivating-factor approach to resolve *Batson* challenges when the striking party offers both race-based and race-neutral reasons. *Here:* because the trial court made no findings to indicate under step three that it had considered all the pertinent circumstances in concluding that the strike was not made with a discriminatory purpose, the record was insufficient for complete appellate review of defendant's *Batson* claim. Because the COA applied a per se approach, the CSC reverses the COA's judgment and remands the case for further proceedings.

People v. Owens, 2024 CO 10. Where the DA provided a number of race-neutral reasons for striking an African-American juror (his reading and views about the death penalty and wrongfully convicted defendants who spent many years in prison, his having "witnessed" the firing of U.S. Attorneys which he erroneously viewed as a crime, and his distrust of the police) that were not challenged on appeal, the additional reference to that juror's own "driving while black" statement in his questionnaire didn't mandate a finding of a *Batson* error in light of the several indisputably race-neutral reasons provided by the DA. The DA's strike of one juror was not substantially motivated by race where: (1) where the jury questionnaire asked all jurors to state whether they had ever had a pleasant or unpleasant experience involving law enforcement and, if so, to describe that experience, the DA's questioning of the juror who stated he had negative experiences with law enforcement did not suggest bias; (2) defendant's reliance on side-by-side comparisons of white jurors who reported negative experiences with law enforcement is unpersuasive where negative experiences around traffic tickets was different than the jurors allegation of driving while black; (3) there was nothing in the DA's alleged post hoc justifications for striking the juror that suggested a racial motivation for the strike-DA's concerns about all jurors views on death penalty was clear through voir dire; and (4) although mischaracterization of a prospective juror's voir dire testimony can suggest pretext, there was no basis for concluding that the DA's asserted justifications were pretextual here. Lastly, even if the DA's statement could arguably be construed as a mischaracterization, in light of the prosecution's indisputably and record-supported race-neutral reasons for its strike, which the trial court credited, this Court cannot conclude that the trial court clearly erred in finding that the strike at issue was not substantially motivated by race. Even though the trial court found that the juror's change of heart was credible and genuine, defendant cites no law suggesting that the trial court's finding in that context is binding on a party for purposes of a subsequent peremptory challenge–a party exercising a peremptory strike may do so for any non-discriminatory reason or combination of non-discriminatory reasons that further the party's litigation strategy.

People v. Toro-Ospina, 2023 COA 45. As issues of first impression, a trial court is not required to ask a race/ethnicity question, and it is not required to provide an implicit bias instruction. Rather, the decision whether to ask such a question or provide an implicit bias instruction is entrusted to the trial court's exercise of its sound discretion. The court rejected defendant's arguments that the trial court erred by denying his *Batson* challenge related to two prospective jurors, preventing him from presenting evidence of the victim's alleged drug dealing, and permitting the prosecutor to engage in improper closing arguments.

People v. Madrid, 2023 CO 12. CSC holds that when a party has been provided with an adequate opportunity to present race-neutral justifications for a challenged peremptory strike under the second step of *Batson*, that party is later barred from introducing new race-neutral justifications on remand. CSC relied on *Miller-El v. Dretke,*

545 U.S. 231, 235 (2005), which explained that "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." After determining that the prosecution offered new justifications for the strike on remand, beyond the reasons the prosecution originally stated at trial, the court affirmed the COA and remanded for a new trial.

People v. Ojeda, 2022 CO 7. CSC reviews a split decision of the COA, holding that the trial court erred in denying defendant's challenge to an allegedly discriminatory juror strike under Batson v. Kentucky, 476 U.S. 79 (1986), during the jury selection process. CSC holds that because the prosecution offered an explicitly race-based reason for striking Juror RP., it did not meet its burden of providing a race-neutral explanation for the strike, as required under step two of the *Batson* test. The COA is affirmed on other grounds.

People v. Howard-Walker 2017 COA 81M, rev'd other grounds, 2019 CO 69. An important tool used to determine whether the objecting party proved the striking party exercised its peremptory challenges with discriminatory animus is an assessment of the striking party's credibility and plausibility of its non-discriminatory purpose. Having observed the demeanor of prospective juror and prosecutor, trial court was entitled to credit prosecutor's assessment that juror "did not want to be here." A pattern of strikes may give rise to an inference of discrimination, but it is not a necessary predicate to a *Batson* violation. A prospective juror's disinterest in the proceedings is a legitimate, non-discriminatory reason for exercising peremptory challenge. Two potential jurors need not be identical in every respect, but isolated similarities do not automatically render two jurors "similarly situated" for purposes of deciding *Batson* challenge. *Here:* although at least three white jurors who served on the jury expressed views similar to the male African-American juror's that police sometimes make mistakes in identifying jurors, none of those jurors also expressed that they had had a particularly bad experience with law enforcement; the African-American juror's statements were broader and less deferential to the police.

People v. Beauvais, 2017 CO 34. Trial court's *Batson* determinations are entitled to deference and do not require explicit credibility findings. The limitation of *Snyder* is narrow and the lack of specific credibility findings on demeanor-based explanations for juror strikes does not – on its own – preclude a reviewing court from relying on these explanations. *Here:* COA erred by conducting a comparative juror analysis that both compared juror traits absent a clear record and compared isolated traits rather than the totality of the circumstances regarding each juror.

People v. Terhorst, 2015 COA 110. Trial court properly applied Crim.P. 24(d)(2) and did not deprive defendant of his statutorily granted number of peremptory challenges, when it disallowed defendant to make any more strikes after replacement juror was seated, defendant then waived challenges to all seated jurors, and prosecutor did the same.

People v. Ellis, 2015 COA 108, rev'd other grounds, 15SC787. Trial court did not err by denying juvenile's *Batson* challenges because prosecutor's demeanor was credible, and prosecutor articulated credible, strategic, race-neutral reasons for the dismissal of challenged jurors. Trial court is not required to personally observe all of the factors (such as jurors' body language or sleeping) cited by prosecution.

People v. Rodriguez, 2015 CO 55. When trial court conducts an inadequate inquiry into a *Batson* challenge, remedy is a remand so trial court may conduct full 3-part *Batson* analysis. An inadequate analysis is not a constitutional violation. An inquiry is inadequate when the trial court's findings do not indicate whether the opponent of the peremptory challenge established that the strike was based on purposeful discrimination because of the juror's race or gender. The threshold for establishing a race-neutral reason for a strike is low; goal is to discern prosecutor's intent, as evidenced by their demeanor. A prosecutor's failure to ask a juror any questions about her questionnaire does not give rise to a presumption of pretext or purposeful discrimination.

People v. Wilson, 2015 CO 54M. The opponent of a peremptory strike must prove purposeful racial discrimination to establish a *Batson* violation. Prosecutor's error in recollection, or an inconsistency between prosecutor's explanation for a strike and juror's responses as reflected in the record, does not compel a finding of purposeful racial discrimination; record must contain additional evidence of racial motivation before a simple discrepancy can satisfy finding of purposeful discrimination. It is the opponent's burden to show both that stated race-neutral reason is not believable and the strike was racially motivated. *Batson* requires trial court assess credibility of proponent of peremptory strike and determine whether to believe proponent's race-neutral explanation. Best evidence often is proponent's demeanor, the observation of which is peculiarly within trial court's province. Reviewing courts must defer to trial court's credibility determination unless clearly refuted by the record. To otherwise find that a discrepancy in the record equals purposeful discrimination elevates review of cold appellate record above trial court's firsthand observations. Trial court is allowed to credit prosecutor's intuition about whether prospective juror will be suitable when explanation is reasonable and grounded in trial strategy. When trial court conducts an inadequate inquiry, proper remedy is a remand so the trial court may conduct the full three-part *Batson* analysis; inadequate analysis is not a constitutional violation.

People v. Morales, 2014 COA 129. Merely identifying cognizable groups to which a juror might have belonged is insufficient, without more, to establish prima facie showing of purposeful discrimination for step one of *Batson* analysis. *Here:* defense counsel made no proffer to court concerning disproportionate effect of prosecutor's peremptory strikes; defense counsel did not establish pattern of prohibited strikes; and did not direct court's attention to any questions/statements of prosecutor during voir dire that supported discriminatory purpose inference.

People v. Hankins, 2014 COA 71. Trial court's unobjected-to error depriving defendant of 2 peremptory challenges is subject to "an appropriate case specific, outcome-determinative analysis" under the plain error standard of review. *Here:* error was obvious and substantial but did not prejudice defendant's substantial right so as to cast serious doubt on the reliability of the conviction -- prosecutor was also so deprived, neither the court nor the parties acted in bad faith because they "simply overlooked the issue," and the jury was fair and impartial. COA declined defendant's invitation to adopt a test that finds reversible error if a defendant is wrongly denied a peremptory challenge and a juror whom he finds undesirable or objectionable serves on the jury; outcome-determinative plain error analysis focuses on fundamental fairness of the trial, and whether jurors can give defendant a fair trial can be determined by existing case law concerning juror's ability to set aside a prior opinion.

People v. Lucero, 2014 COA 53. A waiver of a peremptory challenge, without more, does not support a prima facie case of discrimination under *Batson*; waiver, accompanied by something more such as discriminatory remarks or a pattern of strikes removing a specific group, could support prima facie case. In such instances, trial court could require prosecution to exercise a peremptory challenge. *Here:* there were no discriminatory remarks by the People or any other act that would give rise to an inference of bias or discrimination; defendant failed to make out a prima facie case of discrimination.

People v. Alfaro, 2014 CO 19. Erroneous good faith rulings effectively depriving defendant of any peremptory challenge to which he would be statutorily entitled are in the nature of trial error. Such errors are not subject to automatic reversal under structural error but must instead be reviewed under applicable harmless error standard. *Here:* trial court's error depriving both sides of a peremptory challenge did not amount to structural error and COA erred in reversing defendant's convictions without considering the impact of the trial court's error in jury's verdicts.

People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010), aff'd other grounds, 269 P.3d 1233 (Colo. 2012). Trial court did not err in conducting 3rd step of *Batson* analysis regarding prosecutor's peremptory challenges

against 3 Hispanic prospective jurors. The decisive question in 3rd step is whether counsel's race-neutral explanation for peremptory challenge should be believed. Trial court satisfied 3rd step because its ruling that prosecutor articulated race-neutral reasons implicitly included finding that those reasons were credible. Trial court did not have to personally observe prospective juror's demeanor to credit prosecutor's demeanor-based, race-neutral reason for the strike. Defendant does not waive his *Batson* objection by failing to rebut prosecutor's race-neutral explanation when given the opportunity. *Here:* defendant failed to demonstrate that non-minority jurors were similarly situated to one of the Hispanic prospective jurors where prosecutor challenged juror because she might be sympathetic to people on drugs based on her job providing counseling at drug rehabilitation facility; defense counsel stated only that non-minority jurors "may have empathetic situations," and record did not show that any of them worked with people using drugs.

People v. Collins, 187 P.3d 1178 (Colo. App. 2008). Trial court erred in overruling defendant's Batson objection because (1) three of the five race-neutral reasons articulated by prosecutor were affirmatively refuted by record, and (2) court did not make findings crediting the other two race-neutral reasons articulated. Prosecutor's subsequent acceptance of another African-American potential juror did not foreclose possibility that peremptory challenge against the challenged African American potential juror had discriminatory motive.

People v. Robinson, 187 P.3d 1166 (Colo. App. 2008). Trial court did not err in denying defendant's *Batson* challenge to strike of only African-American on venire panel because prosecutor's facially neutral but wholly subjective reasons did not have to be coupled with some objective verification to overcome a prima facie showing of discrimination according to a test announced in *State v. Cruz*, 857 P.2d 1249 (Ariz. 1993) and cited in People v. Marion, 941 P.2d 287 (Colo. App. 1993); the *Marion* court did not adopt the *Cruz* test. In wake of Purkett v. Elem, 514 U.S. 765 (1995), "the *Cruz* objective verification requirement is no longer viable." *Here:* prosecution's reasons for exercising peremptory challenge—juror was sleeping during voir dire and exhibited body language demonstrating potential bias against police officers—were facially neutral, and trial court was not clearly erroneous in crediting the explanation based on its implicit assessment of prosecutor's credibility and surrounding circumstances. Trial court did not err in ruling on *Batson* challenge without first allowing defense an opportunity to rebut prosecutor's stated reasons for striking the juror because defense did not object to court's ruling or request opportunity to rebut prosecutor's stated reasons, there was no prejudice.

People v. Vieyra, 169 P.3d 205 (Colo. App. 2007). Trial court is not responsible for tracking how many peremptory challenges each side has exercised, and it need not remind or otherwise notify the defense of its remaining challenges. Here: trial court did not interfere with defendant's exercise of his 12 peremptory challenges when it denied defense counsel's request for "an additional peremptory challenge" after counsel excused 11 prospective jurors; trial court here did not err in not alerting defense counsel that he had used only 11 of 12 allotted challenges; trial court made adequate findings in ruling DA had not excused African-American venireman with purposeful discrimination; after DA stated two facially race-neutral reasons, trial court afforded defense counsel an opportunity to respond; trial court reviewed venireman's statements and determined defense had not proven any purposeful discrimination.

Valdez v. People, 966 P.2d 587 (Colo. 1998). There is a 3-step *Batson* analysis for evaluating claims of racial discrimination in jury selection: (1) defendant must make a prima facie showing that the prosecutor excluded a potential juror because of race-appellate court considers the totality of the circumstances and reviews the trial court's ruling de novo; (2) prosecutor must come forward with a race-neutral explanation for the challenge and any facially race-neutral reason will suffice-appellate court reviews the trial court's ruling de novo; and (3) defendant must rebut the prosecutor's race-neutral explanation, and has the burden to show, by a preponderance of the evidence, that the prosecutor excluded a potential juror because of race-appellate court reviews the trial court's ruling for clear error.

JUROR MISCONDUCT: CRE 606(B)

Clark v. People, 2024 CO 55. The CSC also holds that a juror's comment recalling that during her previous jury service the judge told the jury it must deliberate until it reached a unanimous verdict was not "extraneous prejudicial information" under CRE 606(b). As such, defendant was not entitled to an evidentiary hearing on motion for new trial based on affidavit because the statement did not concern element of charged crimes or implicate issue jury was tasked with deciding, but instead related to aspect of jury procedure, and issue of whether juries were required to deliberate until reaching unanimous verdict was neither issue jury needed to decide, nor related to one (facts from COA opinion).

People v. Archuleta, 2021 COA 49. Relying on USSC cases that interpret Fed.R.Evid. 606(b), COA concludes that whether CRE 606(b) bars juror testimony about alleged juror misconduct depends on the type of juror misconduct alleged, not when the misconduct occurred. *Here:* the juror affidavit, which alleged misconduct that occurred prior to deliberations but that was not covered by an exception to CRE 606(b), was inadmissible, and trial court's order denying defendant's motion for new trial was affirmed.

People v. Burke, 2018 COA 166. Juror's comment in a post-trial attorney performance evaluation form that its "hard to believe a client when they choose to remain silent" was not admissible under CRE 606(b), and trial court erred in considering it; juror's statement was not evidence of misconduct nor of concealment of bias. There was not a constitutional exception to CRE 606(b) that would apply and trial court erred in considering the statement and in granting a new trial.

People v. Bohl, 2018 COA 152. Trial court's ruling on motion for juror contact information is reviewed for abuse of discretion. *Here:* no abuse of discretion in denying defendant's motion where (1) court held hearing to determine whether juror misconduct occurred, (2) court concluded extraneous information was not presented to other jurors, and (3) defendant's claim of juror misconduct was speculative.

People v. Johnson, 2017 COA 11. CRE 606(b) prohibits inquiry into whether a juror ignored a trial court instruction to disregard testimony.

People v. Marko, 2015 COA 139. Trial court properly refused to declare mistrial after juror made statements during voir dire regarding the amount of time defendant might spend in state hospital if found NGI. There was no reasonable possibility that the statements influenced the verdict because (1) juror's statements did not indicate a reliable basis of knowledge, and (2) court repeatedly advised jury that the amount of time defendant might spend in state hospital if found legally insane was unknown and not to be considered.

People v. Garrison, 2012 COA 132M. While deliberating, jury turned on cell phone that was admitted into evidence and read previously unknown text messages sent between defendant and his girlfriend around the time of the crime. Jury did not consider "extraneous information" under CRE 606(b) because: the text messages were intrinsic to the phone, and the phone was admitted without limitation or stipulation; the jury's use of the phone was within the scope and purview of the evidence; phones are made to be turned on, and other electronic information in the phone was discussed at trial. Trial court did not abuse its discretion by allowing jury to pose "hundreds" of questions to witnesses throughout the trial because they did not result in undue delay, as it was a lengthy murder trial with many witnesses and exhibits; it did not convert the jurors into advocates or investigators; and did not shift the burden of proof.

People v. Harmon, 284 P.3d 124 (Colo. App. 2011). Where juror question indicates juror may have mistakenly believed that defendant admitted guilt to a crime during opening arguments, trial court must take some action to correct any misunderstanding, such as: speaking to the jurors; advising them that it had received a note suggesting possible confusion regarding defendant's opening statement; reminding them defendant asserted that he was not guilty; that he must be presumed innocent; and that burden of proof remained on prosecution; and

inquiring as to whether any of them would have difficulty affording defendant the presumption of innocence and requiring prosecution to prove defendant's guilt beyond a reasonable doubt.

People v. Holt, 266 P.3d 442 (Colo. App. 2011). Trial court vacated jury verdict and granted a new trial based on jury misconduct. COA reversed - for a court to set aside a verdict because jurors were exposed to extraneous material, the moving party must show both that extraneous information was improperly before the jury, and that the extraneous information posed the reasonable possibility of prejudice to the defendant. *Here:* juror's statement during deliberations regarding the severity of the charged offense does not constitute extraneous information within CRE 606(b); juror's own personal knowledge and everyday experience falls under the heading of "internal discussions," and is not admissible to impeach the verdict under 606(b). Juror bringing a jury definition of "elude" into jury room is not necessarily reversible error; though this is clearly external information, defendant must still show prejudice.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). New trial is required only where there is a reasonable possibility that the verdict was tainted by the introduction of outside information or influences into the jury deliberations. Whether that possibility exists is a question that will be reviewed de novo. *Here:* jury accessed a calendar on a cell phone after the judge told them they could not have a calendar in the jury room. Since a calendar is not something that is subject to error, opinion, or interpretation and the exact dates of the crimes were never alleged, the misconduct was not reversible.

Dunlap v. People, 173 P.3d 1054 (Colo. 2007). When dealing with allegations that jury was exposed to prejudicial publicity, trial court should poll the jury concerning the exposure.

People v. Mersman, 148 P.3d 199 (Colo. App. 2006). Where prospective juror makes a prejudicial comment during voir dire, trial court should remedy the prejudice by (a) giving a curative instruction to disregard the comment, and/or (b) canvassing the jurors to determine if they heard the prejudicial comment and whether it affected their ability to decide the case fairly. However, defense must request either procedure, and trial court's failure to employ either procedure sua sponte is not plain error.

People v. Thompson, 121 P.3d 273 (Colo. App. 2005). Jury may experiment with physical evidence presented at trial during deliberations so long as any experimentation is suggested by testimony or other evidence presented in the case. Jury does not create "additional evidence" simply because it learns from its consideration of an exhibit something new, different, or in addition to the testimony presented at trial. *Here*: Judge, acting as finder of fact, did not err by experimenting with handgun offered as exhibit to determine whether its trigger could be pulled when the gun was in a certain condition, even though experiment led him to reject expert conclusions presented by both prosecution and defense.

People v. Wadle, 97 P.3d 932 (Colo. 2004). Trial court's decision on motion for mistrial based on juror misconduct is reviewed as a mixed question of law and fact, applying the normal deferential standard to the court's factual findings, but reviewing de novo the court's conclusions of law. *Here:* juror's actions in consulting the Internet for information on medication used by defendant at the time of the offense, and in bringing that information into jury deliberations, gave rise to a reasonable possibility that the outside information would have affected the verdict of a typical jury.

People v. McNeely, 68 P.3d 540 (Colo. App. 2002). Trial court properly denied motion for new trial based on juror misconduct where, after an evidentiary hearing, it found juror had not engaged in intentional deception or nondisclosure during voir dire.

People v. Harrison, 58 P.3d 1103 (Colo. App. 2002). Juror had inadvertent contact with defense witness prior to deliberations, decided that the witness lacked credibility, and told the other jurors. When the matter was brought to court's attention prior to the verdict, juror was replaced by an alternate. Mistrial properly denied because

after questioning the remaining jurors, court determined that jurors could put aside the extraneous information and start deliberations anew.

People v. Sherman, 45 P.3d 774 (Colo. App. 2001). A juror waved and smiled at a court observer during the trial, and the court observer called defendant a "crook" outside the courtroom in the presence of jurors. No juror misconduct because defendant must show that jurors actually heard or saw the extraneous information, and that the misconduct prejudiced him. Trial court is in the best position to evaluate the degree of prejudice to defendant.

People v. Cook, 22 P.3d 947 (Colo. App. 2000). During trial, a potentially prejudicial newspaper article was published in local paper; trial court denied defendant's request to poll the jury about the article but offered to instruct jurors that they must be extra vigilant not to read anything about the trial; defendant replied that this would be "fine." Because defendant agreed that extra cautionary instruction would be sufficient, he cannot complain about any error that may have resulted from the court's failure to poll the jurors on appeal.

People v. Dore, 997 P.2d 1214 (Colo. App. 1999). Defendant heard one prospective juror tell another that he was sure defendant "had the intent;" jurors said they were only discussing the intent element of crimes generally, and they assured the court they would not rely upon their conversation in reaching their verdicts; mistrial properly denied.

People v. Herrera, 1 P.3d 234 (Colo. App. 1999). There was conflicting evidence regarding whether jurors were inattentive or sleeping; defense counsel did not request a mistrial but asked the court to admonish the jury to pay attention. No abuse of discretion in failing to declare a mistrial *sua sponte*.

People v. Kriho, 996 P.2d 158 (Colo. App. 1999). Contempt can be imposed when juror conceals relevant information about her background. No need to show disruptive behavior. It is improper to consider juror's actions during deliberations as support for a contempt citation. *Here:* because jurors were only asked generally about their "hobbies and interests," a juror cannot be faulted for failing to mention her involvement in Boulder Hemp Initiative Movement; other misleading statements - such as failing to disclose an arrest and DJ&S for possession of LSD - might support contempt.

People v. Thurman, 948 P.2d 69 (Colo. App. 1997). Defense counsel thought that juror was sleeping for several minutes; DA's witness coordinator thought juror was not sleeping, but just concentrating. Trial court acknowledged that it had observed juror with her eyes closed and that she appeared to be asleep but found that juror had not actually been sleeping.

People v. Garcia, 752 P.2d 570 (Colo. 1988). Generally, a verdict may not be impeached by juror affidavits; but an affidavit may be used to impeach a verdict if there were extraneous influences on the jury or juror misconduct. Extraneous influences include publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons.

Alternate Jurors

James v. People, 2018 CO 72. Trial court failed to discharge alternate juror before jury retired to deliberate; alternate was with regular jurors for approximately 10 minutes before court realized its mistake; court recalled and dismissed alternate; instructed jury to continue on with deliberations uninfluenced by anything alternate may have said or done; and denied defense motion for dismissal or mistrial. Trial court's error in allowing alternate juror to retire with jury and juror's presence for part of deliberations was harmless beyond a reasonable doubt; evidence of guilt was overwhelming.

People v. Riley, 2016 COA 76, rev'd other grounds, 16SC520. Alternate juror was not excused and joined the jury in the deliberation room after closing arguments; record did not reflect how much time passed between the jury retiring and when alternate juror returned to courtroom. Even assuming that these events took only a short time, deliberations may have begun in alternate jurors presence and the case was remanded for an evidentiary hearing regarding whether alternate juror was present during deliberations.

Venire Challenges (Cross-Section of Community)

Washington v. People, 186 P.3d 594 (Colo. 2008). Appellate court reviews factual determinations relevant to defendant's fair cross-section claim for clear error, and reviews legal determinations of whether a prima facie violation has occurred de novo. Sixth Amendment guarantees defendant the right to a jury selected from a representative cross-section of the community; defendants are not entitled to a jury of any particular composition. Fair cross-section guarantee requires only that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. In demonstrating a prima facie violation of Sixth Amendment fair cross-section jury requirement, defendant must prove: (1) the excluded group is a distinctive group in the community; (2) representation of the group in venires is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process. Under the Sixth Amendment fair cross-section analysis, courts throughout the country have variously applied four statistical measures to determine whether the defendant has demonstrated that the representation of a group is not fair and reasonable: (1) absolute disparity; (2) comparative disparity; (3) absolute impact; and (4) statistical significance. CSC and 10th Circuit Court of Appeals have relied on the absolute disparity and the comparative disparity measurements in this analysis. However, no specific statistical measure should be excluded in a court's analysis of a constitutional fair cross-section claim.

People v. Luong, 2016 COA 13. Defendant has right to a jury selected from a representative cross-section of community but is not entitled to a jury of any particular composition; defendant is only guaranteed that jury wheels, pools of names, panels, or venires from which juries are drawn do not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative. To establish that the composition of jury pool is a prima facie violation of Sixth Amendment's fair cross-section guarantee, defendant must prove: (1) the group alleged to be excluded is a distinctive group; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. There are four statistical methods for measuring whether a distinctive group is underrepresented in a jury panel: (1) absolute disparity, (2) comparative disparity, (3) absolute impact, and (4) statistical significance. *Here:* COA applied the first three methods and found that two of the three did not support defendant's claim of systematic discrimination.

SUBSTITUTION OF JURORS: §16-10-105, CRIM.P. 24(E)

People v. Abbott, 690 P.2d 1263 (Colo. 1984). Before deliberations have begun, a trial court has discretion to decide whether a juror has become unable to continue to serve and therefore must be replaced with an alternate.

People v. Christopher, 896 P.2d 876 (Colo. 1995). If replacement is for non-disclosure at voir dire, trial court's should consider five factors: (1) juror's assurance of impartiality; (2) nature of the information withheld in voir dire; (3) whether the nondisclosure was deliberate; (4) any prejudicial effect the nondisclosed information would have had on either party including defendant's right to exercise peremptory challenges; and (5) practical remedies available when the nondisclosure is revealed.

Garcia v. People, 997 P.2d 1 (Colo. 2000). Replacement of a juror after deliberations have begun creates a presumption of prejudice. To overcome this presumption, the record must show extraordinary procedural precautions. The trial court's analysis is informed both by the core importance of jury deliberations and the crucial role juries play in the administration of justice. If a trial court interrupts the jury deliberations and suspends its fact finding functions to investigate allegations of juror misconduct, its inquiry must not intrude into the deliberative process. In the exercise of judicial discretion, before a juror is dismissed from a deliberating jury due to an allegation of juror misconduct, there must be findings by the trial court that support a conclusion that the allegedly offending juror will not follow the court's instructions. Following Carillo v. People, 974 P.2d 478 (Colo. 1999); People v. Burnette, 775 P.2d 583 (Colo. 1989).

Castro v. People, 2024 CO 56. CSC concludes that §16-10-105, is ambiguous as to whether a trial court has authority to replace a regular juror with an alternate juror during deliberations. But, regardless of whether substituting a regular juror with an alternate juror during deliberations is error, it is potentially prejudicial to defendant. So, instead of delving into the appropriate standard of review to ascertain whether an error occurred in this mid-deliberations juror-substitution case, the CSC presumes that a mid-deliberations substitution of a regular juror with an alternate juror always prejudices defendant. It follows that the only relevant inquiry on review is whether reversal is warranted. And that question turns on whether the precautions employed by the trial court, when considered in light of the surrounding circumstances, overcome the presumption of prejudice to the defendant. Thus, the CSC explicitly proclaims the continued vitality of the principle it first articulated in *Burnette*, and then reinforced in *Carrillo*: Substitution of a regular juror with an alternate during deliberations raises a presumption of prejudice to defendant's right to a fair trial, but that presumption may be overcome by taking the precautions delineated in those cases. *Here:* juror became incapacitated after 7 hours of deliberations and had to be replaced; the trial court complied with the precautions laid out in *Burnette* and *Carrillo* - trial court's approach provides a textbook example of the proper effectuation of the teachings of those cases. Because the meticulous precautions employed by the trial court were sufficient under the circumstances of this case to rebut the presumption of prejudice to defendant, the CSC affirms the COA judgment.

People v. Moore, 226 P.3d 1078 (Colo. App. 2009). Under §16-10-105, although trial court had already accepted jury panel, it could summon a second jury panel to replace 2 excused jurors.

People v. Mollaun, 194 P.3d 411 (Colo. App. 2008). After trial court received a note from jury foreman that a juror was refusing to deliberate, court received additional information indicating that juror had decided to participate in deliberations. Notes from jury foreman and surrounding circumstances indicated that whatever problems foreman believed juror's behavior had created no longer existed. Trial court reasonably concluded juror in question was deliberating and there was no need for further inquiry.

Garcia v. People, 997 P.2d 1 (Colo. 2000). Trial court erred in dismissing juror and substituting an alternate after deliberations had begun. Court was not permitted to inquire into what was said by juror during deliberative process and hearsay statements of other jurors presented by foreperson (that juror violated court's instructions by discussing the case before deliberations and had prejudged the case) were insufficient to support a finding that the juror would not follow court's instructions.

Carrillo v. People, 974 P.2d 478 (Colo. 1999). After jury returned a verdict that was divided as to 1 count, trial court replaced a hearing-impaired juror with an alternate. Trial court's precautions were sufficient to rebut any presumption of prejudice arising from mid-deliberation substitution. Opinion discusses principles that govern mid-deliberation replacement of jurors and addresses tension between Crim.P. 24(e) and §16-10-105. People v. Burnette, 775 P.2d 583 (Colo. 1989); People v. Montoya, 942 P.2d 1287 (Colo. App. 1996).

Montanez v. People, 966 P.2d 1035 (Colo. 1998). Soon after jury was discharged, court learned that jury had incorrectly filled out the verdict form on a COV count; it recalled the jurors, two of whom were just leaving the courthouse. This was error because: (1) after jurors are discharged and have had opportunity to interact with outsiders, they cannot be recalled, even if there is no showing that any juror actually talked to anyone; (2) any rule to the contrary would invite doubt about the integrity of verdicts and raise legitimate concerns as to the reliability of the jury system.

People v. Fears, 962 P.2d 272 (Colo. App. 1997). Juror heard that first trial had ended because previous jurors were threatened and intimidated; juror did not regard the information as reliable, nor had he disclosed it to any other juror; court told juror that the first trial had mistried because two previous jurors had become romantically involved, and it instructed him not to tell the other jurors. *Here*: defendant failed to show prejudice and trial court was in the best position to view juror's demeanor and assess whether juror could be impartial; no abuse of discretion in denying defendant's mid-trial motion to remove the juror.

People v. Montoya, 942 P.2d 1287 (Colo. App. 1996). Although Crim.P. 24(e) permits the replacement of a juror during deliberations, §16-10-105 does not. Statute controls over the rule. *Here*: it was error to replace a hearing-impaired juror after deliberations began (and after the initial verdict was returned); but error was harmless because (1) alternate had not been exposed to outside influences; (2) court properly ascertained that it was possible for alternate and other jurors to begin anew; and (3) court instructed jury to begin anew.

Jury & Publicity

People v. Larsen, 2017 CO 29; People v. Jacobson, 2017 CO 28. Colorado has a three-step process for trial courts to follow when a prejudicial news report comes out during the course of a trial: (1) the trial court should determine whether the coverage is actually prejudicial and contains inadmissible evidence; (2) if the report could prejudice the jury, the court should canvass the jury to learn if any of them learned of any impermissible information; and (3) if any jurors admit to learning of outside information, the court should question them outside the presence of other jurors to learn what effect the prejudicial information had on the juror. When determining whether a news report may have prejudiced a jury, courts should consider five factors: (1) whether the report contained inadmissible, prejudicial information; (2) how closely related the report is to the matters in the trial; (3) the timing of the report; (4) likelihood the jury was exposed to it; and (5) likely effectiveness of any instruction not to read, watch, or listen to reports in light of the nature and manner of dissemination of the news reports. The common presumption that jurors follow a trial court's instruction is not applicable in a jury exposure situation where prejudicial information could have come to the attention of a juror inadvertently. However, this is true only where it may "reasonably be believed" that the report came to the jury's attention. *Here (Jacobson):* trial court did not abuse its discretion in refusing to poll the jury because with the court's repetitive, specific admonitions and a limited distribution, there was no reasonable likelihood that the jurors had been exposed to the prejudicial news reports. *Here (Larsen):* trial court did not err in refusing to poll jury

because with court's repetitive, specific admonitions and limited distribution, there was no reasonable likelihood that jurors were exposed to prejudicial news reports.

People v. Bondurant, 2012 COA 50. Trial court has broad discretion in its sentinel role in responding to allegations of irregularity in jury's proceedings. Although doubt about existence of jury prejudice from midtrial media reports should be resolved by polling jurors as a group, trial court is not required to proceed to polling if it deems polling unnecessary. *Here:* trial court acted within its discretion in declining to poll jury as to potential prejudice resulting from midtrial media report of a third party that it determined was irrelevant to the charged case.

Jury Nullification

People v. Rodriguez, 2022 COA 11. The court did not tell/instruct the jurors that they did not have the power to nullify; the court told the jurors that they had a duty to follow the law. We discern no error in the court's instruction.

People v. Scott, 2021 COA 71. A jury has the discretionary power to acquit a defendant, even if each juror believes the defendant to be guilty according to the law and the evidence; this is called jury nullification. Jury nullification is a jury's knowing and deliberate rejection of the evidence or refusal to apply the law because the result dictated by law is contrary to each juror's sense of justice, morality, or fairness. There is no constitutional right to jury nullification. *Here:* defendant's testimony regarding jury nullification was irrelevant in prosecution for attempted possession of controlled substance with intent to distribute, and defendant was not entitled to present it, although defendant had a constitutional right to testify in his own defense; testimony regarding history and concept of jury nullification had no bearing on any element of the charged offense or any permissible affirmative defense.

People v. Iannicelli, 2019 COA 80. Allegations that two defendants, who handed out pamphlets advocating jury nullification to prospective jurors at entrance to courthouse, "communicated with a named jury pool member intending to influence that person's vote, opinion, decision, or other action in a case," were insufficient to charge defendants with jury tampering; statute governing such offense was limited to attempts to influence persons chosen as jurors or selected as part of venire in a particular case, and no particular case was alleged.

People v. Waller, 2016 COA 115. Although jury has the power to nullify, there is no right to jury nullification, and courts need not promote nullification.

Miscellaneous on Jury

People v. Owens, 2024 CO 10. Assuming without deciding that racial issues were inextricably bound up with the conduct of the trial such that racial and ethnic prejudice could possibly have affected the jurors, defendant's contention that the trial court prevented him from inquiring into prospective jurors' attitudes on race is rejected. Although the court precluded defendant from asking in the jury questionnaire to identify their race (a question defendant acknowledged was intended to make a record of the racial composition of the venire, not to ferret out potential racial bias), the court in no way precluded group voir dire on the issue of racial bias. Moreover, to the extent that defendant requested individual voir dire on issues of racial bias arising from the prospective jurors' jury questionnaires, the court clarified that defendant sought individual voir dire on "unusual responses on the questionnaire," including issues of racial bias, and the court indicated that it would allow such 31 individual voir dire which the record shows was done. Defendant points to no questioning on race during voir dire that he was precluded from pursuing, and review of the record reveals none. Defendant's argument that the court should independently have raised the issue of racial bias during its voir dire of prospective jurors was not developed and the USSC has imposed no such obligation. Lastly, there was no error in failing to tell the jury the race of one of the victims, under *Turner*, because: this was no longer a capital case, it was unclear if this case

would satisfy the *Turner* court's definition of an interracial crime because, of the two victims, one was the same race as defendant and the other victim partially shared defendant's race, and even if it was error not to inform the jury of one victim's race, defendant presents no persuasive argument as to how this error might possibly have contributed to his conviction.

People v. Torrez, 2024 COA 11. As a matter of first impression, when a trial court does not administer an oath to the empaneled jury in a criminal matter, no party objects, and the jury renders a verdict, the error is not structural requiring automatic reversal, but instead the issue is reviewed for plain error.

Forgette v. People, 2023 CO 4. CSC considers whether: (1) an objection to an allegedly sleeping juror is preserved when the parties note that the juror was sleeping but request no action from the court; (2) there is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of 12, which could possibly implicate whether counsel could waive the number of jurors on behalf of her client; and (3) the right to a jury of 12 is waived when counsel notes that a juror was asleep but does not object or request action from the court. *Here:* CSC concludes that because defendant was tried by a jury of 12, this case does not implicate the second and third issues on which the court granted certiorari, and the court need not decide those questions. CSC further concludes that defense counsel does not properly preserve an objection to an allegedly sleeping juror merely by noting that a juror was asleep without objecting or otherwise requesting any action from the court and that, on these facts, defendant waived this issue, thereby precluding appellate review. CSC vacates in part and affirms in part the COA judgment.

People v. Richardson, 2018 COA 120. Trial judge's wife answered jury summons, judge and wife informed parties of their relationship, neither party challenged her for cause or with a peremptory challenge, and she served on jury that decided the case. On appeal, defendant argued that judge should have sua sponte recused himself or excused his wife. *Here:* although it might have been preferable and prudent for trial judge to have excused his wife from jury service or to have recused himself, any error was neither structural nor plain error.

People v. Tee, 2018 COA 84. Defense counsel waived any claim regarding alleged juror pre-deliberation by engaging court on the issue.

People v. Van Meter, 2018 COA 13. Sheriff commented during voir dire that he knew defendant because he transported him to court; this did not taint the entire jury panel into believing defendant was in custody, particularly where he was charged with POWPO and jury would necessarily learn that he was previously convicted.

People v. Guzman-Rincon, 2015 COA 166. Trial court's efforts to protect jurors from a potential threat to their lives should not remove the protection of defendant's basic constitutional threats. When a jury is threatened after it has been impaneled, the Iowa Supreme Court's procedures articulated in *State v. Atwood*, 602 N.W.2d 775 (Iowa 1999) have been cited with approval regarding procedures to protect the jurors while simultaneously safeguarding a defendant's rights.

People v. Alfaro, 2014 CO 19. Harris v. People, 160 P.2d 372 (Colo. 1945) and COA cases citing it, which required automatic reversal when there was any statutory error in empaneling the jury because any findings by that jury were not made by a "statutory tribunal," is no longer good law under harmless error standard adopted by the Court.

People v. Flockhart, 2013 CO 42. Trial court erred by giving jury an instruction allowing pre-deliberation because this procedure is not authorized by rule or existing law. However, while other jurisdictions have reached the conclusion that it is constitutional harmless error to permit pre-deliberation discussions, those cases predate empirical research undermining that rationale. *Here:* trial court's instruction allowing jury to discuss case throughout trial was harmless; court presumed jurors followed court's instruction and discussed the case

only when all were present, kept an open mind throughout trial, and waited until all the evidence was presented before forming any firm conclusions; any error did not substantially influence the verdict or affect the fairness of the trial.

Robles v People, 2013 CO 24; Rizo v People, 2013 CO 23; Perez v People, 2013 CO 22. Referring to jurors by number does not violate defendant's right to fair trial, public trial, equal protection, or the presumption of innocence where (1) defendant received the jurors' information; (2) trial court informed jurors that defendant had their information; (3) court instructed jurors that referring to them by number is its routine practice to protect their privacy; and (4) court instructed jury on the presumption of innocence. Referring to jurors by number was not error and did not merit analysis under federal "anonymous jury" framework because counsel and defendant had access to jurors' names/biographical information.

People v. Bondurant, 2012 COA 50. Trial court acted within its discretion in declining to poll jurors regarding potential prejudice after jury had unplanned encounter in elevator with a judicial staff member who stated, "[h]e did it, he did it, he did it." Because staff member was not involved in case, jurors took interaction lightheartedly, trial court gave jury a written curative instruction, and jury did not learn prejudicial information during the elevator exchange, trial court did not need to poll jurors.

Dunlap v. People, 173 P.3d 1054 (Colo. 2007). Misstatements of law by trial court to the venire during jury selection process do not constitute reversible error.

People v. Kinney, 148 P.3d 318 (Colo. App. 2006), rev'd other grounds, 187 P.3d 548 (Colo. 2008). Allowing jurors to retain transcript of defendant's audiotaped statement in their notebooks before the close of evidence did not warrant reversal where defendant did not demonstrate any prejudice from this procedure.

People v. Mersman, 148 P.3d 199 (Colo. App. 2006). At the start of voir dire, trial courts should give a prophylactic instruction that prospective jurors should not volunteer the substance of any comments, knowledge, or opinions they have about the parties or anticipated witnesses but should merely advise the court that they do have an opinion or knowledge; trial court should then explore substance of the opinion or knowledge in camera, thereby avoiding possible taint to entire jury panel.

Medina v. People, 114 P.3d 845 (Colo. 2005). Practice of allowing jurors to ask witnesses questions through the court does not violate defendant's right to a fair trial and an impartial jury.

People v. Phillips, 91 P.3d 476 (Colo. App. 2004). Where trial court inadvertently fails to poll one of 12 jurors, and defendant does not object, plain error applies. *Here:* no plain error because jurors orally informed the court their verdict was unanimous, and record does not show a lack of unanimity in the verdict.

People v. Rivers, 70 P.3d 531 (Colo. App. 2002). Trial court properly declined to consider defense-proffered testimony from juror regarding her thought processes during deliberative phase of trial that ended in a deadlocked jury. CRE 606(b) limitation on inquiry into juror deliberations and thought processes also applies when the jury fails to reach a verdict. Crim. P. 31(d) does not require the trial court to poll the jury before granting a mistrial.

People v. Baird, 66 P.3d 183 (Colo. App. 2002). Although Crim.P. 16(IV)(f) requires that counsel confer pre-trial about the items to be included in juror notebooks, any error in the lack of timely conference was harmless, and any errors in the notebooks were not a basis for reversal. Trial court's efforts to accommodate juror's travel plans by permitting deliberations to extend past midnight did not deprive defendant of a fair trial; court set no time limit, gave no time-fuse instruction, and acted within its broad discretion to schedule trial.

People v. Balkey, 53 P.3d 788 (Colo. App. 2002). Trial court properly provided deliberating jurors with transcript of specific witness's trial testimony after jurors asked to hear that testimony a second time. Under

appropriate circumstances and with proper safeguards, providing jurors with transcript of portion of trial testimony is no different than reading back the testimony in open court.

People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001). Absent a showing of prejudice, erroneous information in juror notebooks is not grounds for reversal; on retrial (based on other grounds) trial court should edit and correct information about the difference between civil and criminal cases, defendants' testimony and presentation of evidence, and possible sentences.

EVIDENCE

People v. Johnson, 2019 COA 159. For confrontation purposes, none of deceased victim's statements defendant challenged on appeal were testimonial; they were not made to law enforcement, and none of them appear to have been made by the victim with an eye toward future use in court; testimonial inquiry focuses on circumstances under which declarant made the statement, not the circumstances around the witness testifying about the statements; witness who testified about deceased victim's statements was present in courtroom and subject to cross-examination about her statements to police, so her testimony presented no confrontation issue.

People v. Vasseur, 2016 COA 107. Rules of evidence do not apply to sentencing proceedings or restitution hearings.

People v. Petschow, 119 P.3d 495 (Colo. App. 2004). Jury may consider evidence that, while arguably excludable, is admitted without objection.

General Evidentiary Rules

Relevancy: CRE 401

People v. Rath, 44 P.3d 1033 (Colo. 2002). Facts which logically tend to prove or disprove a fact at issue or which afford a reasonable inference or shed light on the matter contested are relevant.

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. To establish relevance and materiality of real evidence, it need only be connected in some manner with the perpetrator, the victim, or the crime.

People v. Melillo, 25 P.3d 769 (Colo. 2001). Absent abuse of discretion, trial court's evidentiary rulings will be affirmed; to show an abuse of discretion, defendant must establish that the trial court's ruling was manifestly arbitrary, unreasonable, or unfair.

People v. Grant, 174 P.3d 798 (Colo. App. 2007). Defendant's fundamental right to present a defense does not allow him to present evidence that is neither relevant nor admissible.

People v. Gwinn, 2018 COA 130; Krutsinger v. People, 219 P.3d 1054 (Colo. 2009). Exclusion of evidence may, in some circumstances, implicate defendant's Sixth Amendment right to present a defense; but every restriction on defendant's evidence is not constitutional error. *Here:* because defendant refused chemical testing and never actually blew into Intoxilyzer 9000, the machine's operability and accuracy were irrelevant; testimony about Intoxilyzer's deficiencies could only be probative if defendant knew about the alleged deficiencies and that knowledge caused his refusal.

People v. Tardif, 2017 COA 136. Slow motion video recordings of offense are not automatically admissible simply because unaltered, real-time version is admissible; like all other evidence, slow-motion recording must be independently admissible under applicable evidentiary rules, including CRE 403 balancing test. *Here:*

although slow-motion recording of shooting was relevant to explain sequence of events around shooting and determine whether defendant acted with aggression or self-defense, its probative value was very low because real-time recording clearly showed sequence of events around shooting; danger of unfair prejudice arose because actions that might appear accidental/reasonably self-defensive in real time might appear more intentional/premeditated in slow motion; and defendant's state of mind at time of shooting was disputed issue at trial.

People v. Relaford, 2016 COA 99. Defendant used sex toys/pornography during sexual assaults and, at trial, all sex toys/pornography seized from defendant were admitted into evidence; some of sex toys were identified at trial as objects used during sexual assaults; many of other objects were found in locations where victims said defendant kept these types of items; some of pornographic videos were consistent with victims' descriptions of scenes they remembered from videos. Majority of evidence was properly admitted because it was directly relevant. The sex toys described by victims and at least some of pornography were not subject to CRE 404(b) because they did not involve a separate episode and did not depend on an impermissible inference about defendant's character. However, items not described by victims or found in locations described by them were not relevant and should not have been admitted; any error was harmless because some of items were properly admitted, there was substantial evidence of defendant's guilt, and prosecutor did not argue that jury should use evidence as propensity evidence and explicitly told jury not to use it for this purpose.

People v. Marko, 2015 COA 139. State psychiatrist's testimony that defendant was malingering his amnesia symptoms and he did not "believe" defendant's version of events was not improper as it directly addressed issues raised by insanity plea; testimony also did not violate rule that witness may not opine as to whether another witness was telling truth on a specific occasion, as psychiatric evaluation is "necessary to establish a firm factual basis" for sanity opinion and therefore "critical part of the experts' evaluation."

People v. Conyac, 2014 COA 8M. While child victim's prior sexual knowledge may be relevant and probative, case law does not assume or presume that child victim is sexually naïve or that her "precocious knowledge" is always relevant and admissible. *Here:* victim was 11/12 at time of assaults and 13 at trial; she would have had access to her middle school peers, social media, television, and music that would have contributed to her sexual knowledge. Evidence was properly excluded because: (a) prosecutor did not raise issue of "precocious sexual knowledge" or argue that victim was sexually naïve and that her experience with defendant was only source of her ability to describe sexual abuse; (b) neither defense counsel nor prosecutor asked questions about sexual innocence or similar issues during voir dire; and (c) victim was old enough to know about sexual matters regardless of her experience with defendant.

People v. Osorio-Bahena, 2013 COA 55. Where 22-year-old victim had mental capacity of 5-year old, trial court should have considered his mental capacity, and not just his age, in deciding whether his prior sexual activity was relevant to show "precocious sexual knowledge;." trial court's finding that victim's prior sexual knowledge was relevant to show an alternative for victim's "precocious" sexual knowledge did not require prosecution to open the door before such evidence was admissible.

People v. Banks, 2012 COA 157. Evidence of defendant's close relationship with senior gang member who disposed of murder weapon was relevant and not unduly prejudicial; although senior gang member was connected to unrelated high-profile murder case, no mention was made of unrelated case at trial. Evidence that witness changed his story when faced with taking polygraph was relevant and not unduly prejudicial where evidence was not focused on any actual polygraph test taken and there was no implication that anyone either passed/failed polygraph.

People v. Herdman, 2012 COA 89. If defendant's pleas or filings at any stage trigger court-ordered mental exam, exam may be admitted to rebut defense evidence of mental condition, even if defense theory ultimately

chosen would not trigger a court-ordered exam. (§16-8-107(1)(a); (1.5)(a); 107(3)(b)). When defendant gives notice of intent to introduce mental-condition evidence for some purpose other than to establish legal insanity, §16-8-107(3)(b) authorizes court-ordered mental exam and allows prosecution to admit evidence of defendant's communications during such exam to rebut defense expert's opinion on defendant's mental condition. As used in statute, "mental condition" is broadly interpreted to include learning disabilities, clinical depression, anxiety disorder, and involuntary intoxication. Compare People v. Garcia, 113 P.3d 775 (Colo. 2005) (assertion involuntary intoxication does not mandate court-ordered exam).

People v. Herrera, 2012 COA 13. Photographs of child victims taken around time sexual abuse began, at celebration of first communion, were relevant to illustrate their ages/appearances at that time and were not unfairly prejudicial.

People v. Valencia, 257 P.3d 1203 (Colo. App. 2011). Forensic testing results are only relevant if items tested were connected to defendant, victim, or crime. *Here*: although witness had personal knowledge of test results, she had no personal knowledge of origin of any of objects she tested and could not connect those objects to case; her lack of personal knowledge as to origin of items required that identity of those items be established by other means, such as chain of custody evidence/introduction of items themselves.

People v. Harland, 251 P.3d 515 (Colo. App. 2010). Testimony defendant was identified through hit in DNA database is relevant because without it, jury would speculate how defendant became the accused.

People v. Schreiber, 226 P.3d 1221 (Colo. App. 2009). Where defendant was charged with indecent exposure in laundromat, evidence of similar containers of lubricating jelly found in laundromat restroom and in defendant's backpack when he was arrested was relevant, based on his admission to using lubricating jelly in his daily masturbating sessions, as it made alleged incident more probable than it would be without the evidence.

People v. Munoz, 240 P.3d 311 (Colo. App. 2009). Where no testimony/evidence in record suggested that certain evidence was introduced to prove other bad acts committed by defendant and no testimony was elicited for purpose of showing evidence demonstrated defendant's bad character, inquiry into whether evidence was properly admitted would not address CRE 404(b) but would address only general relevance under CRE 401.

People v. Greenlee, 200 P.3d 363 (Colo. 2009). Defendant's statement that he planned to kill a woman and hide her body in remote location was relevant where two months later he killed a woman and hid her body in remote location, especially where he wrote letter to friend after he was arrested in which he stated that "he loved a novel in which a murder plan was successful."

People v. Pearman, 209 P.3d 1144 (Colo. App. 2008). Under §18-4-414(1), evidence of retail value may include, but is not limited to proof of "fixed labels and tags, signs, shelf tags, and notices." *Here:* loss prevention officer's testimony that he determined value of items by looking at price tags and adding up prices listed was properly allowed under §18-4-414. Hearsay exception in §18-4-414(2) is not limited to circumstances where proof of value is based on sale price of similar property.

People v. Espinoza, 195 P.3d 1122 (Colo. App. 2008). Defendant's driving record is relevant to prove that the defendant had knowledge that he was a habitual traffic offender and was sufficient evidence to prove knowledge.

People v. Muniz, 190 P.3d 774 (Colo. App. 2008). Evidence of defendant's offer or willingness to take polygraph examination is irrelevant to show consciousness of innocence because test results are inadmissible at trial, so suspect's offer to take test is self-serving act without any risk. Evidence is not rendered admissible by rule of completeness when evidence is otherwise inadmissible because of its lack of probative value.

People v. Skufca, 176 P.3d 83 (Colo. 2008). While defendant's right to testify may be infringed when inadmissible evidence against him is erroneously admitted, it is not infringed when evidence is otherwise admissible. *Here:* in drug prosecution, res gestae evidence of an earlier drug transaction for which separate charges were pending was admissible in prosecution's case-in-chief to show defendant's drug knowledge; allowing such evidence did not infringe defendant's right to testify.

People v. Chavez, 190 P.3d 760 (Colo. App. 2007). Where drugs are found in defendant's apartment and he testified at trial he was not living in apartment at time, evidence defendant refused consent to search of apartment held relevant to issue of defendant's dominion and control over apartment, even though jury could have drawn irrelevant or improper inferences.

People v. Garcia, 179 P.3d 250 (Colo. App. 2007). Evidence of victim's prior sexual history with defendant is not presumed irrelevant and is subject to normal relevance rules. To be admissible, evidence must be material and relevant, and must be admissible under CRE 403. *Here*: evidence that victim allegedly previously consented to "rape fantasy" including conduct involving bondage and "feigned violence" was relevant to issue of consent. COA split on issue of whether victim's "sexual fantasy" was considered conduct under rape shield statute.

People v. Owens, 183 P.3d 568 (Colo. App. 2007). Victim's romantic and sexual relationship with an alleged boyfriend is relevant to victim's motive to lie in order to maintain her relationship. Since evidence fell within rape shield statute exception, no need to determine if covered by rape shield statute.

People v. Ortiz, 155 P.3d 532 (Colo. App. 2006). Trial court did not abuse its discretion in admitting photographs of defendant's torso (which depicted gang-related tattoo) since: (1) defendant was relying on self-defense, and photographs of his entire torso were relevant to show he sustained only minor scratches; (2) tattoo did not explicitly refer to street gang, and (3) no evidence was introduced concerning defendant's gang membership or suggesting that this offense was gang-related.

People v. Walters, 148 P.3d 331 (Colo. App. 2006). Evidence regarding search warrant is generally irrelevant when probable cause is not an issue.

People v. Summitt, 132 P.3d 320 (Colo. 2006). Evidence of flight and concealment to avoid arrest can be admissible to show consciousness of guilt, but only if it can be shown that defendant was aware he was being sought or was concealing himself to avoid apprehension. *Here:* no evidence that defendant remained in his house to avoid detection/arrest, so evidence regarding these actions was irrelevant to consciousness of guilt.

People v. Golden, 140 P.3d 1 (Colo. App. 2005). In discovery, defense learned that victim claimed to be in a "committed romantic relationship" with a roommate, which could be relevant to her motive to lie about having consensual sex with defendant. But defense did not seek to pierce rape shield statute with that fact. On cross-examination, victim denied being in a "committed romantic relationship" with any of her roommates; rape shield statute did not apply to defense's question whether she was in a "committed romantic relationship" with one of her roommates; though quoted phrase is generally understood to have sexual component, it does not call for evidence of sexual conduct/sexual orientation.

People v. Ray, 109 P.3d 996 (Colo. App. 2004). Large amount of cash found on defendant at time of arrest properly admitted because "it made assertion that defendant was engaged in drug distribution and dealing more probable."

Res Gestae

Rojas v. People, 2022 CO 8. In this opinion, the CSC abolishes the common law res gestae doctrine in criminal cases in Colorado. In evaluating whether uncharged misconduct evidence triggers CRE 404(b), a trial court

must first determine if the evidence is intrinsic or extrinsic to the charged offense. Intrinsic acts are those that: (1) directly prove the charged offense or (2) occurred contemporaneously with the charged offense and facilitated the commission of it. Evidence of acts that are intrinsic to the charged offense are exempt from CRE 404(b) because they are not "other" crimes, wrongs, or acts. Courts should evaluate the admissibility of intrinsic evidence under CRE 401-403. If extrinsic evidence suggests bad character (and thus a propensity to commit the charged offense), it is admissible only as provided by CRE 404(b) and after analysis under *Spoto*. Conversely, if extrinsic evidence does not suggest bad character, CRE 404(b) does not apply and admissibility is governed by CRE 401-403. *Here:* CSC concludes that the challenged evidence is an extrinsic act that implicates the defendant's character, and its admissibility is therefore governed by CRE 404(b) and *Spoto*. But because the trial court admitted the evidence under the doctrine of res gestae, it didn't conduct a CRE 404(b) analysis and didn't provide the requisite procedural safeguards. This constituted error. Because the error was not harmless, the COA, which affirmed defendant's convictions, is reversed, and the case is remanded to the trial court for a new trial.

Balancing Test: CRE 403

Masters v. People, 58 P.3d 979 (Colo. 2002). In applying the CRE 403 balancing test, the proffered evidence must be given its maximum probative weight and its minimal prejudicial effect.

Williamsen v. People, 735 P.2d 176 (Colo. 1987). In conducting the CRE 403 balancing test, the trial court must also consider other evidence admitted during trial.

People v. Saiz, 32 P.3d 441 (Colo. 2001). Under CRE 403, cumulative evidence may be excluded at the trial court's discretion.

People v. Tardif, 2017 COA 136. Slow motion video recordings of offense are not automatically admissible simply because unaltered, real-time version is admissible; like all other evidence, slow-motion recording must be independently admissible under applicable evidentiary rules, including CRE 403 balancing test. Although slow-motion recording of shooting was relevant to explain sequence of events around shooting and determine whether defendant acted with aggression or self-defense, its probative value was very low because real-time recording clearly showed sequence of events around shooting; danger of unfair prejudice arose because actions that might appear accidental/reasonably self-defensive in real time might appear more intentional/premeditated in slow motion; and defendant's state of mind at time of shooting was disputed issue at trial.

People v. Thompson, 2017 COA 56. Co-defendant's statements to friend that she believed defendant would receive death penalty were relevant and not unfairly prejudicial because jury was specifically instructed death penalty was not an issue in case, and court gave appropriate limiting instructions.

People v. Valdez, 2017 COA 41. Surveillance video evidence of crime itself is not *unfairly* prejudicial under C.R.E. 403.

People v. Raehal, 2017 COA 18. Although photographs of child victim engaged in sexual acts were "undoubtedly upsetting," they were corroborative of victim's testimony, proved the sexual assault, and were not unduly inflammatory in context of SAOC case.

People v. Marks, 2015 COA 173. Prosecution's DNA expert testified that she could form "no conclusion" from results of several of items she tested; she explained that a "no conclusion" result meant she could determine that person was included as possible contributor but could not provide statistical weight for that result. Trial court erred in admitting evidence under CRE 403 because, without probability assessment, there was substantial risk

that jury would have guessed and miscalculated probability that defendant's DNA was present on items tested; error harmless in light of other evidence of defendant's guilt.

People v. McClelland, 2015 COA 1. Photographs are admissible if they depict relevant facts and are not unnecessarily inflammatory so as to incite jury to unfair prejudice against defendant. "In life" photos are not per se inadmissible; admissibility should be determined on case by case basis. *Here:* there was no dispute as to identity of victim or whether he was alive at time of shooting. As such, 3 photos of victim with his family, and prosecution's emphasis on those photos, unfairly prejudiced defendant because pictures did not portray victim as he appeared at time of crime.

People v. Brown, 2014 COA 130M. Testimony of CRE 404(b) witness was qualitatively different, more severe, and more inflammatory than evidence concerning charged offenses. Such evidence was likely to entice jury to render decision on an improper basis, such as sympathy for victim, or hatred, contempt, retribution, or horror at defendant's alleged prior misconduct. *Here*: Under CRE 403, danger of unfair prejudice caused by evidence substantially outweighed its probative value; trial court abused its discretion when it admitted evidence of other act and there was reasonable probability that error contributed to defendant's convictions by substantially influencing verdict or impairing trial's fairness because error concerned core dispute at trial.

People v. Curtis, 2014 COA 100. Evidence that victim (defendant's daughter) had previously given birth to stillborn baby and defendant kept child's corpse in pickle jar and made dead baby jokes was not unduly prejudicial in face of its probative value. Trial court did not abuse its discretion in admitting the evidence, whether as res gestae evidence or as directly relevant evidence.

People v. Acosta, 2014 COA 82. Lay witness testimony that defendant was "very guilty looking" was relevant and not unduly prejudicial under CRE 403 because it tended to prove defendant committed charged act. Term "guilty looking" signifies a range of behavior that ordinary persons would understand relates to consciousness of guilt and is therefore relevant.

People v. Banks, 2012 COA 157. Evidence of defendant's close relationship with senior gang member who disposed of murder weapon was relevant and not unduly prejudicial; although senior gang member was connected to an unrelated high-profile murder case, no mention was made of unrelated case at trial; evidence that witness changed his story when faced with taking a polygraph examination was relevant and not unduly prejudicial where evidence was not focused on any actual polygraph test taken and there was no implication that anyone passed/failed polygraph.

People v. Herrera, 2012 COA 13. Photographs of child victims taken around time the sexual abuse began, at communion celebration, were relevant to illustrate their ages/appearances at that time and were not unfairly prejudicial.

People v. Harland, 251 P.3d 515 (Colo. App. 2010). Testimony that defendant was identified through hit in DNA database is not unfairly prejudicial where no evidence is presented as to how an individual's DNA profile might be database; any inference that jury would think defendant had prior convictions is speculation.

People v. Robinson, 226 P.3d 1145 (Colo. App. 2009). There is danger that jury might misuse evidence offered to explain background for an investigation/police actions, particularly when substance of statements goes precisely to issue that government is required to prove. *Here*: reversal not required because Defendant neither objected on CRE 403 grounds nor requested an appropriate limiting instruction.

People v. Orozco, 210 P.3d 472 (Colo. App. 2009). Evidence of other sexual assaults involving victims of different age/gender is relevant to show intent/motive in charges of incest and SAOC; where defendant disputes victim's allegations, prior acts evidence is relevant to identify defendant as perpetrator of present offense and to rebut suggestion that victim fabricated allegations.

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008), aff'd operation of law, 238 P.3d 1283 (Colo. 2010). Where trial court concluded that additional evidence concerning defendant's husband's physical abuse of his former wife would have no purpose other than to inflame, distract, or confuse jury, court properly exercised its discretion in excluding evidence.

People v. Garcia, 179 P.3d 250 (Colo. App. 2007). Probative value of evidence of victim's alleged rape fantasy and prior sexual conduct, including bondage, was not substantially outweighed by danger of unfair prejudice.

Fletcher v. People, 179 P.3d 969 (Colo. 2007). Probative value of sexual assault victim's testimony that she was virgin prior to assault is substantially outweighed by its prejudicial effect; under CRE 403, sexual assault victim may not testify that she had never had sexual intercourse prior to crime in case at issue; error harmless.

People v. Valencia, 169 P.3d 212 (Colo. App. 2007). Trial court did not abuse its discretion by allowing prosecution to use defendant's real name and alias; defendant did not object when information was amended to reflect his true name; evidence of alias was relevant to identification, ownership of car, and possession of marijuana found in car, where defendant used alias during stop and provided license/registration containing alias.

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). Trial court did not abuse its discretion in not requiring prosecution to have color photographs of murder victim's wounds reprinted in black and white.

People v. Underwood, 53 P.3d 765 (Colo. App. 2002). Evidence that victim had become pregnant by another man and suffered a miscarriage was properly excluded under CRE 403; evidence would have diverted jury's attention from real issues and it was not greatly probative, because defendant was allowed to suggest that victim's emotional difficulties were caused not by sexual assault, but by other traumatic events.

People v. Skinner, 53 P.3d 720 (Colo. App. 2002). In assault case, expert testimony regarding defendant's Norse goddess tattoo was not overwhelmingly prejudicial where expert did not opine as to whether defendant was white supremacist or was likely to attack person of a different race; any prejudice was mitigated by expert's acknowledgement that Norse goddess tattoo could have various meanings, including the meaning described by defendant.

People v. Melillo, 25 P.3d 769 (Colo. 2001). In determining whether prejudice substantially outweighs probative value of evidence proffered under rape shield procedure, trial court may consider policy of rape shield law, which is to protect sexual assault victims against psychological/emotional abuse and invasion of privacy. *Here*: evidence teenage victim was sexually assaulted by babysitter when she was 3-years old would invade victim's privacy and subject her to psychological/emotional abuse.

People in the Interest of K.N., 977 P.2d 868 (Colo. 1999). Evidence of victim's sexual history and juvenile's knowledge of this history was not admissible under rape shield statute to show juvenile's state of mind at time of assault; without more, such evidence only constitutes a collateral attack on victim's credibility which rape shield prohibits.

People v. Dunlap, 975 P.2d 723 (Colo. 1999). Trial court properly admitted photos of murder victims lying in blood; photos were relevant to show crime scene, identities, nature and extent of injuries, and locations of personal possessions; evidence also relevant in capital sentencing phase to show deliberate execution-style killing.

People v. Nuanez, 973 P.2d 1260 (Colo. 1999). Defendant fled police because he wanted to avoid being caught and sentenced as habitual traffic offender; OK to admit that he was also serving DJ&S for burglary because this increased his motivation to avoid capture.

Opening-the-Door

People v. Lopez, 2024 COA 26. Defendant, convicted of multiple counts of sexual assault on a child and incest, argued the trial court erred by admitting a forensic interviewer's testimony that the children did not show signs of having been coached in making their allegations (in response to a jury question). COA, following *Heredia-Cobos* and distinguishing *Liggett*, held that although this kind of testimony is ordinarily inadmissible, defendant opened the door to the testimony by pursuing a defense that the children had been coached to report the abuse. The dissent concluded defendant cannot open the door to expert testimony that the victims of the alleged sexual assault, whose video recorded interviews were admitted into evidence, did not appear to be coached. *[Cert Accepted (12/23/24) in case #24SC244: (1) Whether a criminal defendant can open the door to expert witness testimony that another witness told the truth on a particular occasion. (SAAG Frank Lawson)]*

People v. Cohen, 2019 COA 38. The opening the door doctrine is limited; any otherwise inadmissible evidence introduced after one party opens the door must be confined to preventing any unfair prejudice or misleading impression that might otherwise result. Certain statements introduced in defendant's trial went far beyond anything allowed by the opening the door doctrine; were inadmissible on hearsay, relevance, and undue prejudice grounds; and violated her right to confrontation.

People v. Heredia-Cobos, 2017 COA 130. Where defense challenged victim's credibility by suggesting she was coached by family members to make sexual assault allegations, defense opened the door to forensic interviewer's expert testimony about coaching and whether victim gave any indications of being coached in her interview.

People v. Pernell, 2014 COA 157 aff'd on other grounds, 2018 CO 13. Accusations during defense's opening statement that the victim's allegations were fabricated opened the door to admission of credibility and bolstering evidence.

People v. Thomas, 2014 COA 64. Defendant put his credibility at issue by testifying at trial; under CRE 608(b), prosecution properly impeached his credibility with questions about his character for truthfulness/untruthfulness; while CRE 608(b) generally precludes admission of extrinsic evidence of specific instances of conduct, "**doctrine of specific contradiction**" permits such evidence where it directly contradicts defendant's misleading testimony; defendant can open the door to such extrinsic evidence with misleading testimony, because he should not be permitted to engage in perjury or mislead trier of fact, and then shield himself from impeachment by asserting collateral matter doctrine.

People v. Estes, 2012 COA 41. In response to defendant's cross-examination of police officer implying that failure to find gun used in crime decreased probability that defendant had possessed one, prosecutor was properly allowed to elicit testimony that police recover a missing gun in only 10% of such cases; defendant "opened the door" to this topic and evidence was relevant.

People v. Davis, 312 P.3d 193 (Colo. App. 2010). Defense attorney's opening statements criticizing law enforcement's investigative techniques may open the door to testimony from law enforcement agent concerning veracity of other witnesses whom agent interviewed. *Here*: Defense counsel asserted in opening statements that one prosecution witness only became helpful to police after her interview became confrontational and she was threatened by police. This opened the door to detective's testimony that her interview of witness became confrontational because she did not believe witness's initial statements. Defense counsel also asserted in opening statements that police failed to obtain phone records to substantiate another prosecution witness's statements. This opened the door to detective testifying that she did not obtain phone records because witness's information otherwise proved credible.

People v. Taylor, 159 P.3d 730 (Colo. App. 2006). Re-direct testimony by DA's investigator indicating he had not sought handwriting analysis because he felt he "had plenty of evidence to proceed" was relevant given cross-examination questioning. Defendant opened the door to this inquiry by asking about investigator's failure to conduct handwriting analysis.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Brief "background" evidence concerning witness's family status, employment, and the like is admissible for purpose of providing background information about witness, even though it does not directly relate to any proposition that must be proved at trial. When defense opens the door to a topic, prosecution has right to explain/rebut any adverse inferences that might have resulted from defense questions.

People v. Melillo, 25 P.3d 769 (Colo. 2001). Defendant made 2 statements to police: (1) when his wife had discovered him alone in bedroom with partially unclothed victim (her daughter), he tried to distract his wife because situation did not look good; and (2) he distracted his wife because victim was sexually assaulted when she was 3 years old, and his wife had been extra vigilant in protecting victim ever since. Defendant sought to admit statement (2), but his offer of proof of relevancy stated only that earlier sexual assault was relevant to explain statement (1). Defendant cannot simply rely on theories of "opening the door" and "rule of completeness" to establish admissibility under rape shield exception. Although those theories may establish relevance within CRE 401, they fail to establish whether prejudice of proffered evidence substantially outweighs its probative value under CRE 403. Because defendant failed to make any other offer of proof on that point, trial court did not abuse discretion in excluding statement (2).

Stipulations

People v. St. James, 75 P.3d 1122 (Colo. App. 2002). Prosecution is generally not required to accept defendant's stipulation to certain facts; if, however, defendant offers to stipulate to fact and People's case is not weakened, prosecution may be required to accept stipulation if probative value of offered evidence is substantially outweighed by danger of unfair prejudice. *Here*: trial court properly admitted evidence of records kept by "residential placement" showing defendant's whereabouts on certain dates, even though defendant's proffered stipulation to his whereabouts carried equal probative force; court removed any unfair prejudice by requiring prosecution to avoid any inference defendant was in custody.

People v. Morales, 2012 COA 2. Prosecution need not stipulate to facts where the proposed stipulation will negatively affect probative value/weight of evidence.

People v. Roy, 948 P.2d 99 (Colo. App. 1997). By entering stipulation that plastic bag found in defendant's property contained cocaine, defendant chose not to have a jury determine whether substance contained cocaine; stipulation was judicial admission and defendant waived his right to jury determination of that issue; trial court's instruction that jury "must" regard that fact as conclusively proven was appropriate.

Judicial Notice: CRE 201

People v. Sena, 2016 COA 161. Trial court properly took judicial notice of existence of active warrant from neighboring county on date defendant claimed a false identity during traffic stop.

People v. Doyle, 2015 CO 10. Resolution of factual matter at issue in prior judicial proceeding, unlike occurrence of legal proceeding or other court action itself, does not become an indisputable fact within contemplation of CRE 201 (judicial notice) merely as a result of being reflected in court record. *Here:* Minute

order that FTA'd for a specific court appearance was insufficient to establish that fact as a basis for probation revocation.

People v. Sa'ra, 117 P.3d 51 (Colo. App. 2004). Trial court did not err in taking judicial notice that a person with defendant's name appeared before court for sentencing on prior felony where fact was not subject to reasonable dispute and none of court's comments indicated that defendant was person who appeared before court.

People v. Cooper, 104 P.3d 307 (Colo. App. 2004). Trial court may not take judicial notice of PSI under CRE 201(b) as evidence establishing a habitual criminal count because records prepared by probation do not qualify as court's own records.

Rule of Completeness: CRE 106

People v. Montoya, 2024 CO 20. DUI trials are governed by the same evidentiary rules as any other criminal trial. Accordingly, criminal courts are not bound by the law of refusal that governs administrative, driver's license- revocation hearings. So, if a driver initially refuses blood or breath testing under Colorado's expressed consent statute but later requests testing, criminal trial courts should consider whether the proffered evidence of refusal or recantation is admissible under the Colorado Rules of Evidence. The CSC also concludes that, under the circumstances here, the trial court misapplied CRE 106 and erred by admitting evidence of defendant's refusal to submit to testing and excluding evidence of his subsequent request for testing.

People v. Vanderpauye, 2023 CO 42. CSC clarifies that Colorado law has no per se rule excluding a self-serving hearsay statement by a defendant. Instead, the court holds that, like any other hearsay statement, defendant's self-serving hearsay statement may be admissible if it satisfies a hearsay-rule exception in the Colorado Rules of Evidence. Still, the self-serving nature of defendant's hearsay statement, while not grounds for automatic exclusion, may be relevant in some cases to the determination of whether the statement fits within the scope of a hearsay exception in CRE 803. Of particular interest here, under the excited utterance exception in CRE 803(2), the self-serving nature of defendant's hearsay statement may be probative of whether the statement was a spontaneous reaction, rendering it potentially admissible, or the result of reflective thought, rendering it inadmissible. Regardless of whether the self-serving nature of defendant's hearsay statement affects the statement's admissibility under the particular hearsay exception in play, the trial court should consider that aspect of the statement in exercising its discretion pursuant to CRE 403. *Here:* trial court incorrectly determined that the self-serving nature of defendant's hearsay statement rendered the statement automatically inadmissible. Further, it erred in alternatively ruling that the excluded statement did not meet the excited utterance exception to the hearsay rule under CRE 803(2). CSC concludes that defendant's statement, though self-serving, was admissible under the excited utterance exception. Further, the court rules that the statement satisfied the CRE 403 balancing test. Because the trial court's error in excluding the statement was not harmless, the court remands for a new trial.

People v. McLaughlin, 2023 CO 38. Under CRE 106, if the prosecution creates a misleading impression by excluding a defendant's statements that ought in fairness to be considered contemporaneously with the proffered evidence, then the rule of completeness requires the prosecution to introduce such statements. When a defendant-declarant statements are admitted under the rule of completeness, the prosecution may not impeach defendant-declarant under CRE 806. Court of appeals is affirmed. *Here:* at trial, People introduced a video of the interaction between defendant and the arresting officer; they edited the video to omit statements defendant made to the officer alleging that an unidentified woman was the driver of the vehicle. Defendant sought to introduce these statements under the rule of completeness, arguing that the redacted video created a misleading impression.

People v. Murray, 2018 COA 102. Defendant convicted of burglary and assault could not, pursuant to the doctrine of completeness, introduce statements which were recorded during a visit by victim to defendant while defendant was in jail; victim's statement that she had told defendant's lawyers "everything that they wanted to hear and that [defendant] wanted them to hear" was not misleading standing alone and did not require admission of defendant's response, even if defendant had preferred the jurors to hear it, and defendant's statements were otherwise inadmissible as self-serving statements made with knowledge that he was being recorded.

People v. Short, 2018 COA 47. Rule of completeness allows into evidence otherwise inadmissible self-serving hearsay; the rule applies to oral statements, not just writings or recordings; any error is reviewed for non-constitutional harmless error. *Here:* Defendant told police that "someone's abusing" victim, "but it ain't me."; prosecution sought to only elicit first portion of statement; defendant urged both statements under the rule of completeness; trial court agreed, but ruled that if both statements come in, prosecution could offer evidence of defendant's prior conviction; defense did not pursue admission of the second statement; COA found trial court erred but harmless because strength of prosecution's case.

People v. Manyik, 2016 COA 42. Rule of completeness did not render hearsay statements made by defendant to family members in cell phone conversations made during the time he had been left alone in interview room at police station admissible in prosecution for second degree murder, aggravated robbery, and tampering with physical evidence; although the statements defendant made during the phone calls were recorded at the same time as the police interview, they were not part of the interview, and redacting those portions of the interview did not confuse or mislead the jury with regard to the statements defendant made to police.

People v. Zubiate, 2013 COA 69. Defendant's statement to law enforcement officer during vehicle stop, indicating that she had a fear of needles in response to officer's request that she be taken to hospital to have blood drawn for a chemical test, was not admissible under rule of completeness, in trial for driving under the influence (DUI) and other offenses; defendant's inculpatory statement that she refused to submit to a chemical test was not introduced into evidence, so there was no statement to complete, and defendant's statement concerning her fear of needles was self-serving.

People v. Davis, 218 P.3d 718 (Colo. App. 2008). Defendant's first videotaped interview with police was not admissible to provide context for statements made in defendant's second interview under the rule of completeness, in prosecution for contributing to the delinquency of a minor and furnishing alcohol to a minor; defendant's general denials in first interview were self-serving, untrustworthy hearsay which differed from defendant's inculpatory answers during second interview, and defendant was not prejudiced by exclusion of evidence since she reasserted same statements from first interview during her testimony at trial.

People v. Muniz, 190 P.3d 774 (Colo. App. 2008). Evidence of defendant's offer or willingness to take polygraph examination is irrelevant to show consciousness of innocence because test results are inadmissible at trial, so suspect's offer to take test is self-serving act without any risk. Evidence is not rendered admissible by rule of completeness when evidence is otherwise inadmissible because of its lack of probative value.

People v. Medina, 72 P.3d 405 (Colo. App. 2003). Trial court did not err by permitting jury to use partial transcript of codefendant's videotaped statement in order to follow recording as it was being played where transcripts were collected from jury after videotape was played; trial court did not violate CRE 106 by permitting jury to view partial transcript/partial videotape of codefendant's statement that focused on portions of statement that incriminated defendant; because defendant was permitted to play all or any part of the videotape during cross-examination, he had ability to place partial version of tape in context.

People v. Melillo, 25 P.3d 769 (Colo. 2001). Defendant made 2 statements to police: (1) when his wife had discovered him alone in bedroom with partially unclothed victim (her daughter), he tried to distract his wife because situation did not look good; and (2) he distracted his wife because victim was sexually assaulted when she was 3 years old, and his wife had been extra vigilant in protecting victim ever since. Defendant sought to admit statement (2), but his offer of proof of relevancy stated only that earlier sexual assault was relevant to explain statement (1). Defendant cannot simply rely on theories of "opening the door" and "rule of completeness" to establish admissibility under rape shield exception. Although those theories may establish relevance within CRE 401, they fail to establish whether prejudice of proffered evidence substantially outweighs its probative value under CRE 403. Because defendant failed to make any other offer of proof on that point, trial court did not abuse discretion in excluding statement (2).

People v. Espinoza, 989 P.2d 178 (Colo. App. 1999). Prosecutor was permitted to introduce two complete written statements that implicated defendant, where defendant had attempted to impeach witness on cross-examination with a portion of statements.

Offers to Compromise: CRE 408 & Offers to Plead Guilty: CRE 410

People v. Muniz, 190 P.3d 774 (Colo. App. 2008). Evidence of defendant's offer or willingness to take polygraph examination is irrelevant to show consciousness of innocence because test results are inadmissible at trial, so suspect's offer to take test is self-serving act without any risk. Evidence is not rendered admissible by rule of completeness when evidence is otherwise inadmissible because of its lack of probative value.

People v. Copenhaver, 21 P.3d 413 (Colo. App. 2000). Defendant was properly impeached with: (1) a written statement he submitted in support of a rejected plea agreement; and (2) a letter from him to court that was attached to his motion to continue sentencing hearing. CRE 410 specifically permits statements made in connection with plea bargaining to be used for impeachment where statements are voluntary and reliable, and made in court, on record.

Physical Evidence

Authentication: CRE 901, CRE 902

People v. Vigil, 2024 COA 72. Though CRE 901 relates to the admission of evidence, the same standard applies "if a proper identification of an object is required for other purposes, even if the object itself is not offered" as evidence – before an expert can testify about the results of the testing or analysis of an object, "[t]he object must be identified" — that is, "some proof must be presented of a connection between the object tested and the defendant, the victim, or the crime." *Here:* at trial here, a DNA analyst, relying on a submission letter, testified that she received buccal swabs taken from defendant and determined that the DNA profile developed from the swabs matched DNA on the gun and magazine. A fingerprint examiner, relying on information printed on an AFIS fingerprint card, testified that she compared fingerprints belonging to defendant with a latent print recovered from the gun and determined that the prints matched. Thus, because no one with personal knowledge testified about the source of the known samples, the "known" samples were never authenticated except through hearsay, rendering the experts' testimony concerning "matches" inadmissible. The error was not harmless because, without the hearsay testimony, the prosecution failed to establish the necessary connection between the items tested or analyzed and defendant.

People v. Quillen, 2023 COA 22. COA holds as a matter of first impression that business records (from Lyft) accompanied by a record custodian's affidavit are admissible under CRE 803(6) and 902(11).

People v. Rodriguez, 2022 COA 11. COA clarifies that a proponent of fungible evidence — meaning evidence that is not readily identifiable — must authenticate it through a proper chain of custody, by accounting for the evidence's whereabouts at all times. *Here:* defendant was convicted of possession with intent to distribute a

controlled substance and obstruction of a peace officer. At trial, in lieu of establishing a chain of custody, DA authenticated a bag of cocaine through officer's testimony that he recognized the bag of powder as the same substance he recovered at the scene more than a year earlier. On appeal, defendant argued that the trial court erred by admitting the bag of cocaine because the DA was required to, but did not, establish a sufficient chain of custody for the evidence. Because the officer in this case had no knowledge of the bag's whereabouts after he handed it to a sergeant at the scene and the sergeant did not testify, there was no factual basis for the jury to determine that the evidence admitted at trial was the same bag of powder recovered at the scene. Admission of the cocaine was error.

People v. Abad, 2021 COA 6. Electronic evidence may be authenticated in several different ways under CRE 901, including through the testimony of a witness with knowledge that the evidence is what it is claimed to be and through circumstantial evidence. Information from Dropbox and other similar cloud-based storage providers, however, presents unique challenges in that it lacks readily identifiable characteristics that often make authentication under CRE 901 possible. "Specifically, files uploaded to remote servers are not necessarily shared with other users, which forecloses the opportunity for a recipient to authenticate them. And cloud storage providers may not require detailed profiles of their users, which eliminates another avenue to corroborate ownership of the account's contents." But the standard for authentication is low. *Here:* officer's testimony was sufficient to authenticate the printed images as sexually exploitative images of children from a Dropbox account, which Dropbox sent to him: (1) officer testified that he sent a request for production to Dropbox for subscriber information and the content of the Dropbox account associated with the NCMEC cyber tip; (2) he testified he received a thumb drive from Dropbox and viewed its contents; (3) he copied the contents of the thumb drive to a disc, that he viewed the contents of the disc before trial, and that the contents of the disc were a fair and accurate representation of what he received from Dropbox; and (4) he testified that the printed images the prosecution sought to introduce were fair and accurate representations of the materials he received from Dropbox. The trial court admitted the disc containing the entire contents of the Dropbox account and defendant did not object.

Gonzales v. People, 2020 CO 71. CRE 901 requires a flexible, factual inquiry to determine under facts of each case whether reasonable jury could determine that proffered evidence is what its proponent claims. In making this determination, trial court has broad discretion to consider variety of factors/circumstances and must consider all relevant circumstances that bear on whether a recording is what it purports to be. Under CRE 901(b)(5) party may authenticate evidence through identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing voice at any time under circumstances connecting it with alleged speaker. In absence of evidence suggesting that proffered voice recording has been altered/fabricated, proponent of voice recording may authenticate recording by presenting evidence sufficient to support finding that it is what proponent claims, and once this prima facie burden is met, authenticity becomes question for factfinder. Overruled People v. Baca, 2015 COA 153.

People v. Dominguez-Castor, 2020 COA 1. Evidence was sufficient to show that the social media account that sent incriminating messages belonged to defendant and thus to authenticate the messages for admission as evidence, in trial for first degree murder, aggravated robbery, and related crimes; account was registered in defendant's name and was created using an email associated with him, conversations between defendant and confederate often began over cellular phone and would continue on social media account, messages referred to travel plans only he knew, and incriminating message originated from particular phone he owned and only he had access to when the message was sent.

People v. N.T.B., 2019 COA 150. "[W]here a law enforcement investigator possesses personal knowledge that proffered evidence was produced in response to a search warrant, courts have allowed the investigator to authenticate that evidence." *Here:* DA proffered sufficient evidence for authentication of Dropbox/Comcast

accounts where: investigating detective would testify he caused search warrants to be served on Dropbox/Comcast; these entities provided him with records; and defendant acknowledged that he owned Dropbox account tied to his work email address; detective had sufficient personal knowledge that Dropbox/Comcast records were authentic.

People v. Hamilton, 2019 COA 101. An analysis of the admissibility of a machine-generated record must consider the reliability and accuracy of the process used to create and obtain the underlying data, and whether the report is authentic. The proponent may authenticate electronically generated printouts through the testimony of a person with personal knowledge of how the printouts were generated and that they are what they are claimed to be. Here: records not properly authenticated because the record lacked any evidence that: the machine used to generate the Reports produces accurate reports of the contents of phones; the machine was in proper working order at the time it generated the Reports; the person operating the machine at the time was properly qualified; the person followed proper procedures in operating the machine; the Reports were valid and reliable; or detective was qualified to interpret the Reports.

People v. A.C.E.-D., 2018 COA 157. Authenticating Facebook messages requires two showings: (1) party seeking admission must show that records were those of Facebook and, (2) communications recorded were made by purported party. Regarding (2), witness testimony about making/receiving the Facebook messages at issue, use of nicknames and other unique identifiers, witness' belief that she was never talking to someone other than defendant, are all relevant factors that trial court may consider.

People v. Heisler, 2017 COA 58. To authenticate text message, a person with personal knowledge must: (1) testify that printouts of text message(s) accurately reflect the content of message(s); (2) offer testimony to establish sender's identity -may be accomplished through combination of at least two of following: (a) phone number was assigned to/associated with purported sender; (b) substance of text messages was recognizable as being from purported sender; (c) purported sender responded to an exchange in such a way as to indicate circumstantially that he/she was in fact author of communication; or (d) any other corroborative evidence under circumstances.

People v. Glover, 2015 COA 16. Authentication is a condition precedent to the admissibility of physical evidence that is satisfied by evidence sufficient to support finding that evidence in question is what its proponent claims. Only a prima-facie showing is required, and trial court's role is to serve as gatekeeper in assessing whether proponent has offered a satisfactory foundation from which jury could reasonably find that evidence is authentic. Facebook user's postings are not self-authenticating because there was no evidence presented that Facebook substantially relies for any business purpose on information contained in its users' profiles and communications. Facebook printouts are neither authenticatable under CRE 902(11) nor admissible under CRE 803(6)). To properly authenticate Facebook conversations, prosecution had to make two separate showings: (1) records were those of Facebook and (2) communications recorded therein were made by defendant. Printouts may be authenticated under either CRE 901(b)(1), through testimony of witness with knowledge that a matter is what it is claimed to be, or CRE 901(b)(4), through consideration of distinctive characteristics shown by an examination of their contents and substance in light of circumstances of the case. *Here:* detective testified that he subpoenaed records of defendant's Facebook activity, Facebook complied with subpoena and sent detective compact discs containing requested records; court admitted unchallenged affidavit of a Facebook records custodian certifying that records were from account linked to defendant and stating that they had been created "at or near the time the information was transmitted by the Facebook user" and were kept by Facebook's "automated system." Under these circumstances, sufficient evidence was presented under CRE 901(b) to authenticate the Facebook printouts.

People v. Dutton, 2014 COA 51. Under CRE 901(a), self-identification is sufficient to establish identity of a party to a phone call when it is coupled with additional circumstantial evidence. *Here*: phone call to officer by person who identified himself as defendant was sufficiently authenticated where witness testified that she told defendant to call officer shortly before officer received the phone call and caller demonstrated familiarity with facts of incident at issue.

People v. Gregg, 298 P.3d 983 (Colo. App. 2011). Whether proponent has established proper foundation regarding authenticity of document is a matter within trial court discretion. Under CRE 901(a), requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Public records/reports may satisfy this requirement with evidence that a purported public record, report, statement, or data compilation, in any form, is from public office where items of this nature are kept.

People v. Warrick, 284 P.3d 139 (Colo. App. 2011). Sheriff booking reports were properly authenticated under CRE 901(b)(7); certification on document indicated record came from public office where it was kept; mittimus was properly authenticated under CRE 902(4) because it was certified, signed, and bore district court seal.

People v. Valencia, 257 P.3d 1203 (Colo. App. 2011). CRE 901(a) requires that an object must be identified as a condition precedent to its admissibility. Whether there is complete chain of custody is matter to be resolved by trial court prior to admitting evidence; if court makes that determination, any imperfections in chain go to weight, rather than admissibility.

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). Requirement of authentication may be satisfied by item's appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances. Requirement of authenticity is question of relevancy, dependent upon fulfillment of a condition of fact governed by CRE 104(b). In determining admissibility of conditionally relevant evidence, trial court does not evaluate/weigh credibility of proffered evidence but examines it to determine whether jury could reasonably find, by a preponderance of evidence, that conditional fact has been established. A trial court should allow physical evidence to be presented to jury if reasonable jury could decide that evidence is what its proponent claims it to be.

People v. Huehn, 53 P.3d 733 (Colo. App. 2002). CRE 901(b)(9) permits authentication of computer records by evidence describing a process/system used to produce a result and showing that process/system produces an accurate result. *Here*: to admit computerized records of ATM transactions and service performed on ATM machine in theft case, DA need not produce testimony regarding functioning and accuracy of computer process where records are bank records reflecting data entered automatically rather than manually.

People v. Martinez, 51 P.3d 1029 (Colo. App. 2001), rev'd other grounds, 69 P.3d 1029 (Colo. 2003). Pen Packs, certified by records-manager of Nevada Department of Prisons, were sufficiently certified to be self-authenticating under CRE 902.

People v. Shepherd, 43 P.3d 693 (Colo. App. 2001). California prison records were properly authenticated because documents were certified by person purportedly authorized to make certification, and that person's authority was certified by original documents submitted under seal by California's Deputy Secretary of State.

People v. Lesslie, 939 P.2d 443 (Colo. App. 1996). Once authenticity is established, defects in physical evidence go to weight not admissibility.

People v. Morise, 859 P.2d 247 (Colo. App. 1993). Under CRE 902(6), extrinsic evidence of authenticity is not required in order to authenticate a newspaper. *Here:* although newspaper articles attributing statements to defendant were self-authenticating, they were inadmissible hearsay.

Demonstrative Evidence

People v. Sandoval, 2018 COA 156. Use of a partial reconstruction of crime scene as demonstrative aid met 4-part test for admissibility set out in People v. Palacios, 2018 COA 6M, where: (1) it was authenticated by DA's criminalist; (2) it was relevant to assist jury in understanding witness's testimony; (3) defendant had an opportunity to cross-examine criminalist about discrepancies in reconstruction; and (4) probative value of reconstruction was not substantially outweighed by danger of unfair prejudice.

People v. Palacios, 2018 COA 6M. To be admissible, a demonstrative aid must be: (1) authenticated, (2) relevant, (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value must not be substantially outweighed by danger of unfair prejudice.

People v. Douglas, 2016 COA 59. Computer-generated video depictions of events fall into two categories: animations and simulations. *Animations* are demonstrative evidence and are admissible if proponent: (1) authenticates it; (2) shows relevancy; (3) shows that it is a "fair and accurate representation"; and (4) shows that its probative value is not substantially outweighed by danger of unfair prejudice. *Simulations* are scientific evidence and are offered as substantive, not demonstrative, evidence. Simulation depends on proper application of scientific principles, so its admissibility hinges on whether it meets foundational requirements of scientific evidence. *Here:* video was properly admitted as an animation because expert supplied calculations and opinions that computer used to create the video.

People v. Richardson, 58 P.3d 1039 (Colo. App. 2002). Demonstrative evidence is admissible if it is "reasonably" accurate and correct; testimony regarding accuracy must be given by person having personal knowledge of scene depicted and may not be based on hearsay statements.

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). Computer animation is admissible as demonstrative evidence if it is: (1) authentic under CRE 901; (2) relevant under CRE 401 and CRE 402; (3) a fair and accurate representation of the evidence to which it relates; and (4) not excluded under CRE 403. Courts are encouraged to give cautionary or limiting instructions to the jury when admitting computer-generated evidence.

Real Evidence

People v. Allgier, 2018 COA 122. No Colorado authority holds that admission of firearms connected to crime is unduly prejudicial. *Here:* court did not commit plain error in admitting firearms as instrumentality of POWPO crime where defendant did not propose any stipulation concerning firearms in lieu of their admission, notwithstanding fact that 3 firearms were accurately described in photographs admitted into evidence.

People v. Tardif, 2017 COA 136. Slow motion video recordings of offense are not automatically inadmissible simply because unaltered, real-time version is admissible; like all other evidence, slow-motion recording must be independently admissible under applicable evidentiary rules, including CRE 403 balancing test. *Here:* although slow-motion recording of shooting was relevant to explain sequence of events and determine whether defendant acted with aggression/self-defense, its probative value was very low because real-time recording clearly showed sequence of events around shooting. Danger of unfair prejudice arose because actions that might appear accidental or reasonably self-defensive in real time might appear more intentional/premeditated in slow motion; and defendant's state of mind at time of shooting was disputed issue at trial.

People v. Brown, 313 P.3d 608 (Colo. App. 2011). Because images are real evidence rather than demonstrative exhibits, DA need not show that images "fairly and accurately represent" matters they appear to depict. To establish foundation for admission of child pornography, prosecution need not present expert testimony that images depict real children; at least in absence of evidence that images were altered, jury can make that determination simply by viewing images. *Here:* child pornography images were sufficiently authenticated by a chain of custody showing they were copied from defendant's computer onto a CD played at trial.

People v. Armijo, 179 P.3d 134 (Colo. App. 2007). Law and policy governing admissibility of photographs/motion pictures applies to videotapes. Trial court has broad discretion in determining admissibility of tape recordings. If content of videotape has not been altered, then it is generally permissible to play it to jury at a slower speed/in an enhanced or enlarged form. *Here:* trial court did not abuse its discretion in allowing jurors to view a surveillance videotape on a large projection screen when they previously were unable to see recording on prosecutor's laptop computer. Giving jurors second opportunity to view surveillance videotape did not unduly emphasize it. Also, no indication prosecutor acted in bad faith.

People v. Saiz, 32 P.3d 441 (Colo. 2001). Videotapes are not necessarily best/most probative evidence of events; although they convey information beyond the mere recitation of language, this may constitute only minimal incremental probative value under CRE 403, depending on other admitted evidence.

People v. Herrera, 1 P.3d 234 (Colo. App. 1999). Chain of custody of drug evidence was sufficient to establish that evidence was involved in incident and that condition of evidence at trial was substantially unchanged; any contradictory testimony would simply impact weight of the evidence.

Trial Exhibits & Jury Deliberations

People v. Shannon, 2024 COA 41. Recordings of pretext telephone calls between a victim of sexual assault and defendant may be provided to the jury without any prior assessment of potential prejudice arising from unrestricted access to the recordings. Such recordings are more like police interviews of defendants, for which unrestricted jury access is presumptively allowable (*Rael*) than forensic interviews of sexual assault victims, which should be provided to a deliberating jury, if at all, only after the court considers whether access to the recordings will assist the jury and whether such access might unfairly prejudice defendant (*DeBella/Frasco*).

Ray v. People, 2019 CO 21. Failure of trial courts to adequately control jury access to testimonial exhibits is most problematic where jury's ultimate determination would necessarily turn on its assessment of credibility of witnesses, as distinguished from the force of real, or demonstrative, evidence. This is especially the case where resolution of the issue in question must turn on assessment of witness account of commission of crime, by the only person other than defendant to have purportedly witnessed crime denied by him, which account is both contradictory of principal defense and the only testimonial account jury is permitted to repeatedly view. *Here:* witness interview videotape made shortly after shootings was not inconsistent with his trial testimony and did not directly contradict defendant's testimony concerning pertinent events; exhibit was admitted on the basis of his failure to recall rather than any contradiction of his trial testimony; when confronted with witness's statement in exhibit that he threatened to kill everyone, defendant did not dispute making those statements but testified that he did not recall them; harmless error.

People v. Mendez, 2017 COA 129. Trial court not required during jury deliberations to limit jury's access to video recording/transcript which included conversation relating to drug deal with CI while defendant and CI were in defendant's apartment; video recording and transcript were non-testimonial, and non-testimonial evidence did not present same risk of undue emphasis as videos documenting witnesses' out-of-court, testimonial statements.

Rael v. People, 2017 CO 67. Same danger of allowing jury unfettered access during deliberations to testimonial exhibits does not apply to crime scene video; video was more like a non-testimonial, tangible exhibit (such as a still photograph of crime scene) than a testimonial one (witness's recorded statement); trial court did not abuse its discretion in allowing jury unfettered access during deliberations. An un-coerced confession is among the strongest kinds of physical evidence prosecution may produce. Courts have long treated jury access to transcripts/recordings of defendant's own out-of-court statements differently from transcripts/recordings of other witnesses' out-of-court statements. Although trial court has authority to restrict jury's access to

defendant's taped statements, same concerns that apply to allowing jury unfettered access to testimonial exhibits do not apply to defendant's own out-of-court statements. *Here:* by entertaining argument/addressing whether parts of video should be redacted, record confirmed trial court properly exercised its discretion in granting jury unfettered access to defendant's taped statements.

Carter v. People, 2017 CO 59M. Unlike jury access to testimonial exhibits where trial courts are required to exercise particular caution, access to transcripts/recordings of defendant interrogations do not implicate same concern for selective use or require same exercise of caution. *Here:* trial court did not abuse its discretion where it entertained defendant's assertions of prejudicial impact, distinguished defendant's interrogation from testimonial exhibits meriting particular caution, and found unrestricted access would not be unfairly prejudicial.

Romero v. People, 2017 CO 37. Where defendant does not object, trial courts are not required to make sua sponte restrictions to a jury's unfettered access to electronic exhibits; there are many reasons defendant may want jury to have unfettered access to recordings, including reviewing inconsistencies between the recording and live testimony given during trial; trial court is not required to make sua sponte restrictions on that access. *Here:* any prejudicial effect of already-admitted evidence was not so clear-cut that the trial court should have limited access to the recordings during jury deliberations.

Martinez v. People, 2017 CO 36. Trial court did not commit plain error by declining to restrict jury's access to recorded statement during deliberations because any error did not undermine fundamental fairness of trial under those circumstances.

People v. Jefferson, 2017 CO 35. When defendant objects, trial courts must exercise discretion over jury's control of electronic exhibits, and particularly forensic interviews, to ensure that video is not given undue weight. Appropriate safeguards might include: (1) limiting instruction; (2) waiting for jury request to view tape; (3) instructing jury not to watch it more than once or twice; (4) requiring jury to watch it under bailiff's supervision; or (5) alternative mitigation procedures as determined by trial court.

People v. Valdez, 2017 COA 41. Even assuming that *Debella* applies to nontestimonial exhibits, court reasonably restricted jury's access to surveillance videos and any error harmless in light of evidence as a whole.

People v. Carter, 2015 COA 36. Pursuant to *Gingles*, trial court does not abuse its discretion in giving jury unlimited access to defendant's voluntary statements; whether recorded statements inculpate/exculpate defendant, fairness in allowing their use is the same; they are defendant's own words and can help jury assess defendant's credibility (or lack thereof).

People v. Gingles, 2014 COA 163. In *Frasco*, Court permitted greater jury access to testimonial statements of witnesses. In doing so, it gave no indication: (1) that jury should have less access to defendant's confession, or (2) that defendant's confession must be treated in same manner as testimonial statement of a witness. Because historical reason for treating defendant's confession differently retains its vitality, COA confirmed continuing viability of rule in Colorado allowing unrestricted jury access during deliberations to defendant's voluntary and otherwise admissible confession.

DeBella v. People, 233 P.3d 664 (Colo. 2010). Procedure to be used when providing jury with videotaped interview during deliberations will be left to discretion of trial court; failure to exercise discretion is an abuse of discretion even if defendant does not pose an objection; trial court has obligation to assure juries are not permitted to use exhibits in a manner that is unfairly prejudicial.

Frasco v. People, 165 P.3d 701 (Colo. 2007). Procedure to be used when providing jury with videotaped interview during deliberations will be left to discretion of trial court; control over use of exhibits during jury deliberations must remain firmly within trial court discretion; court has obligation to assure juries are not permitted to use exhibits in manner that is unfairly prejudicial.

Character Evidence: CRE 404(a), CRE 405, CRE 608[7]

People v. Feldman, 2024 COA 119. A lay witness's testimony about defendant's feigned emotions the week before the victim died was not improper character evidence. Although evidence of a person's character generally is not admissible to prove that the person acted in conformity with a given character trait on a particular occasion, CRE 404(a), "a lay witness may give a summary opinion of another person's behavior, motivation, intent, or state of mind if . . . [the] witness has personally observed the physical activity of another and summarizes his 'sensory impressions thereof.'" That's what happened here.

People v. Salazar, 2023 COA 102. The COA did not have to decide if portions of defendant's recorded interview where he stated he "liked younger guys" and had "cravings" amounted to impermissible character evidence under CRE 404(a) because any error would be harmless in light of the unchallenged evidence admitted at trial. These comments were linked to defendant's confession that he had sexual contact with the victims.

People v. Cardman, 2016 COA 135, rev'd other grounds, 2019 CO 73. Admission of detective's statements during defendant's interview where he told defendant multiple times that he did not believe his denial and he believed at least some of victim's allegations were proper because detective testified at trial that he used these statements as interrogation techniques.

People v. Relaford, 2016 COA 99. Error for expert to testify about circumstances in which child might fabricate claims of sexual assault, and to testify that she had never encountered sexual assault fabrications in any other circumstances; this constituted opinion that victims were not lying; while testimony about general characteristics may be admissible if it relates to issue apart from credibility and only incidentally tends to corroborate witness's testimony, the only purpose of testimony in this case was to bolster victims' credibility. Error was not plain because under existing law, it is not always clear (or even consistent among cases) where to draw line between expert testimony on typical characteristics of sexual assault victims that is permissible and that which is impermissible because it is tantamount to opinion that victim was telling the truth. Because expert did not directly testify that child victims were telling truth, there was no case expressly finding this type of general characteristic testimony improper, and there was substantial evidence corroborating victims' statements.

People v. Nardine, 2016 COA 85. Neighbor's testimony that defendant was "sexual predator" and "not a good person" was improper character evidence.

People v. Serra, 2015 COA 130. Error to allow testimony about victim's character for truthfulness; apart from challenging victim's credibility, defense counsel did not attack her character for truthfulness; thus opinion/reputation evidence of her character for truthfulness was impermissible under CRE 608(a).

People v. Cernazanu, 2015 COA 122. Prosecutor asked about victim's demeanor when she lied; witness replied that victim was "quick at retracting." Prosecutor then asked, "did she ever retract what she told you [regarding this particular incident]?" *Here:* witness may not opine on whether another person was telling truth on a specific occasion; witnesses may not offer their direct opinion on child victim's truthfulness or their opinion on whether children tend to fabricate sexual abuse allegations; opinion testimony bearing on credibility of victim is admissible if testimony relates to general characteristics only; witness's testimony that victim did not engage in her typical "lying" behavior on specific occasion necessarily implied that victim was telling truth; testimony was not admissible to rebut defendant's attack on victim's character for truthfulness because prosecutor did not seek to elicit testimony about victim's general character for truthfulness - questioning explored a specific

[7] CRE 404(a) - character evidence generally; CRE 405 - methods of proving character; CRE 608 - character for truthfulness/untruthfulness.

veracity habit and its application to a specific occasion. Testimony was not harmless because there was no physical evidence or eyewitness testimony, and victim's credibility was critical issue before jury.

People v. Clark, 2015 COA 44. Under CRE 608(b), witness may be cross-examined about specific instances of conduct that are probative of witness's character for truthfulness or untruthfulness; trial court has discretion to exclude CRE 608(b) evidence on CRE 403 grounds; under CRE 403, trial court should exclude evidence that has little bearing on credibility, places undue emphasis on collateral matters, or has potential to confuse jury. While character of witness for truth and veracity may be shown, impeachment may not be accomplished by attacking general character of witness. Trial court should not permit broad inquiry into details of prior acts that may direct jury's attention away from case under consideration, have little probative force, or constitute direct attack on general character of witness.

People v. Trujillo, 2015 COA 22. Court did not abuse its discretion by allowing elderly victim to testify she "never lent her debit card to anyone." Prosecution did not offer or elicit that testimony as character evidence, and victim was not giving a generalized description of her disposition or general traits; victim was describing a "habit" - her regular response to the situation of needing people to buy things for her.

People v. Thomas, 2014 COA 64. Defendant put his credibility at issue by testifying at trial; under CRE 608(b), prosecution properly impeached his credibility with questions about his character for truthfulness/untruthfulness; while CRE 608(b) generally precludes admission of extrinsic evidence of specific instances of conduct, "doctrine of specific contradiction" permits such evidence where it directly contradicts defendant's misleading testimony; defendant can open the door to such extrinsic evidence with misleading testimony, because he should not be permitted to engage in perjury or mislead trier of fact, and then shield himself from impeachment by asserting collateral matter doctrine.

People v. Knight, 167 P.3d 147 (Colo. App. 2006). Where witness's conduct was akin to theft, such conduct was not probative of his character for truthfulness; trial court did not abuse its discretion in finding that such evidence was not admissible on cross-examination under CRE 608(b).

People v. French, 141 P.3d 856 (Colo. App. 2005), vacated other grounds, 141 P.3d 856 (Colo. 2005). Evidence of victim's background was irrelevant, but admission of that evidence was harmless because testimony was brief, prosecutor did not dwell on it in closing argument, and trial court instructed jury not to be swayed by sympathy/prejudice.

People v. Lopez, 129 P.3d 1061 (Colo. App. 2005). Police officer testified about techniques he used to interrogate defendant; he told defendant that victims seemed "credible," in attempt to get defendant to confess; defendant argued this testimony constituted impermissible comment on truthfulness of victim on particular occasion; evidence referencing victim credibility only to describe device to interrogate suspect and explain context in which suspect's statements are made is admissible.

People v. Hall, 107 P.3d 1073 (Colo. App. 2004). Defendant challenged exclusion of defense witness's testimony, offered to impeach prosecution witness's testimony that she would have corrected anyone who accused her of driving vehicle on night of accident; trial court erred by excluding evidence under CRE 608(b), since proffered testimony did not constitute attack on prosecution witness's character; error was harmless.

People v. Goldfuss, 98 P.3d 935 (Colo. App. 2004). Evidence that defendant had never been convicted of crime was not evidence of "pertinent character trait" under CRE 404(a)(1); absence of criminal conviction does not necessarily demonstrate defendant's law-abiding character; evidence that defendant had never been convicted was also inadmissible under CRE 405 because it is not in the form of opinion and does not describe specific instance of conduct.

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). Defendant's suppression hearing testimony may be used to impeach character witness's testimony if trial court determines it is appropriate after balancing defendant's Sixth Amendment right to present evidence with his Fourth and Fifth Amendment rights; that same evidence may not be used to establish defendant's guilt.

People v. Williams, 89 P.3d 492 (Colo. App. 2003). Evidence of victim's ten-year-old DJ&S for shoplifting inadmissible under CRE 608(b) because it was not probative of truthfulness or untruthfulness, was remote in time, and would have resulted in confusion, undue delay, and waste of time.

People v. Ferguson, 43 P.3d 705 (Colo. App. 2001). Trial court properly followed CRE 404(a), CRE 405, and CRE 608 by refusing to admit evidence of specific prior act of violence by victim; this did not violate defendant's confrontation rights: defendant had no knowledge of victim's prior acts at time of crime, and he was permitted to put on evidence that victim was violent and disliked African-American people.

People v. Deroulet, 22 P.3d 939 (Colo. App. 2000), rev'd other grounds, 48 P.3d 520 (Colo. 2002). Evidence of witnesses' violent character could not be introduced to challenge their testimony concerning defendant's nonviolent character because witnesses' violent character had not been placed in issue.

People v. Eppens, 979 P.2d 14 (Colo. 1999). Social worker's testimony that child victim's report of sexual assault was "sincere" amounted to impermissible character testimony; witness is not permitted to offer opinion that child was telling the truth on specific occasion; erroneous admission of opinion testimony was not plain error. Prior consistent statements may be used for rehabilitation when witness's credibility has been attacked; court must find, however, that statements have some probative force bearing on credibility of witness beyond mere fact that witness has repeated statement consistent with trial testimony.

Other Acts Evidence: CRE 404(b)(General), §16-10-301 (Sexual Assaults), §18-6-801.5 (Domestic Violence)

Rojas v. People, 2022 CO 8. In this opinion, the CSC abolishes the common law res gestae doctrine in criminal cases in Colorado. In evaluating whether uncharged misconduct evidence triggers CRE 404(b), a trial court must first determine if the evidence is intrinsic or extrinsic to the charged offense. Intrinsic acts are those that: (1) directly prove the charged offense or (2) occurred contemporaneously with the charged offense and facilitated the commission of it. Evidence of acts that are intrinsic to the charged offense are exempt from CRE 404(b) because they are not "other" crimes, wrongs, or acts. Courts should evaluate the admissibility of intrinsic evidence under CRE 401-403. If extrinsic evidence suggests bad character (and thus a propensity to commit the charged offense), it is admissible only as provided by CRE 404(b) and after analysis under *Spoto*. Conversely, if extrinsic evidence does not suggest bad character, CRE 404(b) does not apply and admissibility is governed by CRE 401-403. *Here:* CSC concludes that the challenged evidence is an extrinsic act that implicates the defendant's character, and its admissibility is therefore governed by CRE 404(b) and *Spoto*. But because the trial court admitted the evidence under the doctrine of res gestae, it didn't conduct a CRE 404(b) analysis and didn't provide the requisite procedural safeguards. This constituted error. Because the error was not harmless, the COA, which affirmed defendant's convictions, is reversed, and the case is remanded to the trial court for a new trial.

Yusem v. People, 210 P.3d 458 (Colo. 2009). Under *Spoto* and *Rath*, prosecutor's 404(b) motion must identify a precise evidential hypothesis by which a material fact can be permissibly inferred. CSC rephrased this requirement: prosecution must identify specific purpose for which evidence will be used and explain how proffered evidence establishes that purpose independent of inference forbidden by CRE 404(b). Purposes for which 404(b) evidence are offered must be individually analyzed as separate purposes under *Spoto;* whether an issue is disputed/undisputed does not affect its materiality under first prong of *Spoto;* it does affect probative value under fourth prong of *Spoto*/CRE 403 analysis. *Here:* menacing case where defendant brandished gun and claimed self-defense, incident that occurred 9 months prior where defendant angrily yelled at his apartment manager while his service weapon was displayed on hip, was logically relevant to the material issues of defendant's motive, knowledge, and mental state; evidence was not logically relevant to absence of mistake/accident; this evidence was indistinguishable from bad character inference prohibited by 3rd prong of *Spoto*, (i.e., defendant bullied someone in past while wearing gun, so likely bullied someone again by brandishing gun). Reversible error under CRE 403 because: (1) mental state, motive, and knowledge were either undisputed or easily proved by other means; (2) evidence supported more than one inference – purposeful/inadvertent display of weapon – making it less probative of either inference; (3) probative value could not be separated from prohibited inference that defendant was a bully; (4) defendant's self-defense claim was plausible and his credibility was crucial issue; (5) evidence injected collateral issue which could have confused jury because witness to other act also testified about charged offense and limiting instruction contained laundry list of purposes for which jury could use evidence (should have been limited to actual purpose(s) for which it was admitted);and (6) court disapproved of the prosecutor's motion because the purposes were "carelessly grouped together."

People v. Warren, 55 P.3d 809 (Colo. App. 2002). Pretrial notice is not required for admission of CRE 404(b) evidence, but in some circumstances pretrial notice may be necessary to avoid prejudicial surprise to defendant.

People v. Owens, 2024 CO 10. While the DA did not strictly comply with CRE 404(b)'s notice requirement (because they requested it as res gestae), the record demonstrates that defendant was fully on notice of this evidence. There was no prejudice from any failure to provide the advance written notice that CRE 404(b) requires. *Here:* the trial court determined that the Lowry Park evidence was relevant to motive and identification, which the court deemed material facts, and that without a contextual understanding of why defendant had targeted his victim (a witness to his prior murder), the jury would be left with the impression that his killing was simply a random act of violence. The court further concluded that motive and identification were important purposes and that the probative value of the evidence was strong enough to overcome any bad inference as to defendant's propensity to commit bad acts. Although the Lowry Park evidence was, to some degree, prejudicial, it was not unfairly prejudicial because a good amount of this evidence was necessary to establish the prosecution's theory of its case. Although this Court might have reached a different conclusion than the trial court were it deciding in the first instance how much of the Lowry Park evidence to admit, the trial court had substantial discretion to decide this issue, and there was no abuse of discretion in its determination.

People v. Cooper, 2023 COA 113. Defendant filed a Crim.P. 35(c) motion arguing that, because *Rojas*, which abolished the res gestae doctrine, established a new rule of criminal procedure, it should be applied retroactively pursuant to *Teague*. The postconviction court denied relief under Rule 35(c), concluding that *Rojas* "did not amount to" a watershed rule of criminal procedure that applied retroactively under *Teague*. This division affirms, albeit on different grounds. COA concludes that *Teague* does not apply because *Rojas* did not announce a new *constitutional* rule of criminal procedure. Instead, §18-1-410(1)(f)(II) and Rule 35(c)(1) bar any postconviction claims seeking retroactive application of a significant non-constitutional change in the law once the conviction has become final.

People v. Cross, 2023 COA 24. The trial court reasonably determined that the logical relevance of defendant's prior DV acts were independent of an inference of bad character because the prior acts showed that the relationship may have been volatile and one leading to violence. The prior act evidence placed the shooting in perspective: it showed that defendant previously reacted in an angry and controlling manner after overhearing victim's plans to leave him, the physical violence had reoccurred during the months leading up to victim's death, and the victim was once again planning to leave defendant. A reasonable juror could logically infer defendant's motive from this evidence, independent of any intermediate character inference. Such evidence, coupled with the evidence establishing that defendant attempted to control the victim's access to her friends and family and emotionally abused her, tended to make it more probable that defendant knowingly killed the victim and that the gun did not discharge accidentally. Although the challenged prior act evidence concerned events that occurred as long as three years before the shooting, the evidence was substantially similar to the evidence establishing that, shortly before the victim's death, defendant had physically abused her and she had talked about leaving him if the abuse did not stop. The evidence showed that Cross's DV acts targeting the victim were ongoing. Thus, the trial court did not err by determining that the challenged prior act evidence was "highly probative of the relationship dynamic" between defendant and the victim, and the consistent volatility of their relationship.

People v. Williams, 2020 CO 78. Modus operandi evidence is *not* only admissible to prove the identity of the perpetrator. CRE 404(b) analysis is the same regardless of whether the crimes involved sexual offenses or domestic violence. Other-crime evidence could be admissible to prove a "common plan, scheme, or design," and the plan need not be devised before the prior crime was committed and included within the plan the commission of the charged crime. *Here:* because the incremental probative value of the prior drug sale relative to any material issue in the case was substantially outweighed by the danger that it would be unfairly prejudicial, the district court abused its discretion in admitting it.

People v. Sabell, 2018 COA 85. Trial court did not abuse its discretion by admitting evidence for purposes of intent when defendant injected affirmative defense of involuntary intoxication into case; limiting instruction that included intent was accurate.

People v. Thompson, 2018 COA 83. Under CRE 404(b), defendant's prior act cannot be admitted to prove defendant's character to show defendant acted in conformity with that character on a particular occasion; it can be admitted for other purposes. That other act evidence may imply defendant's bad character does not preclude the evidence so long as it is offered for a permissible purpose; admissibility does not require the absence of inference of bad character but merely requires that proffered evidence be logically relevant independent of that inference. The admission of other act evidence is reviewed for an abuse of discretion. Defendant will not be disturbed unless it was arbitrary, unreasonable, or unfair. *Here:* evidence that defendant had permanently deprived another investor of his money by similar false promises and deceptive statements involving same project was logically relevant to prove that his motive was not to entered into legitimate business agreement with victims, and his inability to return victims' investment was not due to a mistake/accidental circumstances.

People v. Van Meter, 2018 COA 13. Trial court did not commit plain error by admitting evidence that gun may have been stolen or that defendant used meth because defense did not object and used both pieces of evidence as integral portion of defense.

People v. Heredia-Cobos, 2017 COA 130. Although similarities between prior acts may give prior act evidence more probative force for certain theories of relevance, it is not necessary that prior acts replicate charged act in all respects; prior act evidence was admissible under §16-10-301 even though age of prior victims and some differences in type of sexual contact were present.

People v. Relaford, 2016 COA 99. Defendant used sex toys/pornography during sexual assaults and, at trial, all sex toys/pornography seized from defendant were admitted into evidence; some of sex toys were identified at trial as objects used during sexual assaults; many of other objects were found in locations where victims said defendant kept these types of items; some of pornographic videos were consistent with victims' descriptions of scenes they remembered from videos. Majority of evidence was properly admitted because it was directly relevant; COA declined to address whether it was res gestae. The sex toys described by victims and at least some of pornography were not subject to CRE 404(b) because they did not involve a separate episode and did not depend on an impermissible inference about defendant's character. However, items not described by victims or found in locations described by them were not relevant and should not have been admitted; any error was harmless because some of items were properly admitted, there was substantial evidence of defendant's guilt, and prosecutor did not argue that jury should use evidence as propensity evidence and explicitly told jury not to use it for this purpose.

People v. Gee, 2015 COA 151. CRE 404(b) generally governs evidence of defendant's other crimes or bad acts that are extrinsic to events charged. It does not apply to offenses committed as part of single criminal episode in which defendant is charged for fewer than all of his actions.

People v. Serra, 2015 COA 130. Evidence of defendant's bad character was CRE 404(b) evidence, although it was relevant to show how defendant would communicate. Discussion of defendant's "smirk," while not evidence of prior criminality, constituted an "other act." To fall under CRE 404(b), evidence need not be only of prior criminal conduct.

People v. Weeks, 2015 COA 77. Trial court properly admitted multiple instances of other act evidence because evidence was logically relevant to show absence of mistake or accident; evidence was admissible under doctrine of chances; incidents involving abuse of pet animals was admissible to show link with child abuse; and

evidence was not so unfairly prejudicial as to be excluded. Alternatively, at least one piece of 404(b) evidence was harmlessly admitted because case against defendant was very strong.

Perez v. People, 2015 CO 45. Defendant picked up teenage girl, offered her drugs and a ride, and then sexually assaulted her in his car; before trial, People moved to admit prior act evidence of prior sexual assaults; evidence would show that several years before incident, defendant showed up at 42-year old woman's house, brought her flowers, and told her that she smelled good; woman pushed defendant away and he left; few weeks later, she thought she saw defendant at her window; he later dressed up as city inspector, got in her house, and told her room was "sexy;" when she realized it was him, she went to her neighbor's house, and defendant left; few weeks later, defendant appeared at her bedroom window at night, and told her he had brought her flowers; she screamed, and defendant ran. On all of these occasions, defendant did not sexually contact her in any way. Trial court admitted evidence at trial for purpose of defendant's intent to commit sexual assault on child victim in this case as it related to enticement of child count but told jury the evidence could not be considered as to sexual assault and kidnapping charges. CSC held that because trial court abused its discretion in admitting prior act evidence on enticement charge, under facts of this case, error was also not harmless as to convictions on 2 remaining counts because (1) all of the counts for which defendant was convicted included a similar element regarding sexual conduct, and (2) prosecutor's statements/arguments urged jury to consider the 404(b) evidence beyond its limited scope and implied it was relevant to all counts.

People v. Harris, 2015 COA 53. Evidence of prior incident where defendant, in her car, tried to run down an adult with a child in another car, was not logically relevant to defendant's mental state, or to refute defense of mistake or accident, because two incidents were not similar and did not satisfy doctrine of chances.

People v. Clark, 2015 COA 44. Gang evidence is relevant if it provides motive to commit a specific intent crime. While expert testimony about gangs must be admitted with care, such evidence may be admitted to prove material facts. Material facts may either be "ultimate facts" (i.e. evidence defendant committed crime, evidence of requisite intent, or evidence of deliberation) or "intermediate" or "evidential" facts that are probative of "ultimate facts." *Here:* prosecution's gang evidence provided nexus between crime and gang membership independent of any improper character evidence.

People v. Delsordo, 2014 COA 174. CRE 404(b) evidence improperly admitted where other acts (pertaining to false reporting) were not similar to charged crimes (arson/reckless endangerment); there was insufficient basis to conclude that defendant acted with same motive in prior acts and charged crimes other than prohibited general inference of criminal propensity.

People v. Whitlock, 2014 COA 162. Trial court properly admitted some other act evidence that was probative of defendant's method and intent of seeking sexual gratification from sleeping, isolated individuals; also probative to refute defendant's claim that victim fabricated incident. Trial court erred in admitting some of other act evidence because there is markedly different motivation/perspective underlying a 20/21-year-old male's interest in 15-year-old girl, and a nearly 31-year-old male's interest in 12-year-old girl.

People v. Brown, 2014 COA 130. Testimony of CRE 404(b) witness was qualitatively different, more severe, and more inflammatory than the evidence concerning the charged offenses; such evidence was likely to entice jury to render decision on improper basis, such as sympathy for victim, or hatred, contempt, retribution, or horror at defendant's alleged prior misconduct. *Here*: there was reasonable probability that error contributed to defendant's convictions by substantially influencing verdict or impairing trial's fairness because error concerned core dispute at trial.

People v. Trujillo, 2014 COA 72. Evidence related to gang affiliation that "involves a separate and distinct

episode wholly independent from offense charged," may be admissible under CRE 404(b) if evidence complies with the established *Spoto* test. Testimony about gang rules against cowards was relevant to material fact of Defendant's motive, but testimony about gang's organizational structure was not probative of motive and was inadmissible. Testimony about gang rules against cowards was logically relevant to Defendant's motive because it made it more probable he joined in assault because, as a gang member, because he was required to; relevant to show Defendant followed the rules and was independent of prohibited inference of bad character. But testimony that gang was known to commit violent crimes, including homicides, distributing narcotics, and theft was impossible to distinguish from inference that Defendant acted in conformity with bad character. While testimony that gang retaliates violently against "snitches" may have been relevant to witness' reluctance to testify, but it was unduly prejudicial, particularly because her fear of retaliation had already been established.

People v. Thomas, 2014 COA 64. Evidence of specific acts introduced solely for impeachment purposes are governed by CRE 608(b) not CRE 404(b).

People v. Cook, 2014 COA 33. Evidence of defendant's prior Boulder case was proper CRE 404(b) evidence to show lack of mistake, common plan, identity, and motive; fact that trial court did not provide extensive details about how prior acts were similar to current acts was neither significant nor required.

People v. Conyac, 2014 COA 8M. Court addressed whether defendant's consensual sexual act (or request for a sexual act) with spouse in trial for child sexual abuse can be properly admitted under CRE 404(b) as evidence of motive. Citing cases from other jurisdictions, court held that such evidence could be admissible if a relevant theory was established. Court agreed with *Villa* and found that differences between §16-10-301 and §18-3-407 do not violate defendant's due process/equal protection rights. *Here:* DA offered the evidence to show defendant was interested in performing anal sex, he had previously asked his wife to perform such act, she had refused, and defendant turned to his stepdaughter; inferentially, evidence was properly offered for purposes of proving motive.

People v. Jones, 2013 CO 59. **Doctrine of chances** provides one theory of relevance that satisfies second and third prongs of *Spoto;* courts are under no obligation to analyze other acts evidence under doctrine of chances; they retain discretion to apply doctrine of chances when they see fit.

People v. Lahr, 2013 COA 57. Evidence of another robbery committed by defendant was properly introduced under CRE 404(b) for purposes of establishing defendant's identity because: (1) robberies occurred in close geographic/temporal proximity to each other; (2) description of perpetrator of each robbery was substantially similar; (3) weapon and manner in which it was used was similar in each robbery; and (4) evidence of each robbery was found in car being used by defendant.

People v. Casias, 2012 COA 117. Defendant's other acts may be independently relevant to his/her knowledge or recklessness under CRE 404(b) if during the other act: (1) defendant revealed guilty knowledge of circumstance or risk; (2) defendant gained direct knowledge of a fact or risk relevant to charged offense; (3) defendant learned something which circumstantially provides evidence of knowledge or recklessness at time of crime; or (4) when other acts tend to prove requisite knowledge under **doctrine of chances**. If doctrine of chances is used to establish defendant's knowledge, uncharged act should closely parallel charged act, and the most important factor concerning similarity is whether prior act and charged offense require same state of mind. *Here*: prior child abuse was not similar enough to be admissible in trial for knowing killing and knowing/reckless child abuse; there was an age discrepancy between victims; occurrences were months apart; defendant's acts were materially different; in prior act defendant was angry; and results were different.

People v. Rowe, 2012 COA 90. Fact that defendant previously admitted visiting child pornography sites and liking child pornography was admissible as evidence of defendant's intent/lack of mistake; fact that defendant

kept his animated child pornography in same location as his illegal child pornography was relevant to show intent, motive, and lack of mistake.

People v. Cordova, 293 P.3d 114 (Colo. App. 2011). Evidence of knives seized from defendant's person/vehicle was admissible under CRE 404(b) where victims testified they suffered lacerations during a fight with defendant and his friend, existence of lacerations was corroborated by ample evidence, and defendant admitted he and his friend fought with victims, but denied he had cut them, thus making whether defendant or his friend had inflicted victim's injuries essential issue to be resolved at trial; evidence of defendant's possession and ownership of knives had tendency to make it more probable that defendant possessed and used knife on night of stabbing; relevance of knives seized from defendant's person/vehicle was independent of any intermediate inference regarding his character; and prosecutor made no argument that defendant was fascinated with knives and was dangerous man.

People v. Herron, 251 P.3d 1190 (Colo. App. 2010). Erroneous admission of CRE 404(b) evidence is not error of constitutional dimension.

People v. Harland, 251 P.3d 515 (Colo. App. 2010). Testimony that defendant was identified through hit in DNA database does not constitute CRE 404(b) evidence because it is not offered to prove defendant acted in conformity with a character trait.

People v. Everett, 250 P.3d 649 (Colo. App. 2010). Evidence of uncharged sexual assault against different victim was properly admitted because: it related to material fact - by raising consent defense, defendant asserted victim was lying and contested the actus reus of sexual assault; it was logically relevant to defendant's consent defense under "doctrine of chances"-assaults shared significant similarities; fact that defendant was involved in two such unusual incidents exceeded frequency rate for general population; and there was real dispute whether actus reus occurred; relevance was independent of bad character inference as "it is objectively improbable that two women would say that they had been sexually assaulted by defendant" under similar circumstances; probative value of evidence was not substantially outweighed by danger of unfair prejudice where trial court twice evaluated admissibility, referred to controlling law, and rejected several other purposes proposed by prosecution.

People v. Schreiber, 226 P.3d 1221 (Colo. App. 2009). In indecent exposure case, evidence that defendant previously exposed himself to other women on other occasions was relevant whether defendant knowingly (not accidentally) exposed himself in this case; evidence also made it more probable that defendant was aware exposure was likely to cause affront/alarm to victim.

People v. Villa, 240 P.3d 343 (Colo. App. 2009). Where defendant is charged with SAOC and does not stipulate that he (1) committed the assault, or (2) committed it for purpose of sexual arousal, gratification, or abuse; intent is material element that prosecution has right to prove through prior act evidence.

People v. Munoz, 240 P.3d 311 (Colo. App. 2009). Defendant's taking of victim's roommate's property from storage unit was admissible under CRE 404(b) as evidence of his motive to commit charged offenses – attacking/killing victim.; evidence was logically relevant to defendant's motive, as there was evidence that defendant previously had intimate relationship with roommate and may have been jealous of her relationship with victim. Where no testimony/evidence in record suggested that certain evidence was introduced to prove other bad acts committed by defendant and no testimony was elicited for purpose of showing that the evidence demonstrated defendant's bad character, inquiry into whether evidence was properly admitted would not address CRE 404(b) but would address only general relevance of evidence.

People v. Beilke, 223 P.3d 146 (Colo. App. 2009). Where defendant was charged with violating custody order, trial court did not err in admitting another custody order that detailed various instances of misconduct by

defendant; evidence of his prior misconduct related to a material fact – defendant's motive - and was logically relevant because it tended to negate his affirmative defense that he removed child because he was concerned for her welfare; also went toward proving that he removed child because he knew he was likely to lose custody because of misconduct detailed in previous order.

People v. Griffin, 224 P.3d 292 (Colo. App. 2009). When determining whether to admit any evidence which suggests that defendant is person of bad character, a trial court must apply *Spoto* even though CSC held in People v. Greenlee, 200 P.3d 363 (Colo. 2009) that the admissibility of defendant's statements is not subject to CRE 404(b). *Here:* writings in which defendant stated she believed people of victim's race/gender should be killed, and that she had a "dismissive view of laws."

People v. Gallegos, 226 P.3d 1112 (Colo. App. 2009). Evidence that defendant previously used her sister's name in connection with an arrest was relevant to show her intent to (1) buy time before her identity could be determined, and (2) evade responsibility for what she had done.

Kaufman v. People, 202 P.3d 542 (Colo. 2009). Other acts evidence concerning defendant's possession of other knives/weapons, none of which he carried at time of charged incident and none of which were significantly similar to knife used in charged incident, was not relevant to intent in prosecution for murder/attempted murder, but merely painted picture of defendant as a bad person. CSC declined to approve a per se rule that evidence about weapon possession could never be admitted into evidence unless there was proof connecting it to crime and defendant - other act evidence was only admissible if it satisfied requirements of four-part *Spoto* test. Other acts evidence of defendant's training in knives at self-defense class and during military training on use of bayonets was admissible to show defendant intentionally maneuvered knife used in charged altercation to inflict extraordinary/grievous injury; evidence was not presented in inflammatory way, defendant was able to explain his limited training during his own testimony, and court provided a limiting instruction.

People v. Orozco, 210 P.3d 472 (Colo. App. 2009). Evidence of other sexual assaults involving victims of different age/gender is relevant to show intent/motive in charges of incest and SAOC; where defendant disputes victim's allegations, prior acts relevant to identify defendant as perpetrator of present offense and to rebut suggestion that victim fabricated his allegations.

People v. Greenlee, 200 P.3d 363 (Colo. 2009). Because a defendant's statements about having a plan to kill a woman and dispose of her body in a remote area was not conduct, did not amount to an independent crime, and did not reveal prior bad acts, its admissibility did not implicate CRE 404(b).

People v. Davis, 218 P.3d 718 (Colo. App. 2008). When admitting evidence under CRE 404(b), court need not make explicit findings on record that other act occurred and defendant committed it. It is sufficient for court to find that prosecution met its burden by preponderance of evidence solely through its offer of proof.

People v. Romero, 197 P.3d 302 (Colo. App. 2008). Evidence that defendant was in work release on 2 previous occasions and was therefore familiar with procedures for release from county jail, was properly admitted to refute claim that when he did not return to facility, he thought he had been released from his sentence, despite fact he did not go through normal check-out procedures.

Kinney v. People, 187 P.3d 548 (Colo. 2008). Trial court can admit prior act evidence even if defendant was acquitted of those acts -- if court is satisfied by preponderance of evidence that prior act occurred, and evidence otherwise complies with the four-prong *Spoto* test. When such evidence is admitted, it is within trial court's discretion to determine whether jury should be informed of acquittal(s). Review of trial court's determination is for abuse of discretion, on case-by-case basis. An instruction regarding the acquittal is appropriate where prior-act testimony or evidence presented at trial indicates that jurors have likely learned or concluded that defendant was tried for prior act and may be speculating as to defendant's guilt/innocence at prior trial. Court may give a

thorough instruction that also advises jurors they should not necessarily presume defendant was factually innocent because of acquittal, but rather that previous jury determined for whatever reason that state failed to prove guilt beyond a reasonable doubt. *Here:* jury should have been told of acquittals.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). CRE 404(b) adopts an inclusionary rather than exclusionary approach to admission of prior act evidence; courts are accorded great discretion in deciding whether to admit evidence of other acts; when determining whether probative value of CRE 404(b) evidence is substantially outweighed by the danger of unfair prejudice, court must analyze the weight to be added to prosecution's case, considering its probative force and prosecution's need for it, in light of other admissible evidence. Because CRE 403 analysis favors admission of evidence, appellate court reviewing trial court's decision to admit evidence must view evidence as having the maximum probative value and minimum prejudicial impact reasonable juror would give it. Trial court's decision to admit CRE 404(b) evidence may be defended on trial court's express rationale, or on any ground supported by record, even if that ground was not articulated/considered by trial court. Court should instruct a jury on the limited purpose served by CRE 404(b) evidence when it is discussed in testimony and again in the closing instructions; but where jury received an instruction contemporaneous to one witness's testimony and again in closing charge, any error in failing to give instruction during testimony of another witness was harmless.

People v. Baker, 178 P.3d 1225 (Colo. App. 2007). Trial court may determine by preponderance of evidence that prior bad act occurred based on prosecutor's offer of proof; defendant not entitled to cross-examine victim at pretrial evidentiary hearing.

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). Routine destruction of videotaped victim interviews after charges involving those victims were dismissed did not preclude admission of victims' testimony as "other acts" evidence at trial on new charges involving different victims. Fabrication theory of relevance for "other act" evidence does not depend on temporal proximity or exacting similarity COA does not need to compare/contrast factual details of various sexual assaults when other act is logically relevant to rebut suggestion of fabrication.

People v. Mintz, 165 P.3d 829 (Colo. App. 2007). Where witnesses referred to defendant's probation officer and offense-specific treatment provider as his "court-appointed" therapist and counselor, there was no error; terms did not imply that defendant was on probation or that he committed prior felony.

People v. Torres, 141 P.3d 931 (Colo. App. 2006). Defendant broke into ex-girlfriend's home, assaulted her and dragged her to basement. Under CRE 404(b) and DV statute, §18-6-801.5, trial court properly admitted prior incident. Although statute requires cautionary instruction on limited use of defendant's prior bad acts, defendant did not request it, and trial court's failure to give it *sua sponte* was not plain error.

People v. Rincon, 140 P.3d 976 (Colo. App. 2005). Evidence that defendant drove every two weeks to his family's out-of-state home to buy drugs was not relevant to disprove defendant's claim that he had driven there after the crimes at issue merely to visit his family and was impermissible other bad acts evidence.

People v. Taylor, 131 P.3d 1158 (Colo. App. 2005). Evidence defendant previously possessed crack cocaine was relevant to whether he knowingly possessed imitation crack cocaine; prior possession made it more probable that he was aware that substance he possessed appeared to be crack cocaine; evidence was independent of intermediate inference that defendant was person of bad character.

People v. Lopez, 129 P.3d 1061 (Colo. App. 2005). In sexual assault prosecution, officer's testimony referring to "another victim" and "other victims" of sexual assault constituted inadmissible other acts evidence, since testimony clearly implied that defendant had been accused of/committed crimes of sexual misconduct involving other children. *Here*: not reversible error – the first statement (defendant did not object), error was not plain

since this case involved alleged sexual assault on more than one victim; the second comment, once defendant objected, prosecutor "cured" any error by asking witness whether he was merely referring to other victims in this case (rather than other, additional victims), and witness confirmed he was.

People v. Cooper, 104 P.3d 307 (Colo. App. 2004). Trial court did not abuse its discretion by admitting (1) defendant's admission that he used methamphetamine the day before he was arrested; and (2) police officers' observations of defendant outside methamphetamine manufacturing facility day before he was arrested, because, under facts here, evidence was logically relevant as to whether defendant knew of presence of methamphetamine in car he was driving.

People v. Moore, 117 P.3d 1 (Colo. App. 2004). In DV cases, admissibility of prior acts is governed by §18-6-801.5 and CRE 404(b). In determining whether defendant committed prior DV acts, court may rely solely on parties' offers of proof; an evidentiary hearing, although permissible in court's discretion, is not required.

People v. Ma, 104 P.3d 273 (Colo. App. 2004), rev'd other grounds, 121 P.3d 205 (Colo. 2005). Trial court must, pursuant to *Spoto* and CRE 104(a), find by preponderance of the evidence that proffered prior DV acts actually occurred before admitting them under §18-6-801.5; court does not need to hold evidentiary hearing if offer of proof satisfies preponderance standard.

People v. Larson, 97 P.3d 246 (Colo. App. 2004). Evidence concerning 4 prior sexual assaults on children committed by defendant was properly admitted, despite fact that assaults occurred 27-33 years prior, because assaults were sufficiently similar to offense at issue to be probative on identity, modus operandi, and intent; probative value was not substantially outweighed by any danger of unfair prejudice, particularly in light of limiting instructions given by court.

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). CRE 404(b) does not apply when other acts are admitted as directly relevant to elements of charged offense. *Here:* evidence of National Association of Securities Dealers complaint and decree, which barred defendant from associating with NASD members, was properly admitted in securities fraud trial, because information in the complaint, and sanction imposed by the NASD, were material information that should have been disclosed to Colorado investors.

People v. Novitskiy, 81 P.3d 1070 (Colo. App. 2003). Defendant's statement to police officer that he was previously accused of doing "something similar" to charges being prosecuted but, "there wasn't any evidence to pursue charges" was inadmissible evidence of other bad acts.

People v. Salyer, 80 P.3d 831 (Colo. App. 2003). Where sheriff's officers' contact with defendant was result of homicide investigation, it was appropriate for jury to hear that defendant was suspect in the homicide; evidence of defendant's prior drug dealing was properly admitted, to show his intent to sell marijuana he undisputedly possessed.

People v. McKinney, 80 P.3d 823 (Colo. App. 2003), rev'd other grounds, 99 P.3d 1038 (Colo. 2004). No plain error: when trial court does not sua sponte conduct CRE 404(b) analysis of unchallenged evidence; when prosecution elicited testimony that witness traded places with defendant during traffic stop in order to protect defendant from being charged with traffic violation; prosecution focused on witness's conduct and credibility, and showed that she previously lied to protect defendant; in admitting testimony that defendant owed money to his lawyer for defending him against a DUI charge because there was no express testimony that defendant was convicted of any DUI offense.

Masters v. People, 58 P.3d 979 (Colo. 2002); People v. Garner, 806 P.2d 366 (Colo. 1991); People v. Spoto, 795 P.2d 1314 (Colo. 1990). Proponent must demonstrate, by a preponderance of evidence, that other act occurred and that defendant committed the act. Under CRE 404(b), other acts evidence is admissible if it: (1) relates to a material fact; (2) is logically relevant; (3) has logical relevance that is independent of intermediate

inference that defendant has bad character and acted in conformity therewith; and (4) has probative value that is not substantially outweighed by its prejudicial affect.

People v. Apodaca, 58 P.3d 1126 (Colo. App. 2002). Trial court properly admitted defendant's 8-year-earlier act as evidence of identity.; earlier act and charged offense were similar because in both cases, defendant took advantage of his acquaintance with young girl and committed non-consensual digital penetration while victim remained clothed; under §16-10-301, general assembly intended that similar transaction evidence be more readily available in sexual assault cases.

People v. Harrison, 58 P.3d 1103 (Colo. App. 2002). In case involving beating and resulting death of homeless man, evidence of subsequent assault committed by defendant on another homeless man was properly admitted under CRE 404(b); evidence was relevant to material issues of identity and intent since two acts were perpetrated by group of homeless youths who severely beat homeless men and then left them to die.

People v. Rath, 44 P.3d 1033 (Colo. 2002). Admissibility of other act evidence follows 4-step analysis: (1) evidence must relate to a material fact - at this stage, it does not matter whether material fact is contested (consideration for 4th step because it affects incremental probative value of evidence) - "identity" does not mean "mere presence;" (2) evidence must be logically relevant; (3) logical relevance must be independent of forbidden inference; (4) CRE 403 balancing test applied - trial court necessarily retains great deal of discretion, bearing in mind that uncharged misconduct always has substantial potential for unfair prejudice - court does not consider probative value in isolation, it determines the "marginal" or "incremental" probative value of evidence by considering the logical force of the evidence and the need for the evidence in light of other available evidence. Depending on particular evidential hypothesis, similarity may/may not be factor in assessing logical force of other act evidence. Other act evidence is not admissible solely to bolster credibility of prosecution witness, but neither is it excluded merely because it has that effect. If victim's disputed testimony is only direct evidence of commission of guilty act, the incremental probative value of other act evidence may be particularly high.

People v. Mata, 56 P.3d 1169 (Colo. App. 2002). To rebut defense theory of fabrication, defendant's adult daughter testified that defendant sexually abused her multiple times when she was a child; properly admitted under §16-10-301(3) and CRE 404(b) because daughter and victim were of similar age at time of assaults, both were familiar to defendant and molested in his home, the progression of abuse was similar, and defendant threatened both children to maintain secrecy.

People v. Underwood, 53 P.3d 765 (Colo. App. 2002). In sex offense cases, admissibility of other act evidence governed by both §16-10-301 and CRE 404(b). Under §16-10-301: (1) an interval of 3 years did not make prior incidents too remote; (2) detailed offer of proof sufficiently established prima facie case and occurrence of other acts; and (3) failure to give a limiting instruction was not plain error.

People v. Rivera, 56 P.3d 1155 (Colo. App. 2002). In securities fraud case, co-conspirator's prior felony convictions and defendant's numerous acts of bad business practice were not subject to CRE 404(b) limitations but were admissible to show defendant concealed material information to advance fraudulent course of business; evidence that co-conspirator used investor funds for personal use and solicited other victims was admissible to prove existence of a conspiracy to defraud.

People v. Warren, 55 P.3d 809 (Colo. App. 2002). Pretrial notice is not required for admission of CRE 404(b) evidence, but in some circumstances pretrial notice may be necessary to avoid prejudicial surprise to defendant. *Here:* no surprise where defendant moved to exclude the evidence in motion *in limine*. No plain error where trial court failed to identify purpose of CRE 404(b) evidence in its limiting instruction on direct examination since it cured any potential prejudice by doing so after cross-examination. When a contemporaneous limiting

instruction states explicit purpose of CRE 404(b) evidence, closing instruction need only remind jury that certain evidence was admitted during trial for limited purpose.

People v. Trusty, 53 P.3d 668 (Colo. App. 2001). Evidence of alternate suspects' prior drug dealing was properly excluded because those crimes were not sufficiently distinctive to be probative of whether the suspects committed the charged offense.

People v. Medina, 51 P.3d 1006 (Colo. App. 2001), aff'd other grounds, 71 P.3d 973 (Colo. 2003). Evidence that defendant tried to persuade witness not to testify against him was properly admitted pursuant to CRE 404(b) to show defendant's consciousness of guilt and knowledge of crime.

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). Evidence of child abuse victim's prior fractured ribs, which could not be attributed to defendant, was admissible under CRE 703 to support doctor's opinion that cause of death was nonaccidental trauma; evidence was correctly not offered or considered as CRE 404(b) evidence.

People v. Martinez, 36 P.3d 154 (Colo. App. 2001). Defendant's admission he raped women in past was logically relevant to his intent and victim's lack of consent because it demonstrated that defendant knew difference between consensual sex and forced intercourse.

People v. Ramirez, 18 P.3d 822 (Colo. App. 2000). Prior DV act admissible under §18-6-801.5 and CRE 404(b) to show common plan, scheme, design, identity, modus operandi, motive, or guilty knowledge; court has substantial discretion in determining whether to admit it. *Here*: prosecution for burglary, defendant's earlier assault on his wife was relevant to element of intent to commit underlying crime - assault - at the time of trespass; prior assault made it more likely that defendant's intent was to assault his wife and not merely frighten her.

People v. Wallen, 996 P.2d 182 (Colo. App. 1999). Admission of defendant's prior sexual assault was not barred by collateral estoppel, even though defendant was acquitted of earlier charge, because a lower standard of proof (preponderance of the evidence) applies to admission of other acts evidence.

Rape Shield: §18-3-407

People v. Melillo, 25 P.3d 769 (Colo. 2001). The rape shield statute creates a rebuttable presumption that evidence relating to victim's prior/subsequent sexual conduct with persons other than defendant is irrelevant in a criminal prosecution, except when it is offered to show "the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant." In determining whether prejudice substantially outweighs probative value of evidence proffered under rape shield procedure, trial court may consider policy of rape shield law, which is to protect sexual assault victims against psychological and emotional abuse and invasion of privacy. *Here*: Evidence that teenage victim was sexually assaulted by a babysitter when she was three years old would invade victim's privacy and subject her to psychological and emotional abuse.

Pierson v. People, 279 P.3d 1217 (Colo. 2012). Rape shield statute (1)(b) "source or origin of semen" exception is limited to evidence of "sexual intercourse." Evidence that a child-victim was sexually assaulted by someone other than defendant may be admissible under subsection 2(e) of the statute to rebut the inference that child's precocious sexual knowledge was gained from defendant. To be admissible, defendant must show that the child's sexual knowledge is precocious (likely through expert testimony), and that other abuse is sufficiently similar to the child's allegations against defendant as to rebut inference that child was abused by defendant. Presumption under rape-shield statute as to irrelevance of alleged victim's prior or subsequent sexual conduct, as applicable to evidence not falling with two specific exceptions, in no way alters the required balancing, under generally applicable rule of evidence, of probative value of such evidence against danger of unfair prejudice, confusion of issues, or misleading the jury when such evidence is offered as being otherwise relevant to a material issue. *Here:* evidence that child-victim's cousin touched her vagina was properly excluded under this exception because it was not evidence of sexual intercourse under (1)(b).

People v. Bryant, 94 P.3d 624 (Colo. 2004). Rape shield statute: (1) protects the sexual assault victim's privacy; (2) allows the accused person to explore facts, examine witnesses, present testimony, and challenge expert opinion to uncover material evidence potentially helpful to the defendant; (3) enables the trial judge in pre-trial proceedings to determine what shall be admitted or excluded at the public trial; (4) shelters all evidence in the *in camera* proceeding from being reported publicly; (5) keeps the evidence that is not material and relevant from being publicly reported in the future; and (6) serves the state's interest in prosecuting those accused of sexual assault and protecting the victims of sexual assault while affording defendants a fair opportunity to confront their accusers and hold prosecutors to the burden of proof at the public trial.

People v. Gholston, 26 P.3d 1 (Colo. App. 2000). Under rape shield statute, victim's "prior or subsequent sexual conduct" is presumed irrelevant. This includes sexual assaults perpetrated *against* victim, as well as sexual assaults perpetrated *by* the victim. Trial court properly excluded evidence that victim had sexually assaulted a sibling.

People v. Ramcharan, 2024 COA 110. An offer of proof submitted to pierce the rape shield statute, §18-3-407(2)(b), that consists only of a summary of witness statements without any explanation of whether the statements are admissible is insufficient. The COA reasoned that although there's no requirement that the affiant who executes the affidavit under §18-3-407(2)(b) speak with the witnesses whose statements appear in the affidavit, an affiant's sole reliance on third-party documents to obtain those statements increases the likelihood that a court will determine that the offer of proof fails to establish the statements' admissibility.

People v. Hood, 2024 COA 27. In this sex-assault case, COA held that the presence of another male's DNA profile on the victim's external genitalia did not constitute evidence of a "specific instance of a victim's prior or subsequent sexual conduct" under the rape shield statute, §18-3-407(1), which is presumptively inadmissible evidence barring an exception, because there was no other evidence presented to suggest that the DNA profile had been planted there by means of sexual contact as opposed to being transferred there. Further, the evidence was relevant under CRE 401 because it made it less likely that defendant's DNA was not found on the victim's body because she had showered shortly after the assault or because her body had naturally expelled it, which was the prosecution's theory. And because the evidence did not fall under the rape shield statute and because it was highly relevant for defendant when attacking the prosecution's theory, the evidence was admissible under CRE 403. Therefore, the trial court erred by excluding this evidence and error was not harmless because it misled the jury's perception of the evidence as a whole and the evidence was not overwhelming.

People v. Gulyas, 2022 COA 34. Defendant in prosecution for several sexual offenses involving a minor was not a witness within meaning of rape-shield statute, under which admission of evidence of a witness's prior sexual conduct was generally prohibited, and thus statute did not apply to bar evidence that defendant was previously sexually assaulted; preclusion of the evidence would not have served the statute's purpose of protecting victims and witnesses from public fishing expeditions into their past sexual conduct, as the evidence did not embarrass or humiliate victim, or any other trial witness, given that the evidence pertained to defendant's own sexual conduct.

People v. Buckner, 2022 COA 14. The rape shield statute allows defendant to offer "evidence that the victim ... has a history of false reporting of sexual assaults" if the procedure outlined in the statute is followed. Under this procedure, the moving party is required to file a written motion setting forth "an offer of proof of the relevancy and materiality" of the evidence. The motion must be accompanied by an affidavit stating the offer of proof. An offer of proof typically states: (1) what the anticipated testimony of the witness would be if the witness were permitted to testify; (2) the purpose and relevance of the testimony sought to be introduced; and (3) all the facts necessary to establish the testimony's admissibility. It is a "preview of the evidence a party is prepared to introduce at an evidentiary hearing" and "consists of allegations that the party's attorney represents would be proven if the court granted the hearing." To warrant a hearing, defendant's offer of proof must "articulate facts which, if demonstrated at the evidentiary hearing by a preponderance of the evidence, would show that the alleged victim made multiple prior or subsequent reports of sexual assault that were in fact false." Proof by a preponderance of the evidence requires that the evidence must "preponderate over, or outweigh, evidence to the contrary." In the absence of such a showing, the evidence is "irrelevant, immaterial, and inadmissible in the case at trial." Although defendant may offer more evidence at the hearing than set forth in the offer of proof, the offer of proof itself must make the threshold showing-if defendant established only the facts alleged in the offer of proof at the evidentiary hearing, those facts must be sufficient to establish, by a preponderance of the evidence, that the alleged victim made multiple prior or subsequent false reports of sexual assault.

People v. Daley, 2021 COA 85. A defendant cannot introduce evidence of a victim's prior sexual history to attack the credibility of a victim as a witness. Even if the doctrine of opening the door somehow negates that black letter rule of law, defendant did not explain how this testimony would impinge the victim's credibility. The victim testified that she lost her virginity to someone she met online with the help of her mother. The testimony of the prosecution's witness did not contradict that. Without more, it is not clear how the victim's credibility would have been impeached by the proffered evidence. Defendant also argues that the cousin should have been allowed to "defend himself." But what the cousin did or did not do had nothing to do with the offenses that defendant was charged with. On appeal, defendant argued the cousin's testimony was necessary to rebut the inference that defendant "was recruiting her own nephew to take her daughter's virginity to facilitate plans with [the] British [G]uy." Defendant did not make this argument to the trial court in her offer of proof, so

we will not consider it on appeal, but even if considered, it is not at all clear how the witness's testimony led to the inference that defendant was recruiting the cousin to have sex with the victim because the testimony did not mention defendant.

People Interest of D.F.A.E., 2020 COA 89M. Rape shield statute does not "specifically prohibit the victim from testifying as to the *lack* of prior sexual activity." *Here:* if error it was harmless where evidence of victim's virginity was referenced at trial in two ways: (1) the DA asked the nurse who performed the sexual assault examination a series of questions about her exam notes - nurse confirmed the notes stated "never" in response to a question on the form asking when victim's last sexual activity was; (2) jury heard an audio recording of a detective interviewing juvenile – juvenile denied he was with victim or that he had sex with her – when juvenile then said sex was consensual, detective responded "You're telling me that a 14 year old girl who's never had sex before, chooses to lose her virginity like this?" But, before the jury heard that question, the juvenile court gave a limiting instruction to use the statement for context only.

People v. Marx, 2019 COA 138. When determining whether defendant sufficiently triggered an in-camera hearing in order to pierce the rape shield statute, defense need not establish that victim's prior false allegations of sexual assault are false in fact; defense only needs to show that, at an evidentiary hearing, he could establish falsity of victim's prior accusations by a preponderance of evidence.

People v. Sims, 2019 COA 66. Roommate's testimony that victim had dealer named "Sparky" and was "prostituting herself" for drugs in 1993 could not, on its own, have led to a reasonable inference that victim was involved in a consensual sexual relationship with defendant during the period shortly before the murders; "[p]resumption and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference."

People v. Fortson, 2018 COA 46M. Defendant failed to preserve for appeal his claim that rape shield statute did not preclude evidence of alleged victim's history of sexual activity with her boyfriend on ground that evidence was relevant both to show alternate source of alleged victim's sexual knowledge and to show alternate source of DNA found in victim's underwear, where defendant did not make those arguments at trial or follow rape shield statute's procedural requirements.

People v. Lancaster, 2015 COA 93. Defendant's offer of proof was insufficient to demonstrate, by a preponderance of the evidence, the falsity of victim's second report. Although counsel alleged that the second report resulted in charges that were dismissed, such an allegation is insufficient, in and of itself, to establish the falsity of the report; defendant alleged that police received information from an unnamed witness suggesting that victim's report was false, this information would have been inadmissible hearsay; offer was insufficient to warrant rape shield hearing.

People v. Cook, 2014 COA 33. Where defendant seeks to introduce alternate suspect evidence to show motive and opportunity, there must be proof that the alternate suspect committed an act directly connecting him to the charged crime. Where the alternate suspect evidence seeks to challenge the identity of the perpetrator, the alternate suspect's prior act or crime must be similar to the present crime to be relevant and admissible. *Here:* victim's prior victimization by her brother did not meet the criteria for admission and trial court properly denied defendant's request to pierce the rape shield statute for purposes of establishing alternate suspect.

People v. Osorio-Bahena, 2013 COA 55. Rape shield statute's procedural safeguards do not change the evaluation of relevance under CRE. Admissibility of a child victim's prior sexual conduct necessarily depends on "the nature of the sex acts involved, as well as the age, circumstances, and other sources of knowledge to which the child in question might be privy." Courts might also consider how the victim reports and describes the charged sexual assault, the degree of similarity between the alleged assault and the prior sexual activity to

which victim was exposed, and whether less prejudicial means are available to show victim's prior sexual knowledge. *Here:* trial court abused its discretion in finding that evidence of victim's prior sexual conduct was not relevant to show an alternative source of victim's precocious sexual knowledge because: (1) victim's limited mental capacity may give rise to an inference of a lack of sexual knowledge; (2) evidence of prior incidents may show an alternative source of sexual knowledge, regardless of whether the prosecution injects the issue into the trial; and (3) the dissimilarities here did not tend to negate such knowledge. COA remanded to trial court to do a CRE 403 analysis. Defendant argued that victim's prior incidents of oral and anal sex, offered to explain an alternative source of her sexual knowledge and rebutted "the inference that a child victim could not describe the sexual acts unless defendant had committed the alleged acts." Prosecutor had also argued this theory to jury.

People v. Salazar, 2012 CO 20. Case involves the intersection of competing evidentiary considerations: defendant's right to present a complete defense, including relevant evidence of an alternate suspect; use of prior transaction evidence by CRE 404(b) for defensive purposes; presumption of irrelevance with regard to a witness's prior sexual conduct under rape shield statute; and general evidentiary principles of relevancy and probativeness. Because trial court abused its discretion in finding that the probative value of specific instances of the witness's prior sexual conduct was not substantially outweighed by the danger of such evidence to mislead the jury and confuse the issues remanded for further findings.

People v. Williamson, 249 P.3d 801 (Colo. 2011). Solicitation of prostitution from an undercover police officer, even when no sexual contact or intercourse has occurred, is "sexual conduct" and protected under the rape shield statute. Trial court was required to hold an evidentiary hearing to determine admissibility of evidence of victim's past acts of solicitation of prostitution.

People v. Villa, 240 P.3d 343 (Colo. App. 2009). To overcome rape shield statute, mere similarity between two series of sexual assaults is insufficient to demonstrate the relevance of the facts of the first series to the facts at issue in the second series.

People v. Orozco, 210 P.3d 472 (Colo. App. 2009). Defendant's cross examination of a CRE 404(b) witness as to whether she had initially accused someone besides defendant of having sexually assaulted her is subject to the rape shield statute. Admissibility of the question depends on whether witness's initial accusation encompassed sexual conduct *other than* that to which she testified on direct examination at defendant's trial.

People v. MacLeod, 176 P.3d 75 (Colo. 2008). Rape shield statute applies even if defendant is not offering the evidence "for the truth of the matter asserted." The statute's language includes no "purpose" exception that would enable the statute's requirements to be avoided if the proponent were not offering the evidence for the truth of the matter asserted.

People v. Garcia, 179 P.3d 250 (Colo. App. 2007). Victim's statements to defendant regarding a rape fantasy do not constitute evidence of sexual conduct for purposes of the statute. The fantasy could be established without revealing whether victim had ever acted it out. Evidence of defendant's prior sexual relationship with victim is subject to the prior sexual contact with the actor exception in (1)(a) is material and relevant and should have been admitted.

People v. Owens, 183 P.3d 568 (Colo. App. 2007). Victim's romantic and sexual relationship with an alleged boyfriend is relevant to victim's motive to lie in order to maintain her relationship. Since evidence fell within rape shield statute exception, no need to determine if covered by rape shield statute.

Fletcher v. People, 179 P.3d 969 (Colo. 2007). CSC has never addressed admissibility of testimony regarding a victim's lack of sexual conduct or virginity (COA *Johnson* case did). *Here:* CSC did not reach this issue because it applied CRE 401, 402, and 403 and concluded that in this case, trial court should not have admitted

the evidence of the victim's virginity because it was so over-inclusive that its prejudicial nature outweighed its probative value. Since the evidence of victim's virginity failed the threshold test of relevancy, court did not need to reach rape shield issue.

People v. Prentiss, 172 P.3d 917 (Colo. App. 2006). Evidence which provides an alternative explanation for an injury is not precluded by the rape shield statute nor is it subject to the rape shield procedures; it is subject to the other rules of evidence; defendant must establish a sufficient foundation for the admission of this evidence, "presumably before trial, or at least outside the jury's presence," before the evidence will be introduced. *Here:* defendant failed to provide any evidence that victim was sexually active and waited until the morning of trial to raise the issue. Defendant did not make a sufficient offer of proof that victim's hymenal injury was caused by any prior sexual activity; although she admitted during the videotaped Sungate interview that she had "boyfriends," she never admitted or even suggested she had engaged in any sexual activity with them, much less vaginal intercourse; she was specifically asked during the Sungate interview whether anybody else had ever touched her in the same way that defendant did, and she said no; and during her physical examination, she told the medical expert she was not aware that any other kind of prior vaginal penetration had occurred.

People v. Weiss, 133 P.3d 1180 (Colo. 2006). In order to pierce the rape shield, motion for an in-camera evidentiary hearing must be accompanied by an affidavit containing a sufficient offer of proof (preponderance) to warrant the hearing. Because a prosecutor may decline to bring charges for any number of reasons, the fact that prior sexual assault reports by the victim did not result in charges being brought is not a sufficient offer of proof upon which a trial court may order an evidentiary hearing. Defendant must be able to show victim's prior accusations were in fact false.

People v. Golden, 140 P.3d 1 (Colo. App. 2005). In discovery, defense learned that victim claimed to be in a "committed romantic relationship" with one of her roommates, which could be relevant to her motive to lie about having consensual sex with defendant; defense did not seek to pierce the rape shield statute with that fact. On cross-examination, victim denied being in a "committed romantic relationship" with any of her roommates. *Here:* Rape shield statute did not apply to the defense's question whether she was in a "committed romantic relationship" with one of her roommates. Though the quoted phrase is generally understood to have a sexual component, it does not call for evidence of sexual conduct or sexual orientation.

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). Trial court did not abuse its discretion in denying defendant's request to present evidence that victim was sexually assaulted previously, had previously been a perpetrator of a sexual assault, and had talked about his own and defendant's sexuality to others. Defendant failed to rebut the rape shield statute's presumption of irrelevance.

People v. Mata, 56 P.3d 1169 (Colo. App. 2002). Evidence properly excluded. When relevancy of evidence depends on the fulfillment of a condition of fact under CRE 104(b), the proponent must make a prima facie showing that the conditional fact occurred. *Here:* defendant sought to show that victim was previously abused by her sister's boyfriend. If this abuse involved penetration, it could have constituted an alternative explanation for victim's disrupted hymen and vaginal discharge. Because defendant failed to meet his prima facie burden, the proffered evidence fell within rape shield's presumption of irrelevance.

People v. Harris, 43 P.3d 221 (Colo. 2002). Under rape shield statute, trial court properly excluded evidence of victim's prior consensual sexual encounter with another. Victim's prior sexual history had no logical relevance where defense was that victim had consented and her vaginal abrasion could have been caused by consensual sex.

People v. Melillo, 25 P.3d 769 (Colo. 2001). Defendant cannot simply rely on theories of "opening the door" and "rule of completeness" to establish admissibility under rape shield exception. Although those theories may

establish relevance within the meaning of CRE 401, they fail to establish whether the prejudice of proffered evidence substantially outweighs its probative value under CRE 403. *Here:* defendant made two statements to police: (1) when his wife discovered him alone in bedroom with partially unclothed victim (her daughter), he tried to distract his wife because the situation did not look good; and (2) he distracted his wife because victim was sexually assaulted when she was 3 years old, and his wife was extra vigilant in protecting victim ever since. Defendant sought to admit statement (2), but his offer of proof of relevancy stated only that the earlier sexual assault was relevant to explain statement (1). Because defendant failed to make any other offer of proof as to relevancy, trial court did not abuse discretion in excluding statement (2).

People in the Interest of K.N., 977 P.2d 868 (Colo. 1999). Evidence of victim's sexual history and juvenile's knowledge of that history was not admissible under the rape shield statute to show juvenile's state of mind at the time of the assault. Without more, such evidence only constitutes a collateral attack on victim's credibility, something that is prohibited by the rape shield law.

Opinion Testimony: Lay vs. Expert

Generally

Venalonzo v. People, 2017 CO 9. To determine whether testimony is lay testimony (CRE 701) or expert testimony (CRE 702), trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony. Whether testimony is lay or expert depends on the facts and surrounding circumstances of the case and requires a case-by-case analysis of the witness, the witness's opinion, and the basis for the witness's opinion. The proper inquiry is not whether a witness draws on personal experiences to inform their testimony - all witnesses rely on their personal experience when testifying. Rather, it is the nature of the experiences that could form the opinion's basis that determines whether the testimony is lay or expert opinion. To determine whether the testimony in question is testimony that an ordinary person could give, courts consider whether ordinary citizens can be expected to know certain information or to have had certain experiences. Expert testimony is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have. *Here:* Lay Testimony - Forensic interviewer's testimony describing her professional background, including the number of interviews she has conducted and the number of times she has testified in court, is not expert testimony because any ordinary person is capable of describing her own credentials. The description of basic interview protocol does not require specialized knowledge. Testimony that children are "not very good at understanding physical measurements, that they often use generalities when speaking, and that they often reveal secrets to other children before they tell adults" was not expert testimony. Expert Testimony - Forensic interviewer's testimony describing "the significance of the [child-victims'] behavior during the forensic interviews," including her "reference to 'reproduction'—the habit of children to gesture with their hands to demonstrate where on their bodies they were touched—and her statement that [a child victim] had engaged in this behavior in this case," amounted to expert testimony, because it was based on her "specialized experience conducting forensic interviews." The forensic "interviewer's discussion of 'core versus peripheral' details" and "the relative importance of each type of detail in determining the truth of an allegation," and her testimony "catergoriz[ing] several of the details to which the children testified as either core or peripheral," was expert testimony because "based on specialized knowledge" and "[t]he significance of these differences is not common knowledge, nor would the ordinary person recognize their importance based on life experiences.

People v. Feldman, 2024 COA 119. As a matter of first impression, the COA holds that, when the county coroner certifies the cause and manner of a victim's death as "undetermined," the prosecution may present other evidence regarding the cause and manner of the victim's death in a subsequent criminal proceeding, even if it conflicts with the coroner's determination. COA rejected defendant's argument that the prosecution's expert witness usurped the county coroner's sole authority to determine the cause and manner of the victim's death, thereby violating either the subdelegation doctrine or the separation of powers doctrine. There is no support for defendant's claim that the coroner is part of the legislative branch of government.

People v. Shannon, 2024 COA 41. Trial court did not err by declining to hold a *Shreck* hearing for a blind expert's testimony about child sexual assault victim dynamics – delayed disclosure, different details disclosed to different people, behavior of child victims, grooming, child memory issues. No *Shreck* hearing warranted. *Here:* defendant's main objection was the trial court never found the expert's testimony relevant. The COA disagreed and found the expert's testimony about these issues fit the facts and theories of the case, the expert

had previously testified in about 300 cases in Colorado on these and closely related issues, a fact of which the district court was aware. And the helpfulness and admissibility of such testimony in a case such as this is amply supported by Colorado case law.

People In the Interest of D.I., 2015 COA 136. Any error in allowing a lay witness to provide expert testimony was harmless when it was cumulative to other evidence not challenged on appeal.

People v. Flippo, 159 P.3d 100 (Colo. 2007). Defendant may attack credibility or reliability of a confession by presenting evidence of his "mental slowness" in form of lay opinion or expert testimony.

Lay Opinion: CRE 701

People v. Stewart, 55 P.3d 107 (Colo. 2002). The admission of lay opinion testimony is governed by CRE 701. A witness not testifying as an expert may present opinions or inferences that are: (a) rationally based on the perception of the witness; and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

People v. Feldman, 2024 COA 119. A lay witness's testimony about defendant's feigned emotions the week before the victim died was not improper character evidence. Although evidence of a person's character generally is not admissible to prove that the person acted in conformity with a given character trait on a particular occasion, CRE 404(a), "a lay witness may give a summary opinion of another person's behavior, motivation, intent, or state of mind if . . . [the] witness has personally observed the physical activity of another and summarizes his 'sensory impressions thereof.'" That's what happened here.

People v. Murphy, 2021 CO 22. CSC holds that the trial court did not abuse its discretion by admitting the officer's testimony as lay opinion because the testimony rested on rationally drawn conclusions that the officer derived from his observations and perception of the witness's body language. Officer's passing reference to his training and experience did not render the testimony expert opinion under CRE 702, nor did the officer's testimony improperly comment on the credibility of another witness. Judgment of COA is reversed.

Vigil v. People, 2019 CO 105. Because a comparison of a shoe and an imprint left in the dirt by a shoe based on the size of each, and a visual comparison of an emblem on the sole of a shoe and an imprint in the dirt left by a shoe, are not beyond the ken of an ordinary person without specialized training or experience of any kind, a police officer's opinion that defendant's shoe caused the imprint was admissible as a lay opinion. (*People v. Vigil*, 2015 COA 88).

People v. Ramos, 2017 COA 100. Basic mathematical calculations involve processes of reasoning familiar in everyday life so properly admitted as lay opinion.

People v. Howard-Walker, 2017 COA 81M, rev'd other grounds, 2019 CO 69. Lay witness may testify to the identity of a person depicted in a surveillance video or photograph if there is some basis for concluding that witness is more likely to correctly identify defendant from the video than is the jury. While a lay witness may give testimony that she believed a gun was a real gun, but the officer's testimony, based on the size of the barrel, constituted expert testimony. However, admission of this testimony as lay testimony was not plain error.

People v. Froehler, 2015 COA 102. In determining whether testimony is lay or expert in context of computer-related testimony, critical inquiry is whether a witness's testimony is based upon "specialized knowledge." *Here:* detective's testimony about the dates associated with the image files on a thumb drive was proper lay testimony. Method she used to view the dates did not require any specialized knowledge or familiarity with

computers beyond that of average lay person. Right-clicking on a file to view its properties requires some basic computer competency but is within realm of knowledge of ordinary people who use computers every day.

People v. Glover, 2015 COA 16. Detective's understanding of Facebook and its features is not the result of any specialized knowledge; it is based on an investigation uncovering information, experience, or knowledge common among ordinary people using, or considering the use of, Facebook so it was lay testimony. Detective's testimony about the meaning of several terms of "street slang" could be determined "from a process of reasoning familiar in everyday life," rather than "a process of reasoning which can be mastered only by specialists in the field." Process of reasoning used was ascertaining meaning of a term from context in which it was used.

People v. Acosta, 2014 COA 82. Lay witness may give a summary opinion of another person's behavior, motivation, intent, or state of mind when witness has personally observed the physical activity of another. *Here:* Lay testimony that defendant was "very guilty looking" was properly admitted because: witness was physically present; personally observed defendant's behavior; had a rational basis for forming an opinion as to how defendant appeared at the time; testimony did not improperly give a legal opinion; and opinion did not comment on defendant's truthfulness on a particular occasion (CRE 608).

People v. Conyac, 2014 COA 8M. Police officer may testify about his assessment of interviewee credibility when that testimony is offered to provide context for interrogation tactics/investigative decisions. *Here:* officer's statements were very basic and interviewing concepts he described could be gleaned by an ordinary person through watching television or reading detective fiction or true crime materials. COA held that, even assuming the officer had crossed line between lay opinion and expert testimony, no plain error because officer was qualified to offer such expert testimony given his training and experience.

People v. Munoz-Casteneda, 2012 COA 109. When a fact witness's testimony includes an English translation of his out-of-court conversation with a non-English speaker, his role does not change from fact witness to neutral interpreter for purposes of that testimony. *Here :*even though he was a fact witness, the detective was not certified or sworn by the court as an official interpreter; the trial court properly permitted him to translate his conversation with defendant because he had personal knowledge of the relevant conversation, was sufficiently capable of translating a recording of conversation without misleading jury, and was subject to cross-examination.

People v. Herdman, 2012 COA 89. Defendant's fellow soldier opined that defendant was not suffering PTSD in months before the crime. *Here:* Opinion properly summarized witness's observations of defendant's behavior; even if impermissible opinion evidence, no plain error because experts from both sides offered extensive evidence on that point; and testimony did not violate CRE 608(a), because it was not a comment on defendant's veracity on any specific occasion. Defendant's fellow soldier opined that defendant was being "rebellious" after his return from Iraq. *Here:* Evidence did not violate CRE 404(a), because it amounted to personal observations about defendant's behavior. Any error was not plain because the opinion was not "obviously bad character evidence."

People v. Douglas, 2012 COA 57. Participant in a conversation may testify as a lay witness as to what she believed another party to the conversation meant by the words he was using, and as to what she believed words she used would have meant to other party.

People v. Warrick, 284 P.3d 139 (Colo. App. 2011). Lay witness may testify regarding the identity of a person in a photograph if witness is in a better position than jury to determine whether image is that of the person. *Here:* Officer was in a better position to identify defendant because he had come into contact with him during the investigation and got a good look at him. Although this familiarity was superficial, it was sufficient to allow

an identification. *Here:* Officer providing the class of felony of a particular offense was not expert testimony because it came from everyday reasoning, specifically, looking something up in a book.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). Officer need not be qualified as an expert to provide valuation testimony concerning a stolen item based on Kelly Blue Book.

Dunlap v. People, 173 P.3d 1054 (Colo. 2007). Lay witnesses may give opinions or conclusions concerning defendant's mental condition but may not offer diagnoses defendant suffered from a particular mental illness.

People v. Graybeal, 155 P.3d 614 (Colo. App. 2007). Court may admit lay identifications of marijuana and other controlled substances based on testimony concerning their appearance, taste, and smell. *Here:* witnesses described prior experiences with marijuana and based their identification on its appearance, taste, and distinctive smell.

People v. Rincon, 140 P.3d 976 (Colo. App. 2005). Police officer's testimony that witnesses are sometimes unable to make photographic lineup identifications after incidents that happened quickly was lay opinion evidence.

People v. Souva, 141 P.3d 845 (Colo. App. 2005). Lay witness was permitted to testify that she did not believe that defendant was under influence of drugs because her testimony was rationally based on her perception of his condition and her experience in dealing with people who are under the influence of drugs.

People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005). Police officers testified that it is not uncommon for guilty criminal suspects to deny guilt, make false accusations of police brutality, and falsely claim that they do not understand their *Miranda* rights. *Here*: This was proper lay opinion of defendant's conduct based on the officers' observations and everyday experience and was admissible to show defendant had required mens rea for charged offense. Police officer testified defendant was "messing" with him when defendant claimed he did not understand his *Miranda* rights. *Here*: No plain error where testimony was offered to rebut defendant's intoxication defense and to show his state of mind; it did not constitute an improper opinion regarding defendant's truthfulness on a specific occasion.

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). Lay witness may state an opinion about another person's motivation/intent if witness had sufficient opportunity to observe the person and to draw a rational conclusion about person's state of mind. *Here:* Trial court properly applied CRE 701 in admitting a witness's opinion that the sexual encounter that he observed appeared to be nonconsensual. Under CRE 704, testimony is not improper simply because it includes an opinion as to an ultimate issue to be decided by the trier of fact.

People v. Caldwell, 43 P.3d 663 (Colo. App. 2001). Lay person may describe bullet holes and deduce the bullets' path from the locations of the bullet holes and impact marks.

Robinson v. People, 927 P.2d 381 (Colo. 1996). Detective's opinion on the identification of defendant from surveillance videotape was admissible. For this kind of opinion, there must be "some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." Witness needs only to be personally familiar with defendant.

Expert Opinion: CRE 702

People v. Cooper, 2021 CO 69. Critical question that a trial court must answer to discern "helpfulness" of expert testimony to a jury is whether, on the subject, the jury can receive appreciable help from the expert. This test for helpfulness calls for a commonsense inquiry of whether an untrained lay person would be qualified to determine a particular issue intelligently and to the best possible degree without enlightenment from those having a specialized understanding of the subject involved in the dispute. Helpfulness of expert testimony to a jury turns on whether testimony fits a particular case. The "fit" of expert testimony to a particular case demands more than simple relevance; it requires that there be a logical relation between proffered testimony and factual issues involved in the litigation. Analyzing fit between expert testimony and factual issues in case necessarily requires consideration of the purposes for which the evidence is being offered. Generalized expert testimony (formally called blind expert testimony) fits a case if it has a sufficient logical connection to factual issues to be helpful to a jury while still clearing the admissibility bar of CRE 403 providing for exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Fit of generalized expert testimony to case need not be perfect for testimony to be admissible; in other words, each aspect of such testimony need not match a factual issue. *Here:* generalized expert testimony on dynamics of domestic violence, including testimony regarding kindness-violence dichotomy and power-and-control dynamic, fit facts of case, as required to admit testimony in assault prosecution arising from defendant's allegedly striking victim who was his much-younger girlfriend who had dog that also was injured during dispute over a fan, despite victim's failure to recant or minimize her previous statements; testimony's logical relation to facts of case, which involved victim's counterintuitive behaviors, was sufficient to be helpful without contravening rule providing for exclusion of relevant evidence due to prejudice, confusion, or waste of time, especially since defendant attacked credibility of victim's allegation regarding severity of her injuries.

People v. Coons, 2021 CO 70. Since generalized expert testimony, by definition, seeks to inform the jury about generic concepts or principles without knowledge of facts, it is almost inevitable that parts of such testimony will not be logically connected to the particular case; for that reason, the "fit" inquiry for admissibility of such testimony must be flexible. A trial court should not be expected to parse proposed generalized expert testimony and determine whether each statement expert intends to utter is logically connected to a fact in case in order to decide whether such testimony is admissible. Prosecutors should take care to endorse generalized expert testimony about domestic violence only in appropriate cases; and, when they do so, they should endeavor to present only testimony that is logically connected to the factual issues. *Here:* generalized expert testimony on dynamics of domestic violence, including testimony regarding power-and-control dynamic, "fit" facts of case, as required to support admission of such testimony, in prosecution for sexual assault, criminal extortion, and third-degree assault, arising from defendant's intimate years-long abusive relationship with younger victim; expert educated jury about characteristics of abusive intimate relationship, which helped explain specific behaviors of victim and defendant, in light of evidence that defendant repeatedly intimidated victim through blackmail threats, emotionally abused her by putting her down, isolated her by limiting who she saw, economically abused her by threatening to jeopardize her parents' financial support, and shifted blame to victim.

People v. Valencia, 257 P.3d 1203 (Colo. App. 2011). Facts and data upon which an expert bases an opinion or inference do not need to be admissible as evidence if they are of the type reasonably relied upon by experts in field. Three methods whereby expert may acquire knowledge of facts upon which to base an opinion: (1) expert's first-hand observation; (2) facts presented at trial; or (3) facts that are outside record that, although not personally observed by expert, are of type reasonably relied on by experts in same field. Items do not have to be placed into evidence in order for expert to testify about them.

People v. Ramirez, 155 P.3d 371 (Colo. 2007). The "reasonable medical probability" standard for admissibility of expert medical testimony is outdated and inapplicable. Admission of expert medical testimony is governed by the flexible standard of admissibility set forth in CRE 702. This case contains a good explanation of reliability and relevance, noting that an expert can opine with less than certainty without making the opinion speculative or unreliable. Unreliable testimony under CRE 702 is only testimony that "has no analytically sound basis" or no underlying scientific principles. COA recognized that under CRE 705 an expert need not testify to the basis of the opinion on direct examination.

People v. Feldman, 2024 COA 119. COA rejected defendant's claim that the People's expert, Dr. Smock was not qualified to testify about the cause and manner of the victim's death because he was not a forensic pathologist and that his testimony was therefore unreliable. Whether Dr. Smock is a forensic pathologist is not dispositive of this issue because a trial court's CRE 702 reliability determination is based on the totality of the circumstances and considers the witness's subject matter expertise. Additionally, concerns about conflicting opinions on the reliability of the methodology used by the experts in a case and the degree of certainty to which the experts holds their opinions are issues for cross-examination. *Here:* Dr. Smock's seventy-one-page curriculum vitae indicated that his experience included treating or consulting with thousands of strangulation and suffocation patients, assisting in thousands of autopsies, publishing extensively in the fields of emergency and forensic medicine, and working as a police surgeon and a medical director for the Institute on Strangulation Prevention. Based on his experience, the COA concluded that the trial court did not abuse its discretion by admitting Dr. Smock as an expert in clinical forensic medicine and strangulation to opine that the victim's bruises were consistent with strangulation and suffocation.

People v. Martinez, 2024 CO 69. CRE 702 and applicable case law neither require nor prohibit a formal offer and acceptance of an expert during trial. The lack of a formal tender and acceptance of the expert does not render expert testimony inadmissible, and such testimony is admissible if it otherwise complies with the requirements of CRE 702 and *Shreck. Here:* the CSC reverses the COA judgment below and remands for consideration of the remaining appellate issues raised by defendant.

People v. Vigil, 2024 COA 72. Though CRE 901 relates to the admission of evidence, the same standard applies "if a proper identification of an object is required for other purposes, even if the object itself is not offered" as evidence – before an expert can testify about the results of the testing or analysis of an object, "[t]he object must be identified" — that is, "some proof must be presented of a connection between the object tested and the defendant, the victim, or the crime." *Here:* at trial here, a DNA analyst, relying on a submission letter, testified that she received buccal swabs taken from defendant and determined that the DNA profile developed from the swabs matched DNA on the gun and magazine. A fingerprint examiner, relying on information printed on an AFIS fingerprint card, testified that she compared fingerprints belonging to defendant with a latent print recovered from the gun and determined that the prints matched. Thus, because no one with personal knowledge testified about the source of the known samples, the "known" samples were never authenticated except through hearsay, rendering the experts' testimony concerning "matches" inadmissible. The error was not harmless because, without the hearsay testimony, the prosecution failed to establish the necessary connection between the items tested or analyzed and defendant.

People v. Gamboa-Jimenez, 2022 COA 10. Applying Salcedo v. People, 999 P.2d 833 (Colo. 2000), COA finds that state trooper's expert testimony at trial was improper drug courier profile testimony and was plainly erroneous.

People v. Baker, 2021 CO 29. Factors that courts should consider in determining whether opinion testimony is admissible include, but are not limited to, whether: (1) the testimony was clarified on cross-examination; (2) the expert's testimony expressed opinion of applicable law or legal standards and thereby usurped function of court; (3) the jury was properly instructed on law and that it could accept or reject expert's opinion; and (4) the expert opined that defendant had committed crime or that there was particular likelihood that defendant did so. *Here:* expert testimony by deputy securities commissioner in securities fraud case, opining on materiality of defendant's alleged misstatements and omissions and her determination that statements made by the purported victims were accurate, was inadmissible; in so testifying, the deputy commissioner effectively weighed the evidence, made credibility determinations as to such evidence, and essentially told the jury what had occurred in the case, all of which were matters solely for the jury's determination, and in doing so, the deputy commissioner effectively opined that defendant was guilty of the crimes charged.

People v. Murphy, 2021 CO 22. Trial court did not abuse its discretion by admitting officer's testimony as lay opinion about a witness's body language: it rested on rationally drawn conclusions from the officer's observations of the body language during an interview; officer's passing reference to his training and experience did not render the testimony expert opinion under CRE 702, nor did the officer's testimony improperly comment on the credibility of another witness.

People v. Vidauri, 2019 COA 140, rev'd other grounds, 2021 CO 25. The bar for helpfulness is low – whether an expert can offer appreciable assistance on a subject beyond the understanding of a typical juror.

People v. Marx, 2019 COA 138. Blind expert testimony on the percentage of children and teenagers who make false allegations of sexual assault is improper because it impermissibly bolster's the victim's credibility and relates to no other issue than the victim's truthfulness. Such an opinion amounts to plain error where the theory of defense is premised on the victim's lack of credibility.

Campbell v. People, 2019 CO 66. Testimony concerning Horizontal Gaze Nystagmus (HGN) field-sobriety test requires expert testimony.

People v. Kubuugu, 2019 CO 9. Deputy's testimony in DUI case that defendant exuded a metabolized alcohol odor, which indicated that defendant drank a volume of alcohol consistent with the number of beer cans found in his car and that he consumed such alcohol before he entered apartment complex, was expert testimony based on deputy's years of experience as police officer and extensive training and, therefore, was not based on experiences/knowledge of ordinary person.

People v. Bryant, 2018 COA 53. Police testimony about a slang term for PCP is expert testimony. *Here*: error was harmless because it was not a key factor in establishing defendant's knowledge that the substance he possessed was PCP; it was cumulative to defendant's admission that the substance in his sock was PCP.

People v. Short, 2018 COA 47. Blind expert may testify about hypothetical scenarios that align with circumstances of the case and describe victim dynamics and behavioral traits of abused children. Detective may testify that, based on his experience and consistent with the expert, it is not uncommon for a child to decline to disclose certain types of abuse. *Here:* the testimony "simply related to the jury his observations about child victim disclosures." Victim's family member's testimony that the victim would not "normally…lie about something like that" was not plain error where the case was strong.

People v. Robles-Sierra, 2018 COA 28. Expert's testimony that defendant "distributed" child pornography by placing it into a share-capable folder on a file sharing website was not plain error because the error was not obvious, and it did not undermine the confidence in the verdict in light of defendant's theory of the case and overwhelming evidence.

People v. Heredia-Cobos, 2017 COA 130. Where defense challenged victim's credibility by suggesting that victim was coached by family members to make sexual assault allegations, defense opened the door to the forensic interviewer's expert testimony about coaching and whether victim gave any indications of being coached in her interview.

People v. Garrison, 2017 COA 107. Expert testimony required for a witness to testify that the record of each email transmission includes an internet protocol (IP) address from where the transmission initiated, that the IP address can be linked to an internet service provider, and that the internet service provider can often trace the IP address to a physical address.

People v. Howard-Walker 2017 COA 81M. Officer's testimony concerning how he could tell that a handgun he observed in a video was a real gun constituted expert testimony. While a lay witness may give testimony that

she believed a gun was a real gun, the officer's testimony, based on the size of the barrel, constituted expert testimony. However, admission of this testimony as lay testimony was not plain error.

People v. Thompson, 2017 COA 56. Defendant argued that two of prosecution's expert witnesses improperly vouched for child-victims' credibility when they testified about various dynamics of child abuse and whether the children in this case exhibited those behaviors. Neither expert testified either directly or by implication that the children were telling the truth; neither expert said that they believed the children; neither expert suggested that children do not tend to make up stories of abuse; and neither expert tried to explain the inconsistencies in the children's testimony.

Romero v. People, 2017 CO 37. Reversible error where officer's testimony about what "grooming" meant as it relates to sexual predation should have been expert testimony.

Marsh v. People, 2017 CO 10. COA need not reach the question whether a lay witness's testimony improperly rose to level of expert opinion if record discloses the error was harmless.

People v. Ramos, 2017 CO 6. Applying *Venalonzo*, an ordinary person would not be expected to have the experience, skills, or knowledge to differentiate reliably between blood cast-off and blood transfer. *Here:* police officer should have been qualified as expert witness as he relied on his 19 years of experience as an officer, 9 years of experience as a detective, and his work on thousands of cases involving blood evidence.

People v. Archuleta, 2017 COA 9. Expert's testimony that he went to outside agencies to get his work reviewed prior to releasing his reports was not error. Unlike in *Golob*, testimony was not associated with the particular results and conclusions expert reached, and prosecutor did not use challenged testimony to argue that jury should accept validity of blood spatter expert's opinion.

People v. Douglas, 2016 COA 59. An animation "simply illustrates an opinion or reconstruction which an expert witness has already devised through the expert's own independent computation and analyses." An animation is not subject to the more rigorous scientific evidence standard found in CRE 702 and *Shreck*. It functions as a visual depiction of the expert's theory about how an accident occurred, as opposed to a computer's recreation of the actual event.

People v. Douglas, 2015 COA 155. While self-teaching can be an approved method of gaining the required knowledge to be an expert, the witness must still provide a foundation for that self-taught knowledge. *Here:* trial court did not abuse its discretion in refusing to certify defendant's proposed "expert" in marijuana grow operations because witness did not specify for the court how exactly he accumulated his self-taught knowledge and experience. Trial court abused its discretion in admitting certain portions of two narcotics detectives' testimony regarding drug distribution operations and marijuana plants without first having them certified as experts. Testimony was based on specialized, knowledge-based experience acquired by the police through training. However, no plain error because any problems were later rectified by admissible testimony which cured any fundamental unfairness and officer's id of a plant as marijuana was harmless because defendant conceded the plants were marijuana.

People v. Froehler, 2015 COA 102. Testimony concerning software that depends on knowledge beyond that of average lay person should be admitted as expert testimony. *Here:* detective's technical description of a law enforcement computer program's capabilities and limitations, including her opinions on the software's hypothetical capabilities, constituted expert opinion.

People v. Montante, 2015 COA 40. Trial court did not abuse its discretion by admitting expert testimony by a medical school instructor to help jury understand whether a doctor had a "bona fide physician-patient relationship" with the undercover officer for whom he recommended the use of medical marijuana.

People v. Conyac, 2014 COA 8M. Experts may testify regarding the modus operandi of a certain category of criminals where those criminals' behavior is not ordinarily familiar to average person. *Here:* expert testified about sex offender characteristics such as grooming behaviors, only 5%-10% of victims are sexually assaulted by a stranger; in her clinical practice over half of her cases involve a family member as the perpetrator; child molesters are likely to exhibit some type of minimization or denial about what they have done; and child molesters may try to justify their behavior. Evidence was not "profile" evidence but was relevant to aid jury in understanding modus operandi of sex offenders and was admissible "background information." Fact that defendant's behavior was consistent with that modus operandi made it more likely that defendant committed the acts in this case. Evidence was not unduly prejudicial under CRE 403 because jury received expert witness limiting instruction, expert was thoroughly cross-examined at trial, and prosecutor only used the evidence in his rebuttal argument to refute defendant's assertion about a "lack of corroboration." Dr. Crawford's testimony that she did not expect to see physical findings in a child sexual assault case because the abuse may not have been recent, because genital areas heal very quickly in children, because the penetration may not have been significant enough to cause injury, and because her research revealed that there are no physical findings in 90-95% of cases, was relevant to rebut defense counsel's argument concerning the lack of physical evidence and to explain to jury why lack of physical findings did not refute victim's allegations.

People v. Glasser, 293 P.3d 68 (Colo. App. 2011). Testimony on sexual assault trauma issues is more probative than prejudicial where victim's credibility was attacked. *Here:* expert's testimony as to general behavior of sexual assault victims was admissible to help jury understand why a victim may delay reporting an incident or why she remembered only fragments of an assault.

Estate of Ford v. Eicher, 250 P.3d 262 (Colo. 2011). A qualified physician may provide an expert medical opinion regarding causation of a child's injuries during childbirth (intrauterine contraction theory), because the theory is reasonably reliable. Excluding testimony because the theory cannot be tested and error rates cannot be assessed focuses the reliability analysis too narrowly. While testability and error rates of a scientific theory are factors a trial court may consider in assessing reliability, trial court may give these factors less weight or disregard them altogether if case so requires. CRE 702 inquiry is designed to be flexible to accommodate precisely this type of situation. A theory's inability to satisfy some of the suggested reliability factors will not automatically render the theory unreliable. Concerns about not being able to test theories are "adequately addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." Concerns about the reliability of the theory go to weight of the expert testimony. Differential diagnosis or diagnosis by exclusion (comparing clinical facts to known mechanisms, literature, and experience) is reliable under CRE 702. Physician's theory of how a child's injuries occurred is "extremely helpful to the jury" and highly probative. *Here:* theory was supported by research, clinical study, and a body of peer-reviewed literature spanning almost twenty years. It was accepted in the scientific community as illustrated by the fact that it was adopted in authoritative texts and in medical practice guidelines.

People v. DeBella, 219 P.3d 390 (Colo. App. 2009), rev'd other grounds, 233 P.3d 664 (Colo. 2010). Defense investigator not qualified by education, training, or experience regarding the standard practice required by an attorney in communication plea offers to mentally impaired clients he could not testify as an expert on this issue.

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008), aff'd operation of law, 238 P.3d 1283 (Colo. 2010). Trial court has discretion to determine scope and limits of redirect examination in order to prohibit a party from introducing material that was not properly disclosed. *Here:* no abuse of discretion with respect to limiting redirect examination or precluding inquiry into nondisclosed matters of expert opinion.

People v. Destro, 215 P.3d 1147 (Colo. App. 2008). Former commissioner of Colorado Division of Securities properly gave expert testimony on issue of whether a particular agreement was an investment contract, and thus a security.

People v. Montalvo-Lopez, 215 P.3d 1139 (Colo. App. 2008). Expert opinion testimony from police officer concerning modus operandi used to transport controlled substances by automobile did not constitute prohibited "drug courier profile" evidence. Distinguishing People v. Salcedo, 999 P.2d 833 (Colo. 2000).

People v. Valdez, 183 P.3d 720 (Colo. App. 2008). Defense expert's testimony on heat of passion would not be helpful to jury where provocation mitigator does not apply. *Here*: testimony was properly excluded because defendant intentionally put himself in the provoking situation by going to his estranged wife's house for purpose of being there while she engaged in sexual relations with her boyfriend.

People v. Rojas, 181 P.3d 1216 (Colo. App. 2008). Contrary to defendant's characterization of the testimony, expert did not diagnosis child as having been molested. DNA evidence was admissible even though it did not definitively identify defendant as a contributor. Statistics were useful and relevant because they showed more probably than not that defendant contributed to the sample.

People v. Washington, 179 P.3d 153 (Colo. App. 2007), aff'd other grounds, 186 P.3d 594 (Colo. 2008). Defendant's failure to raise the issue precluded appellate review of whether he was entitled to present expert testimony on the effect of his mild mental retardation on his forming the mens rea for these offenses. The defendant never sought to offer such expert testimony, never asserted that his expert should be permitted to testify beyond the limits set by the court, and never objected to the court's ruling on the allowable scope of his expert's testimony. His failure to make an offer of proof precludes plain error review.

People v. Flippo, 159 P.3d 100 (Colo. 2007). Defendant who seeks to present expert evidence of his mental retardation to show that he was highly suggestible (to challenge the credibility of his inculpatory statements to police) must comply with §16-8-107(3)(b) by giving notice of his intent to present such testimony and subjecting himself to a mental examination. The term "mental condition" in §16-8-107(3)(b) – which requires notice and examination of the defendant before he may present expert testimony – encompasses a defendant's mild mental retardation. The term "condition" is variously defined as: "mode or state of being; state of health; a disease or physical ailment."

People v. Welsh, 176 P.3d 781 (Colo. App. 2007). Trial court did not err in admitting defense evidence derived from defendant's sanity examination for purposes unrelated to her sanity or in permitting a psychiatrist to testify concerning his opinion that defendant did not have capacity to deliberate at time she killed victim.

People v. Grant, 174 P.3d 798 (Colo. App. 2007). While experts may offer opinions that embrace the ultimate issues in a case, they may not offer opinions on the applicable law.

People v. Mintz, 165 P.3d 829 (Colo. App. 2007). Expert may testify as to the typical demeanor and behavioral traits displayed by a sexually-abused child; expert may answer hypothetical questions involving facts of the case.

People v. Pahl, 169 P.3d 169 (Colo. App. 2006). Trial court did not err in admitting expert testimony from former commissioner of the Colorado Division of Securities on whether the transaction was a security; opinion did not invade jury's province, and under trial court's instructions, jury was free to reject commissioner's opinion.

People v. Veren, 140 P.3d 131 (Colo. App. 2005). Police officers erroneously testified as lay witnesses that, based on their experience and training in law enforcement, large amounts of pseudoephedrine, gas line antifreeze, and starter fluid were precursors to methamphetamine manufacture. While certain basic information

about drugs may properly fall within scope of lay opinion testimony, the amount of pseudoephedrine required to manufacture methamphetamine is not within the common knowledge of ordinary citizens. Nor is the knowledge that a combination of pseudoephedrine with the other chemicals and supplies tends to indicate an intent to manufacture methamphetamine. Testimony describing how methamphetamine is manufactured and how the various precursor chemicals are used is also expert testimony.

People v. McGlotten, 134 P.3d 487 (Colo. App. 2005). Although contemnor produced expert testimony evidence that, if credited, would have supported a finding that she lacked the ability to purge the contempt, court discounted the credibility of this evidence, and COA was bound by the trial court's findings.

People v. Atencio, 140 P.3d 73 (Colo. App. 2005). Police officer could testify as expert that the amount of drugs in defendant's possession was consistent with distribution.

People v. Wilkerson, 114 P.3d 874 (Colo. 2005). Trial court did not abuse its discretion in excluding opinion testimony of ergonomics expert that it was "more likely than not" / "more than a 50% probability" that defendant shot victim accidentally. By expressing his expert opinion as a numerical conclusion, the witness had to be understood as offering a scientifically quantifiable probability statement about likelihood of a particular occurrence; but such a numeric probability statement was completely without empirical or methodological justification in the record.

People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004). CBI expert was properly qualified as an expert even though: (1) the CBI lab is not accredited; (2) his supervisor was not trained in PCR/STR process for DNA testing; (3) the expert had not published nor taught a court concerning PCR/STR analysis; and (4) he had never taken a blind proficiency test. These attributes go to the weight to be given his testimony, and not its admissibility.

People v. James, 117 P.3d 91 (Colo. App. 2004). Even if police officer's lay testimony about gang culture was erroneous, it did not require reversal since defendant relied on officers' "expert opinion" during trial.

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). Trial court did not abuse its discretion by excluding defendant's expert witness testimony as to a study the expert had conducted under circumstances that trial court determined lacked reliability, and expert's opinion that would not have been helpful to jury concerning an identification procedure where police asked a witness to identify a single weapon.

People v. Prendergast, 87 P.3d 174 (Colo. App. 2003). It is impermissible for expert to articulate the law and then circumvent the jury's decision-making function by telling it how to decide the case under the law as the expert has described it. Expert may permissibly testify to an ultimate issue of fact by reference to legal standards. There can be a fine line between impermissible and permissible testimony. It is impermissible for expert to repeatedly characterize defendant's conduct in a prejudicial manner, such as repeated statements that defendant's conduct constituted securities fraud. *Here:* expert properly testified about the standard of materiality, because: (1) he did so to give a brief overview of securities law; (2) his statements of law were correct; (3) his statements were not phrased in a prejudicial manner; (4) his discussion of materiality was not so pervasive as to supplant the trial court's authority to state the law; and (5) his statements were clarified during cross examination. In securities fraud trial, expert properly testified on the definition of "security." Although the Colorado Securities Act does not expressly use the phrase "full and fair disclosure," that concept is implicit in CSA, and therefore, the expert could so testify.

People v. Martinez, 74 P.3d 316 (Colo. 2003). The standard for admissibility under CRE 702 is relevancy and reliability, not certainty. Admissibility of evidence must be evaluated in light of its offered purpose. *Here:* expert's testimony that subdural hematomas in infants were seen only in limited situations such as in falls from multi-storied buildings, high speed auto accidents, or when a baby is violently shaken or slammed was

admissible to support the expert's opinion that subdural hematomas result from "massive force." However, the same "accident scenario" testimony was not admissible to show the amount of force that the defendant may have employed, where expert admitted that she did not know the amount of force necessary to cause a subdural hematoma.

People v. Jenkins, 83 P.3d 1122 (Colo. App. 2003). Victim's treating physician could properly opine that victim's burn patterns were consistent with her having been assaulted. Victim's treating psychologist could properly opine that victim's behavior was consistent with that of a person burned as a result of an assault. This testimony was not improper commentary on the victim's credibility.

People v. Johnson, 74 P.3d 349 (Colo. App. 2002). Defendant argued that court violated his right to a fair trial by allowing expert testimony concerning DV and the reasons why victims sometimes recant. In such cases, expert testimony concerning reasons for victims' recantations is admissible. *Here:* victim had changed her story and the expert testimony was relevant to her credibility, a key issue in the case. Under *Shreck*, since reliability of the principles underlying battered-woman opinion evidence is well recognized, and its helpfulness to the jury is plain, any error by the court in failing to make specific findings is harmless.

People v. Watson, 53 P.3d 707 (Colo. App. 2001). Trial court properly allowed educational psychologist with experience in substance abuse clinics, but no medical training, to opine that victim was in a semi-comatose state. Psychologist reviewed testimony from an earlier trial regarding substances the victim ingested and her psychological condition. *Here:* under CRE 703, the psychologist had sufficient foundation to testify as to victim's condition.

People v. Martinez, 51 P.3d 1029 (Colo. App. 2001), rev'd other grounds, 69 P.3d 1029 (Colo. 2003). Assuming, without deciding, that *Brooks* applies when dogs are used to detect drug odor, there was no reversible error. Any flaw in foundation was rendered harmless when handler testified on cross-examination that, in approximately 100 sniffs, dog had never falsely alerted to clean money. Narcotics detective did not testify beyond the scope of his expertise regarding the amount of cocaine, number of doses it would yield, or drug dealers' use of weapons. Detective properly opined that the house was being used as a distribution center for drugs. He related no opinion about whether defendant possessed the drugs found at house, nor did he opine whether defendant was involved in the distribution.

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). Evidence of a child abuse victim's prior fractured ribs, which could not be attributed to an act of defendant, was admissible under CRE 703 to support doctor's opinion that the cause of death was nonaccidental trauma; evidence was correctly not offered/considered as CRE 404(b)evidence.

Salcedo v. People, 999 P.2d 833 (Colo. 2000). Trial court erred in admitting expert drug courier profile evidence under CRE 702, because there was no evidence that the expert witness used an objective, widely recognized profile. This seriously undermined the likelihood that the expert's testimony and opinions would assist the jury. Before drug courier profile evidence can be considered logically relevant to whether a person conforming to the profile is a drug courier, the prosecution must demonstrate that the behavior and characteristics that constitute the profile are relatively unique to drug couriers.

People v. Gay, 24 P.3d 624 (Colo. App. 2000). Trial court did not abuse its discretion in permitting officer, qualified as an expert with regard to the sale, packaging, and distribution of crack cocaine and not involved in defendant's arrest, to testify that if defendant in fact sold cocaine in manner alleged, his actions were consistent with those of drug runners in neighborhood.

People v. Ramirez, 1 P.3d 223 (Colo. App. 1999). Trial court properly admitted expert opinion of police officer concerning modus operandi of traffickers transporting drugs into Colorado. Testimony did not constitute impermissible "drug courier profile" evidence.

People v. Lucero, 985 P.2d 87 (Colo. App. 1999). Toxicologist's testimony that defendant's exhausted condition, just prior to car accident for which he was charged, was result of his earlier ingestion of cocaine, was sufficient for jury to infer that defendant was under influence of intoxicants.

People v. Morrison, 985 P.2d 1 (Colo. App. 1999). OK for expert to testify about the typical reactions that young boys exhibit after sexual abuse. *Here:* expert gave an improper response to a question about whether it was typical for young victims to lie about homosexual acts. No plain error because expert went to great lengths to explain she had not considered, and did not express any view about, the credibility of victims in this case.

People v. Dunlap, 975 P.2d 723 (Colo. 1999). Polygraph evidence is *per se* inadmissible.

People v. Miller, 981 P.2d 654 (Colo. App. 1998). Pivotal question for trial court in deciding whether to admit expert testimony is whether jury can receive appreciable help from the testimony. *Here:* trial court properly admitted expert testimony on bloodstain pattern interpretation and crime scene reconstruction because testimony pointed out things that a lay person would not normally observe. Trial court did not abuse its discretion in excluding a psychology professor's expert testimony in support of defendant's theory of self-defense - that a male faced with a sexual assault from another male typically responds with anger - because testimony was based on a survey containing facts that were inconsistent with defendant's story, and involved a hypothetical, rather than actual responses of sexual assault victims.

People v. Lopez, 946 P.2d 478 (Colo. App. 1997). Trial court erred in excluding expert testimony regarding physical and psychological environment surrounding defendant's out-of-court confession. Testimony should not have been excluded as irrelevant because it bore directly on reliability of defendant's statements.

People v. McCoy, 944 P.2d 577 (Colo. App. 1996). Trial court properly excluded expert testimony concerning mental state of person with whom defendant acted because it was not relevant to defendant's intent.

Shreck Hearings

People v. Shreck, 22 P.3d 68 (Colo. 2001). CRE 702 inquiry should focus on the reliability and relevance of the proffered evidence and requires a determination as to (1) the reliability of the underlying principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury. The inquiry should be broad in nature and consider the totality of the circumstances of each specific case. In doing so, a trial court may consider a wide range of factors pertinent to the case. In addition to the requirements of CRE 702, the court must consider the requirements of CRE 403. (Whether the proposed testimony would be useful to the jury depends on its logical relevance and whether its probative value is substantially outweighed by the danger of unfair prejudice or confusion.). The trial court must issue specific findings under both CRE 702 and CRE 403. *Here:* DNA evidence derived from PCR-based testing is admissible under CRE 702 This includes evidence derived from STR multiplex systems. Questions about the reliability of the particular type of multiplex kit go to the weight of the evidence, rather than its admissibility.

People v. Rector, 248 P.3d 1196 (Colo. 2011). *Shreck* does not require an evidentiary hearing with regard to the reliability of every bit of scientific evidence; the trial court has discretion to "avoid unnecessary reliability proceedings ... where the reliability of an expert's methods is properly taken for granted." A party raising a challenge under *Shreck* must sufficiently identify the testimony and/or the witness being challenged. Under CRE 704, an expert's opinion or inferences may embrace the "ultimate issue to be decided by the trier of fact" provided the expert does not: opine on the applicable law or legal standards, state that defendant committed the crime, or opine that there is a particular likelihood that defendant is guilty. *Here:* expert physician's diagnosis of child abuse/intentionally inflicted trauma was proper because he did not recite the legal standards for child abuse, did not testify that defendant caused the child's injuries, and did not speculate about the intent of the person who inflicted the child's injuries. Expert physician's diagnosis of child abuse/intentionally inflicted trauma was not plain error because it did not embrace the "ultimate issue" and because the jury was properly instructed on the elements of child abuse and instructed that it may accept or reject expert testimony. Any potential juror confusion about "medical" versus "legal" child abuse was eliminated during cross-examination and in both parties' closing arguments, and by proper jury instructions – especially where defendant neither requested nor tendered an instruction defining "medical" versus "legal" child abuse.

People v. Prieto, 124 P.3d 842 (Colo. App. 2005). In the absence of a specific *Shreck* challenge to the reliability of the evidence in the trial court, COA will assume that defendant accepted as reliable the scientific principles underlying the proffered expert testimony. *Here:* trial court did not err in concluding that expert's microscopic fiber analysis was reliable and admissible.

Kutzly v. People, 2019 CO 55. When it is appropriate to a hold a *Shreck* hearing, a trial court needs to make a specific finding regarding the reliability of an expert's testimony. In making that finding, a trial court should apply a liberal standard that only requires proof that the underlying scientific principles are reasonably reliable. Determining if expert testimony is reasonably reliable requires considering the totality of the circumstances surrounding the proposed expert testimony and is not contingent on any specific list of factors. Therefore, certain factors—such as whether the technique has been tested, whether it has been subjected to peer review and publication, whether it has been generally accepted, its known or potential rate of error, and the existence and maintenance of standards controlling its operation—will be crucial in some cases but inapposite in others. *Here:* People's expert's testimony about the behavior of sexually abused children and offenders was reasonably reliable. The expert based his opinions on his educational background in conjunction with his experience counseling 1,000 purported child victims of sexual abuse and over 250 purported sexual offenders. Although defendant argued that in order to be reliable, it needed to be confirmed

People v. Perkins, 2023 COA 38. The standards set by the National Fire Protection Association (NFPA) and specifically NFPA 921, the Guide for Fire and Explosion Investigations, constitute a reliable basis for an expert's opinion, under *Shreck* and no hearing was required. As a matter of first impression, COA further holds that strict compliance with NFPA 921 is not required for an expert's testimony to be admissible under CRE 702, and that deviations from NFPA 921 go to the weight of the expert's opinion and not the opinion's admissibility.

People v. Marston, 2021 COA 14. Trial court may admit evidence of the results of a HGN test given to a motorist without first holding a *Shreck* hearing, if the evidence is offered only as evidence of impairment and if the witness testifying about the administration and the results of the test is competent to give such testimony.

People v. Shanks, 2019 COA 160. As an issue of first impression, but consistent with most federal courts, use of historical cell site data to determine general geographic location of a cell phone is widely accepted as reliable and does not require a *Shreck* hearing. Note that historical cell site analysis is distinct from the theory of granulization, which remains a source of controversy within the scientific and forensic communities.

Campbell v. People, 2019 CO 66. Testimony concerning the Horizontal Gaze Nystagmus (HGN) field-sobriety test requires the testimony of an expert.

Ruibal v. People, 2018 CO 93. COA held that because trial court made no specific finding that the theory of "overkill" espoused by the witness was reliable, nor was the reliability of that theory supported by evidence in record or already accepted in this jurisdiction, its admission was an abuse of discretion. Error was harmless because there was overwhelming evidence of defendant's guilt apart from expert testimony.

People v. Campbell, 2018 COA 5. Trial court did not abuse its discretion in denying defendant's motion for a pretrial *Shreck* hearing on admissibility of expert testimony concerning GPS data because GPS technology is prevalent in modern society and widely regarded as reliable.

People v. Rail, 2016 COA 24. Testimony of prosecution's expert on general behavior of child sexual abuse victims did not violate defendant's right to due process and fair trial on charges for sexual assault on child and sexual assault on child-position of trust; opinion was sufficiently reliable, regardless of whether expert had attempted to investigate veracity of such reports of child sexual abuse, testimony did not impermissibly bolster child victim's credibility, especially since she testified that she had never treated nor interviewed victim and was not aware of facts underlying charges against defendant, and defendant did not demonstrate how probative value of her testimony was substantially outweighed by danger of unfair prejudice.

People v. Tunis, 2013 COA 161. Calculations from mixed sample Y-STR DNA found to be reliable in determining the likelihood that a crime sample would not exclude the defendant as a contributor: (1) metric used to determine major and minor contributors was reliable methodology; (2) "counting method" was admissible because used in other fields and generally accepted by other labs; and (3) sample size of less than recommended amount was acceptable because it yielded an interpretable partial profile.

People v. Laurent, 194 P.3d 1053 (Colo. App. 2008). When considering whether to admit evidence tested pursuant to a specific scientific technique, trial court should consider: (1) whether the technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) existence and maintenance of standards controlling the technique's operation; (4) frequency and type of error generated by the technique; and (5) whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure. Scientific tests conducted on physical evidence do not need to be performed pursuant to "written analytical methods."

People v. Wallin, 167 P.3d 183 (Colo. App. 2007). In DV cases, expert testimony on the reasons why DV victims recant is properly admitted under CRE 702, as the reliability of the principles underlying opinion evidence about battered women is well recognized. *Here:* expert witness testified generally about several

possible ways recantation occurs: Victim may deny the story altogether; victim may minimize the story; or victim may refuse to tell the story again. Testimony was relevant to victim's credibility as she recanted her original story by denying portions of it, and by minimizing other portions.

People v. McAfee, 104 P.3d 226 (Colo. App. 2004). Reliability of blood testing for drugs is well-established and was not subject to *Shreck* reliability hearing in absence of any indication that testing procedure/results were unreliable.

People v. Baenziger, 97 P.3d 271 (Colo. App. 2004). Expert testimony regarding rape trauma syndrome was admissible because it was reasonable reliable and helpful to jury to understand victim's behavior during and after the assault.

Masters v. People, 58 P.3d 979 (Colo. 2002). Trial court properly admitted forensic psychologist expert testimony regarding the characteristics of sexual homicides because under CRE 702, it was reasonably reliable and useful to jury, and under CRE 403, its probative value was not substantially outweighed by unfair prejudice.

People v. Huehn, 53 P.3d 733 (Colo. App. 2002). Computer-generated records are not "scientific evidence" that require a showing under *Frye* or *Daubert*.

People v. Lafferty, 9 P.3d 1132 (Colo. App. 1999). OK for DA to introduced DV expert testimony "cycles of violence" to explain why victims recant. Testimony did not amount to vouching for victim's credibility but explained why a victim's testimony might change over time. This testimony is generally admissible as helpful to jury under CRE 702.

Brooks v. People, 975 P.2d 1105 (Colo. 1999). Nonscientific evidence is governed by two standards: (1) CRE 702 - whether the information will be helpful to the jury and whether the witness is qualified to opine on such matters; and (2) CRE 403 - whether probative value is substantially outweighed by danger of unfair prejudice. *Here:* OK to admit dog-scent-tracking evidence in the form of expert testimony from the dog's handler.

People v. Genrich, 928 P.2d 799 (Colo. App. 1996). Pretrial hearing on the reliability of prosecution's tool-mark-identification testimony was not warranted (even though expert did not have any formal education after high school) because expert had extensive experience in the area and had testified more than 400 times as an expert on firearms and tool marks.

Impermissible Bolstering

People v. Battigalli-Ansell, 2021 COA 52. Trial court did not abuse its discretion by prohibiting defense expert from testifying that defendant's chat messages were consistent with fantasy role-play (defendant did not believe he was talking to a juvenile) because the expert's opinion crossed the line into impermissible bolstering by suggesting that defendant was telling the truth.

People v. Baker, 2019 COA 165. A securities fraud expert improperly usurped the jury's function when she phrased her opinions in a way that suggested she had made credibility and guilt determinations, rather than offering generalized conclusions on what the victims and defendant "might" have said. Because the facts the expert relied on were disputed, the error was not harmless, and the securities fraud and theft convictions were reversed.

People v. Marx, 2019 COA 138. Blind expert testimony on the percentage of children/teenagers who make false allegations of sexual assault is improper because it impermissibly bolster's victim's credibility and relates to no other issue than victim's truthfulness. Opinion amounts to plain error where theory of defense is premised on victim's lack of credibility.

People v. Short, 2018 COA 47. Victim's family member's testimony that victim would not "normally…lie about something like that" was not plain error where case was strong - although it was improper.

People v. Howard-Walker, 2017 COA 81M, rev'd other grounds, 2019 CO 69. Officer's testimony that he did not think defendant was being forthcoming/truthful during the police interview was an improper opinion regarding defendant's truthfulness; not plain error where ample evidence to support convictions.

People v. Thompson, 2017 COA 56. Defendant argued that two of the prosecution's expert witnesses improperly vouched for the child-victims' credibility testified about various dynamics of child abuse and whether the children in this case exhibited those behaviors. Neither expert testified either directly or by implication that the children were telling the truth; neither expert said that they believed the children; neither expert suggested that children do not tend to make up stories of abuse; and neither expert tried to explain the inconsistencies in the children's testimony.

People v. Bridges, 2014 COA 65. Expert witness may not opine that witness was telling the truth on a specific occasion (CRE 608). *Here:* forensic interviewer testified that he concluded that victim was not coached; this was an impermissible opinion about credibility of another witness's statement.

People v. Davis, 312 P.3d 193 (Colo. App. 2010). Trial court erred by excluding witness's lay opinion testimony impeaching his sister's veracity pursuant to CRE 608(a). Error was harmless because defense had the opportunity to otherwise impeach sister's credibility through cross-examination and by eliciting testimony from the brother that he would not trust his sister with personal information.

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). Expert's testimony that she could not imagine an eight-year-old child hyper-reporting in order to be seen as a victim was invited error. Expert's answer was reasonably foreseeable given wording of defense counsel's question. The question, if error by defense counsel, was not simply an oversight but an error in strategy.

People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005). Police officers testified that it is not uncommon for guilty criminal suspects to deny guilt, make false accusations of police brutality, and falsely claim that they do not understand their *Miranda* rights. *Here*: this was proper lay opinion of defendant's conduct based on the officers' observations and everyday experience and was admissible to show defendant had required mens rea for charged offense. Police officer testified defendant was "messing" with him when defendant claimed he did not understand his *Miranda* rights. *Here*: No plain error where testimony was offered to rebut defendant's intoxication defense and to show his state of mind; it did not constitute an improper opinion regarding defendant's truthfulness on a specific occasion.

People v. Hall, 107 P.3d 1073 (Colo. App. 2004). Officer's opinion testimony that two witnesses seemed "sincere" was improper; however, any error did not rise to the level of plain error.

People v. Jenkins, 83 P.3d 1122 (Colo. App. 2003). Victim's treating physician could properly opine that victim's burn patterns were consistent with her having been assaulted. Victim's treating psychologist could properly opine that victim's behavior was consistent with that of a person burned as a result of an assault. Further, this testimony was not improper commentary on the victim's credibility.

People v. Eppens, 979 P.2d 14 (Colo. 1999). Prior consistent statements may be used for rehabilitation when a witness's credibility has been attacked. Trial court must find, however, that the statements have some probative force bearing on the credibility of the witness beyond the mere fact that the witness has repeated a statement consistent with trial testimony. *Here*: testimony of a social worker that a child victim's report of sexual assault was "sincere" amounted to impermissible character testimony. A witness is not permitted to offer an opinion that a child was telling the truth on a specific occasion. However, the admission of the erroneous opinion testimony did not constitute plain error.

Closed Circuit Television (CCTV): §16-10-402

People v. Aldridge, 2018 COA 131. Use of CCTV for child witness testimony is permissible only if statute is strictly followed. Opinion suggests that following procedures in §16-10-402 other than those approved of in *Maryland v. Craig*, 497 U.S. 836 (1990)—witness and counsel in another room, judge, defendant, and jury in courtroom—may be unconstitutional. *Here:* judge and defendant watched CCTV testimony from chambers, and all other participants remained in courtroom; inability of jury to see defendant during CCTV testimony violated his right to be present.

People v. Phillips, 2012 COA 176. Trial court did not violate defendant's confrontation rights by allowing child witness to testify via CCTV, in prosecution for first degree murder, child abuse resulting in death, and tampering with physical evidence. Child's therapist testified child would be traumatized psychologically if he were made to testify in front of defendant, child testified via CCTV from court's chambers, defense counsel was present in chambers, court and prosecution helped jury see and hear child during his testimony, court allowed defense counsel to cross-examine child fully, and defendant had two-way communication with counsel during direct and cross-examination.

People v. Ujaama, 2012 COA 36. Neither the Confrontation Clause nor the statute relating to testimony of child witnesses via CCTV requires the actual receipt of evidence before permitting a child to testify via that procedure. *Here:* Under confrontation clause, trial court could authorize use of CCTV in murder prosecution to take testimony of child witness on basis of state's offer of proof alone without taking any actual evidence including expert testimony, where defendant did not contest the substance of state's offer of proof despite the opportunity to do so, but, at best, contested the means by which that information was conveyed, as well as the sufficiency of the information to support the relief requested by state.

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008), aff'd operation of law, 238 P.3d 1283 (Colo. 2010). Error in removing defendant from the courtroom to view her daughter's testimony by CCTV, without effective means of instantly communicating with counsel, did not require reversal. Neither the abuse suffered by the daughter nor defendant's role in it were disputed; daughter's testimony was consistent with the theory of defense (duress); and defendant failed to establish that she was prejudiced by the lack of constant electronic communication with counsel.

People v. Mosley, 167 P.3d 157 (Colo. App. 2007). Court may not erect physical barrier between testifying child victim and defendant to protect victim from trauma of testifying in defendant's presence; court must follow procedure set in CCTV statute. Recognized that CCTV procedure for taking testimony of traumatized children was consistent with defendant's right in a criminal case to face-to-face confrontation of adverse witnesses.

Hearsay

General Hearsay: CRE 801

People v. Perez, 2024 COA 94. The admission of recorded jailhouse calls between defendant and his mother did not violate the confrontation clause because the statements were not testimonial. *Here:* defendant and his mother discussed his alibi defense and defendant explained why it would not work anymore; primary purpose of mother's statements was to discuss defendant's theory of defense, not to develop a record for the prosecution.

People v. Vanderpauye, 2023 CO 42. CSC clarifies that Colorado law has no per se rule excluding a self-serving hearsay statement by a defendant. Instead, the court holds that, like any other hearsay statement, defendant's self-serving hearsay statement may be admissible if it satisfies a hearsay-rule exception in the Colorado Rules of Evidence. Still, the self-serving nature of defendant's hearsay statement, while not grounds for automatic exclusion, may be relevant in some cases to the determination of whether the statement fits within

the scope of a hearsay exception in CRE 803. Of particular interest here, under the excited utterance exception in CRE 803(2), the self-serving nature of defendant's hearsay statement may be probative of whether the statement was a spontaneous reaction, rendering it potentially admissible, or the result of reflective thought, rendering it inadmissible. Regardless of whether the self-serving nature of defendant's hearsay statement affects the statement's admissibility under the particular hearsay exception in play, the trial court should consider that aspect of the statement in exercising its discretion pursuant to CRE 403. *Here:* trial court incorrectly determined that the self-serving nature of defendant's hearsay statement rendered the statement automatically inadmissible. Further, it erred in alternatively ruling that the excluded statement did not meet the excited utterance exception to the hearsay rule under CRE 803(2). CSC concludes that defendant's statement, though self-serving, was admissible under the excited utterance exception. Further, the court rules that the statement satisfied the CRE 403 balancing test. Because the trial court's error in excluding the statement was not harmless, the court remands for a new trial.

People v. McLaughlin, 2023 CO 38. Under CRE 106, if the prosecution creates a misleading impression by excluding a defendant's statements that ought in fairness to be considered contemporaneously with the proffered evidence, then the rule of completeness requires the prosecution to introduce such statements. When a defendant-declarant statements are admitted under the rule of completeness, the prosecution may not impeach defendant-declarant under CRE 806. Court of appeals is affirmed. *Here:* at trial, People introduced a video of the interaction between defendant and the arresting officer; they edited the video to omit statements defendant made to the officer alleging that an unidentified woman was the driver of the vehicle. Defendant sought to introduce these statements under the rule of completeness, arguing that the redacted video created a misleading impression.

People v. Johnson, 2019 COA 159. None of deceased victim's statements were testimonial; they were not made to law enforcement and were not made by victim with eye toward future use in court; testimonial inquiry focuses on circumstances under which declarant made statement, not witness testifying about statements. Here: witness who testified about deceased victim's statements was present in courtroom and subject to cross-examination about her statements to police; testimony presented no confrontation issue.

People v. N.T.B., 2019 COA 150. Dropbox and Comcast records were hearsay. Dropbox account identification number, activity log, and associated IP address, as well as the Comcast records connecting the IP address to the physical address where the defendant resided, were offered for the truth of the information. While the prosecution asserted that these records were not hearsay because they were generated automatically without human input, the offer of proof in the trial court did not identify a basis for concluding they were generated automatically.

People v. Dominguez, 2019 COA 78. Offer to purchase drugs at particular price is a verbal act and is not hearsay.

People v. Godinez, 2018 COA 170. Where testimony is admitted for its falsity, not for its truth, the evidence does not implicate hearsay concerns; hearsay statements properly admitted, to show effects on police investigation.

People v. Short, 2018 COA 47. Rule of completeness allows into evidence otherwise inadmissible self-serving hearsay; rule of completeness applies to oral statements, writings and recordings; any error is reviewable for non-constitutional harmless error. *Here:* defendant told police that "someone's abusing" victim, "but it ain't me;" prosecution sought to only elicit first portion of statement, but defendant urged that both statements should be elicited under rule of completeness; trial court agreed, but ruled that if both statements come in, prosecution could offer evidence of defendant's prior conviction; defense did not pursue admission of second statement. COA concluded trial court erred but harmless in light of strength of prosecution's case.

Nicholls v. People, 2017 CO 71. Nontestimonial statements do not implicate a defendant's right to confrontation under the Colorado Constitution. Overruled Compan v. People, 121 P.3d 876 (Colo. 2005).

People v. Smalley, 2015 COA 140. In phone conversation between defendant and another person, other person's statements were all properly introduced for non-hearsay purpose of putting defendant's responses in context as admissions - no violation of defendant's right to confrontation.

People v. Phillips, 2012 COA 176. When statement contains multiple possible layers of hearsay, each layer must be individually analyzed to determine its admissibility; term "statement" under CRE 801(a) only applies to statements of fact which could be considered true/false; it does not apply to "imperative declarations" such as orders or instructions to do something; non-assertive acts, such as those that show a person is abnormally hungry, are not hearsay.

People v. Buckner, 228 P.3d 245 (Colo. App. 2009). Cell phone is an electronic device containing electronically stored information; it is not a person or declarant making a communicative statement within meaning of CRE 801; stored telephone numbers on cell phone were not hearsay.

People v. Robinson, 226 P.3d 1145 (Colo. App. 2009). Informant's statements – referencing drug transaction arrangements, purportedly describing the two suppliers and giving their street names, and identifying them upon arriving at scene – were all properly introduced for non-hearsay purpose of showing their effect on listening officers - to show why the officers acted as they did. No violation of defendant's right to confrontation.

Golob v. People, 180 P.3d 1006 (Colo. 2008). Testimony regarding independent verification of expert witness's conclusion by non-testifying expert as part of CBI lab protocol is inadmissible hearsay and does not qualify as non-hearsay under CRE 703.

Vasquez v. People, 173 P.3d 1099 (Colo. 2007). Doctrine of forfeiture by wrongdoing does not provide basis for admission of hearsay in absence of specific hearsay exception.

Hinojas-Mendoza v. People, 169 P.3d 662 (Colo. 2007). Police officer's translation of informant's statements did not add a layer of inadmissible hearsay to informant's statements. In determining whether admission of translated testimony is appropriate, relevant factors include: (1) whether actions after the translated conversation were consistent with the translated statements; (2) whether interpreter had qualifications to interpret and language skill; (3) whether interpreter had any motive to mislead or distort; and (4) which party supplied interpreter.

People v. Kendall, 174 P.3d 791 (Colo. App. 2007). Where officer testified to conversation over a cell phone where caller denied he was defendant, statement was not hearsay because it was not offered for truth of matter asserted.

People v. Isom, 140 P.3d 100 (Colo. App. 2005). There is no right of confrontation or hearsay preclusion when statements are offered, not for their truth, but to provide context for declarant's statements. *Here:* defendant challenged admission of videotaped interview of child sexual assault victim, arguing that interview contained hearsay statements made by interviewer, and since interviewer did not testify, his right of confrontation was violated. Forensic interviewer's questions/statements were offered solely to place victim's statements into context and were not offered to prove truth of matter asserted.

People v. Joyce, 68 P.3d 521 (Colo. App. 2002). No plain error where prosecutor elicited victim's hearsay statements from arresting officer, such as how much victim had to drink or whether he was a light or heavy sleeper; testimony was merely cumulative and had little impact given extensive testimony by other witnesses.

People v. Mossman, 17 P.3d 165 (Colo. App. 2000). Trial court erred in excluding as hearsay statements of two witnesses regarding violation of custody order, because these statements were offered only to prove that defendant believed his daughter was being abused - a fact relevant to his affirmative defense.

Prior Consistent/Inconsistent Statements: CRE 801(d)(1)(B)

People v. Allgier, 2018 COA 122. Witness's prior consistent statements are admissible under CRE 801(d)(1)(B) as substantive evidence or to rehabilitate a witness's credibility; when a witness's credibility has been attacked, how much of a prior consistent statement is admissible turns on the scope of the attack; if witness's testimony is an attack based on specific facts, only prior consistent statements regarding those facts are admissible; but where the attack is more general, jury may hear all relevant facts, including consistent/inconsistent statements.

People v. Manzanares, 2020 COA 140M. Prior consistent statements may be used for rehabilitation when a witness' credibility has been attacked, as such statements are admissible outside CRE 801(d)(1)(B). *Here:* consistent with defense counsel's opening statement that the victim had "made the story up," defense counsel's cross-examination focused on victim's motivation to accuse defendant, which was that he "had everything to gain and nothing to lose." In other words, defense counsel launched a general and sustained attack on victim's credibility that was not limited to specific facts.

People v. Clark, 2015 COA 44. In Colorado, a witness's prior consistent statements are admissible under two distinct theories. Under CRE 801(d)(1)(B), such statements may be admitted as substantive evidence if the requirements of that rule are met. They may also be used for rehabilitation when a witness' credibility has been attacked, as such statements are admissible outside CRE 801(d)(1)(B). Under either theory, the rehabilitative uses of such statements are still governed by the general principles of relevancy found in CRE 401, 402, and 403.

People v. Miranda, 2014 COA 102. Determining how much of a prior consistent statement is admissible is based upon its relevance and probative use, which turns on the scope of impeachment and the attack on the witness's credibility.

People v. Banks, 2012 COA 157. Recorded police interviews with 2 witnesses were properly admitted pursuant to CRE 801(d)(1)(B) as prior consistent statements after witnesses' credibility was brought into question at trial.

Admission by Party-Opponent: CRE 801(d)(2)

People v. Thomas, 2014 COA 64. Defendant's silence in response to accusation he was driver during DUI-related crash was properly admitted as adoptive admission.

People v. Stroud, 2014 COA 58. Defendant's statements at contested D&N adjudication/termination hearing are admissible in subsequent criminal prosecutions as admissions by party opponent under CRE 801(d)(2).

People v. Phillips, 2012 COA 176. Defendant need not be charged with conspiracy before statement made to him can be admitted as co-conspirator statement under CRE 801(d)(2).

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). Letter properly authenticated as being written by defendant constitutes an admission by party opponent under CRE 801(d)(2) and is not hearsay.

People v. Scearce, 87 P.3d 228 (Colo. App. 2003). Verbal act evidence is not hearsay because statement is admitted to show that it was actually made, not to prove truth of what was asserted in statement. Here: conspiracy trial, court erred in prohibiting defendant from eliciting testimony about statements he and

accomplice made; statements were offered not for truth of matters contained in statements, but for very fact that they were made, to dispute prosecution's claim there was an agreement made to perform an illegal act.

People v. Robson, 80 P.3d 912 (Colo. App. 2003). CRE 801(d)(2), classifying confession as non-hearsay, does not abrogate substantive rule of law requiring that confession be corroborated to support a conviction.

People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003). Under CRE 801(d)(2)(B), a statement is not hearsay if it is offered against a party who has, by words or conduct, manifested belief in the truth of statement – an "adoptive admission." This is troublesome in criminal cases because of constitutional constraints against inferences drawn from defendant's silence. In a noncustodial setting, silence in face of an accusation of wrongdoing gains probative weight when it occurs in circumstances where silent party could be expected to disagree with statement. In determining whether incriminating statement constitutes adoptive admission of defendant, court should consider whether (1) statement is such that an innocent person would normally be induced to respond; (2) defendant heard and understood statement made in his presence; and (3) he could have denied or objected to statement without emotional or physical impediment. *Here:* defendant's silence in face of friend's claim to another that defendant participated in robbery, and his later tapping of his gun to emphasize friend's threats to another to remain silent about robbery, constituted an adoptive admission since it clearly indicated that he understood and agreed with incriminating statement.

People v. Rivera, 56 P.3d 1155 (Colo. App. 2002). Under CRE 801(d)(2)(E), proponent of admission of co-conspirator's statement as non-hearsay bears burden of establishing by preponderance that (1) party against whom statement is offered and declarant were members of a conspiracy; and (2) declarant's statement was made during course of and in furtherance of conspiracy.

CRE 803 Exceptions (Declarant Available/Unavailable)

Spontaneous Present Sense Impressions: CRE 803(1)

Bernache v. Brown, 2020 COA 106. While police report contains no identifying information about the witness, it can be inferred that witness spoke with officer after the accident occurred; without more foundation, no way to conclude that the statement automatically qualifies as present sense impression under CRE 803(1).

People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. App. 2005). Informant's statements concerning telephone arrangements for drug transaction with defendant, admitted through officer's testimony commingling statements of informant relating content of his telephone conversation after it had ended with informant's side of the conversation while it was occurring, did not qualify as spontaneous present sense impression under hearsay exception.

People v. Czemerynski, 786 P.2d 1100 (Colo. 1990). Hearsay statement of daughter's identification of the caller's voice was admissible under C.R.E. 803(1); spontaneous or present sense impressions are admissible despite the availability of declarant CRE 803(1) is more restrictive than the relevant FRE 803(1) because Colorado includes a contemporaneous requirement.

People v. Franklin, 782 P.2d 1202 (Colo. App. 1989). As distinguished from Federal rule, for testimony to be admitted under CRE 803(1), it must be a spontaneous statement describing or explaining an event or condition made while the declarant is perceiving the event or condition. Colorado case law requires a present sense impression to be instinctive and spontaneous in order to be admissible.

Excited Utterance: CRE 803(2)

People v. Abdulla, 2020 COA 109M. A statement may qualify under the excited utterance hearsay exception if :(1) the occurrence or event was sufficiently startling to render inoperative the normal reflective thought processes of an observer, (2) the declarant's statement was a spontaneous reaction to the event, and (3) direct or circumstantial evidence supports an inference that the declarant had the opportunity to observe the startling event. Factors to be considered in determining whether a statement was spontaneous, as required by the excited utterance hearsay exception, include the lapse of time between the startling event and the out-of-court statement, whether the statement was made in response to an inquiry, whether the statement was accompanied by outward signs of excitement or emotional distress, and the choice of words employed by the declarant to describe the experience. While there is no bright-line time limitation for an excited utterance hearsay exception, the statement must be a spontaneous reaction rather than the operation of normal reflective thought processes. A trial court is in the best position to consider the effect of a startling event on a declarant, and it is afforded wide discretion in determining admissibility under the excited utterance hearsay exception. The excited utterance hearsay exception extends to statements made in response to questioning. *Here:* trial court's finding that victim was still under the trauma of attack when she was speaking with detective, at least 12 hours afterwards, was insufficient by itself to admit victim's out-of-court statements at police station pursuant to the excited utterance hearsay exception, in sexual assault trial.

People v. Vanderpauye, 2023 CO 42. CSC clarifies that Colorado law has no per se rule excluding a self-serving hearsay statement by a defendant. Instead, the court holds that, like any other hearsay statement, defendant's self-serving hearsay statement may be admissible if it satisfies a hearsay-rule exception in the Colorado Rules of Evidence. Still, the self-serving nature of defendant's hearsay statement, while not grounds for automatic exclusion, may be relevant in some cases to the determination of whether the statement fits within the scope of a hearsay exception in CRE 803. Of particular interest here, under the excited utterance exception in CRE 803(2), the self-serving nature of defendant's hearsay statement may be probative of whether the statement was a spontaneous reaction, rendering it potentially admissible, or the result of reflective thought, rendering it inadmissible. Regardless of whether the self-serving nature of defendant's hearsay statement affects the statement's admissibility under the particular hearsay exception in play, the trial court should consider that aspect of the statement in exercising its discretion pursuant to CRE 403. *Here:* trial court incorrectly determined that the self-serving nature of defendant's hearsay statement rendered the statement automatically inadmissible. Further, it erred in alternatively ruling that the excluded statement did not meet the excited utterance exception to the hearsay rule under CRE 803(2). CSC concludes that defendant's statement, though self-serving, was admissible under the excited utterance exception. Further, the court rules that the statement satisfied the CRE 403 balancing test. Because the trial court's error in excluding the statement was not harmless, the court remands for a new trial.

People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). Statement on 911 tape by an unidentified bystander did not qualify as excited utterance because there was no evidence that bystander observed startling event.

People v. King, 121 P.3d 234 (Colo. App. 2005). Declarant's statements, made over 2-hour period after she was sexually assaulted and stabbed, were properly admitted as excited utterances, where declarant was hysterical, repeatedly asked if she was going to die, continually lapsed into her native French, and was continually being examined and treated for her injuries.

People v. Garrison, 109 P.3d 1009 (Colo. App. 2004). Statement is not precluded as excited utterance where victim made statement in response to question. Here: victim's statements made during and after series of phone calls qualified as excited utterances where evidence showed victim was "extremely excited and mad" and had no time to reflect on statements made under stress.

People v. Mullins, 104 P.3d 299 (Colo. App. 2004). While speaking to 911 operator, about 15 minutes after being stabbed, victim was bleeding, having trouble breathing, and sweating profusely. Being stabbed is startling event, and it was within the trial court's discretion to determine that 911 call was admissible as excited utterance.

People v. Moore, 117 P.3d 1 (Colo. App. 2004). Hearsay statement is an excited utterance if its proponent shows: (1) event was sufficiently startling to render inoperative normal reflective thought processes of observer; (2) declarant's statement was spontaneous reaction to event and not result of reflective thought; and (3) direct or circumstantial evidence supports inference that declarant had opportunity to observe startling event. Trial court is afforded wide discretion in determining whether statement is an excited utterance, and, if supported by evidence, court's ruling will not be disturbed on appeal. *Here:* declarant was stabbed; in ambulance shortly after and in response to police officer's question, she told officer who stabbed her. Trial court did not err in finding her statement admissible as excited utterance because being stabbed is startling event, and because excited utterance exception extends to statements made in response to questioning, court acted within its discretion in determining that declarant was still under stress/excitement of stabbing at time of her statement.

People v. Martinez, 83 P.3d 1174 (Colo. App. 2003). Victim's testimony that witness upon entering room during sexual assault, said "Oh My God" was properly admitted as excited utterance. Trial court "is in the best position to consider the effect of the startling event on the declarant," and therefore is "afforded wide discretion" is determining admissibility of the statement.

People v. Suazo, 87 P.3d 124 (Colo. App. 2003). In harassment-stalking case, testimony from police officer relating victim's statement about her relationship with defendant was not an excited utterance because it referred to prior events and not the startling event (defendant's arrest); error not harmless because it contradicted victim's own testimony about her interpretation of defendant's threats and was central to the case; in closing argument, prosecutor characterized statement to officer as more accurate than victim's testimony.

People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001). There is no firm time limit between startling event and excited utterances "because the duration of stress will obviously vary with the intensity of the experience and the emotional endowment of the individual." Where 3 hours elapsed between murder and statement, with several interludes of reflective thought, trial court erred in concluding that statement was an excited utterance.

People v. Martinez, 18 P.3d 831 (Colo. App. 2000). Statements victim made after she was found and taken to hospital were properly admitted as excited utterances, notwithstanding that some of statements were made in response to questions, and that 20 minutes elapsed since "startling event."

Existing Mental, Emotional, Physical Condition: CRE 803(3)

People v. Cross, 2023 COA 24. A victim's statements to the effect that she was, at the time, afraid of another fall squarely within the state of mind hearsay exception under CRE 803 because they refer not to past events or conditions, but to the victim's then existing state of mind. *Here:* victim's brother testified that the victim told him she would speak to him on her cell phone from the downstairs area of the house because defendant had difficulty walking up and down stairs and would have difficulty overhearing her when she spoke in that area of the house. The brother explained that the victim told him that, when she and her brother needed to talk about specific issues, she would actually wait for defendant to leave the house, and then go downstairs and call her

brother, because she was afraid of defendant's reaction and that he might be standing at the top of the stairs listening.

People v. Acosta, 2014 COA 82. Hearsay statements are not inadmissible under CRE 803(3) simply because they are made in response to direct questioning; testimony that thinking about incident made victim feel sick was admissible because it established victim's state of mind and was statement describing present physical condition.

People v. Phillips, 2012 COA 176. Child's nontestimonial statement to the teacher's aide about his ear hurting was admissible for its truth under CRE 803(3), as an indication of the child's then existing physical condition.

Pena v. People, 173 P.3d 1107 (Colo. 2007). Out-of-court statements by sexual assault victim describing physical injuries resulting from the sexual assault were admissible under the hearsay exception for statements describing a declarant's then existing physical condition. *Here:* the officer testified that the night of the assault, the victim complained that her wrists were sore from being held down. We hold that this statement is within the scope of CRE 803(3) and was admissible.

People v. Welsh, 176 P.3d 781 (Colo. App. 2007). Evidence that victim wanted to end his relationship with defendant was relevant/admissible CRE 803(3) to show that defendant had motive for killing victim and to rebut her testimony that she had not intended to kill him.

People v. Gash, 165 P.3d 779 (Colo. App. 2006). For purposes of federal/state Confrontation Clause analysis, state of mind exception, CRE 803(3), constitutes firmly-rooted hearsay exception; because its firmly rooted, court's failure to make reliability determination regarding the out of court statements was not plain error.

People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000). No error in permitting victim's sister to testify that victim, who was alleged to have been initial aggressor, was afraid of defendant; it was relevant in light of defendant's theory of self-defense.

Statements Purpose Medical Diagnosis: CRE 803(4)

People v. Jaramillo, 183 P.3d 665 (Colo. App. 2008). Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded as hearsay. CRE 803(4). The rationale for this exception to the hearsay rule is that statements made to a physician are presumptively reliable because of a patient's belief that the effectiveness of the treatment he or she receives may depend largely upon the accuracy of the information provided to the physician. To ensure that evidence admitted under CRE 803(4) meets the rule's rationale, the court must determine: (1) whether the declarant's motive is consistent with the purpose of the rule; and (2) whether it is reasonable for the physician to rely on the information in diagnosis or treatment. *Here:* prosecution called a nurse practitioner who treated the victim to testify about her injuries and testified that the victim stated she was involved in a domestic dispute with her significant other. The record did not indicate that the type of dispute or identity of the assailant was necessary for or pertinent to the nurse practitioner's diagnosis or treatment. Under these circumstances, the challenged statements were inadmissible hearsay. However, the record also shows the challenged statements were cumulative of other non-objected to testimony and defendant never argued at trial that he was not the person who assaulted the victim or that the fight was not a result of a domestic dispute. Any error was harmless.

People v. Tyme, 2013 COA 59. Statements made to SANE nurse during SANE exam are admissible if: (1) statement is reasonably pertinent to treatment or diagnosis; and (2) content of statement is such as is reasonably relied on by physician in treatment or diagnosis. *Here:* victim was examined by SANE 5 days after assault and at request of law enforcement; statements she made to SANE were reliable and admissible because SANE testified that victim's medical history is used "to diagnose and treat" victim and to "guide diagnosis and treatment."

People v. Vigil, 127 P.3d 916 (Colo. 2006). The doctor's questioning of the child during the course of the medical examination did not constitute the functional equivalent of police interrogation. The doctor was not a government official who produced the child's statements with a purpose of developing testimony for trial, nor was the police officer involved in producing the statements with a purpose of developing testimony for trial. Under *Crawford's* explicit guidance, the child's statements to the doctor are not testimonial evidence and were properly admitted under CRE 803(4).

People v. Edwards, 101 P.3d 1118 (Colo. App. 2004). Out-of-court statements that fit within the medical diagnosis or treatment exception to the hearsay rule may also be admitted without violating the Confrontation Clause despite the declarant's failure to testify at trial. Such statements include those under CRE 803(4) describing "the inception or general character of the cause or external source" of the medical condition being treated if the statements are "reasonably pertinent to diagnosis or treatment."

People v. Allee, 77 P.3d 831 (Colo. App. 2003). No error in admitting victim's hearsay statements to ER doctor; but mention of defendant as perpetrator should have been excluded under rule because defendant's identity was not required for diagnosis or treatment. Not reversible because identity testimony was cumulative to testimony of investigating officers.

People v. Martinez, 18 P.3d 831 (Colo. App. 2000). Statements victim made at scene while being treated by paramedic were admissible under CRE 803(4) as statements made for purpose of medical diagnosis.

People v. Dore, 997 P.2d 1214 (Colo. App. 1999). When defendant has not testified at trial but elicits his own statements through another witness as exception to hearsay, rules authorize jury to hear impeachment evidence that would have been admissible if defendant had testified. Here: defendant's prior statements to treating psychiatrist were admissible under CRE 803(4); once statements were admitted, prosecutor could introduce evidence of defendant's prior felony convictions under CRE 806.

Recorded Recollection: CRE 803(5)

People v. Clary, 950 P.2d 654 (Colo. App. 1997). A recorded recollection is not excluded by hearsay rules if: (1) it appears that the witness once had knowledge concerning the matter; and (2)(a) can identify the memorandum or record, (b) adequately recalls the making of it at or near the time of the event, either as recorded by the witness or by another, and (c) can testify to its accuracy. Memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

People v. Miranda, 2014 COA 102. When victim's credibility is broadly and generally attacked, her entire prior statement is admissible for rehabilitation even if some parts are consistent and some parts are inconsistent with her trial testimony. CRE 803(5) does not specify time limitation in which a past recollection recorded must have been prepared/adopted. *Here:* though there was a delay between charged acts and preparation of document, the time span was not so long that it impacted victim's ability to recall the events she recited.

Records Regularly Conducted Activity: CRE 803(6)

People v. Jaeb, 2018 COA 179. The business records exception. It provides that a hearsay document is admissible if: (1) it was made at or near the time of the matters recorded in it; (2) it was prepared by, or from information transmitted by, a person with knowledge of the matters recorded; (3) the person who recorded the document did so as part of a regularly conducted business activity; (4) it was the regular practice of that business activity to make such documents; and (5) the document was retained and kept in the course of a regularly conducted business activity. *Here:* although the witness testified that the affidavit appraised the value of the trailer as of the time of the theft, the affidavit itself was created a year and half after the theft of the trailer, and two months before trial; on its face the document reflected it was requested by the witness; thus, the affidavit was not created "at or near the time" of the events recorded in it and lacks the inherent reliability we ascribe to true contemporaneous business records. Finally, the testimony of the witness did not lay an adequate foundation for a business record as she did not testify, and the trial court did not find, that the document was prepared by, or from information transmitted by, a person with knowledge of the matters recorded; or that the person who recorded the document did so as part of a regularly conducted business activity; or that it was the regular practice of that business activity to make such documents.

People v. Quillen, 2023 COA 22. COA holds as a matter of first impression that business records (from Lyft) accompanied by a record custodian's affidavit are admissible under CRE 803(6) and 902(11).

People v. Tran, 2020 COA 99. Walmart's statement in the trespass notice was not prepared in anticipation of litigation: (1) Walmart's statement warned defendant that he was not allowed on Walmart property and that if he entered Walmart property again, he could face criminal prosecution. This language suggests that the statement's purpose was to deter criminal litigation, not to prepare for it; (2) at the time Walmart issued the trespass notice to defendant there was nothing to litigate. If Tran had complied with the notice, there would have been no criminal litigation; (3) the reliability concerns associated with documents prepared in anticipation

of litigation — an incentive to deceive and a lack of routine practice in making the document — are not present here. Walmart was simply informing defendant that he could no longer enter its property. Walmart had no incentive to misrepresent this fact to avoid liability; and (4) the undisputed record shows that Walmart routinely issued trespass notices to shoplifters across the country. Trial court did not abuse its discretion in admitting this statement under CRE 803(6).

People v. N.T.B., 2019 COA 150. Dropbox and Comcast records were hearsay; Dropbox account identification number, activity log, and associated IP address, as well as Comcast records connecting IP address to physical address where defendant resided, were offered for truth of the information; while prosecution asserted that these records were not hearsay because they were generated automatically without human input, offer of proof in trial court did not identify a basis for concluding they were generated automatically.

People v. Flores-Lozano, 2016 COA 149. Computer spreadsheet, prepared by an in-house loss prevention director, was properly admitted as business record; although spreadsheet was not "a simple regurgitation of electronically generated information" because loss prevention director applied his professional judgment to sort data and decide what information to include, it was still proper business record because it was compiled from information generated as transactions occurred, loss prevention director had knowledge of matters recorded, and he regularly conducted theft investigations and kept spreadsheets in course of investigations; court acted within its discretion in finding that spreadsheet was not prepared in anticipation of litigation.

People v. Glover, 2015 COA 16. Under CRE 902(11), extrinsic evidence of authenticity is not required with respect to a business record, if [the record is] accompanied by an affidavit of its custodian or other qualified person ... certifying that the record: (a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) was kept in the course of the regularly conducted activity; and (c) was made by the regularly conducted activity as a regular practice. *Here:* even though an arguable business relationship exists between Facebook and its users, there was no evidence presented that Facebook substantially relies for any business purpose on information contained in its users' profiles and communications. Thus, the Facebook printouts were neither authenticatable under CRE 902(11) nor admissible under CRE 803(6). Explains how to authenticate Facebook records in other ways.

People v. Marciano, 2014 COA 92. Admission of bank records under CRE 803(6) can be based on judicial notice because nature of bank records and their trustworthiness can establish sufficient foundation for admission.

People v. Herdman, 2012 COA 89. Where prosecution witness's opinion was based on an unrecorded phone call, call was hearsay and did not qualify as business record; error was harmless because there was substantial other evidence rebutting hearsay statement.

People v. Williams, 183 P.3d 577 (Colo. App. 2007). CRE 803(6) provides for the admission of any "memorandum, report, record, or data compilation ... of acts, events, conditions, opinions, or diagnosis, made at or near the time by ... a person with knowledge, if kept in the course of a regularly conducted business activity." *Here:* defendant made a timely request pursuant to §16-3-309(5) to have the person who conducted the testing present to testify at trial. Thus, even if the COA assumed the laboratory report constituted a business record, the specific requirement in §16-3-309(5) that the testing technician be made available at trial upon timely request overrides the general hearsay exception of CRE 803(6). Therefore, the trial court erred by admitting the laboratory report without the testimony of the CBI agent who conducted the testing.

Public Records: CRE 803(8)

People v. Warrick, 284 P.3d 139 (Colo. App. 2011). Public records hearsay exception CRE 803(8) prohibits admission of matters observed by police officers in criminal cases; prohibition does not apply to non-adversarial

reports that are routinely prepared, such as charging documents and booking reports; rule only prohibits admission of investigative reports, which inherently contain subjective findings and conclusions.

People v. Gregg, 298 P.3d 983 (Colo. App. 2011). Generally, proponent of admitting public record into evidence as exception to hearsay rule is not required to provide foundation testimony about the way in which public record was generated or maintained; court order that is not certified may be admissible under CRE 803(8)(B) if the order sets forth matters court observed and reported pursuant to duty imposed by law. *Here:* probation order was properly admitted under public records exception because sentencing defendant is duty imposed on courts by law.

People v. Vasquez, 155 P.3d 888 (Colo. App. 2006). E-mail printout of records from DMV containing defendant's photograph/driver's license number was properly admitted as public record under CRE 803(8), even though it was not self-authenticating under CRE 902.

People v. Carrasco, 85 P.3d 580 (Colo. App. 2003). Charging documents were admissible pursuant to CRE 803(8)(a), which allows for admission of records of public offices or agencies setting forth activities of office or agency, since documents set forth activities of DA's Office

Market Reports/Commercial Publications: CRE 803(17)

People v. Hard, 2014 COA 132. Information from drugs.com was inadmissible under CRE 803(17) where foundation presented failed to establish that information was sufficiently necessary and reliable for purpose of identifying a controlled substance.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). Kelly Blue Book valuation is admissible under §18-4-414(2) and CRE 803(17)(market reports exception), in order to prove value of stolen vehicle.

Judgments of Prior Conviction: CRE 803(22)

People v. Denton, 91 P.3d 388 (Colo. App. 2003). Over defendant's objection, court admitted certified record of one of defendant's felony convictions, which he denied on cross-examination; certified document contained brief factual summary of offense. Extraneous information concerning facts of conviction constituted hearsay and should not have been admitted. Error was harmless because information described nonviolent offense and jury was already aware that he had several prior convictions.

CRE 804 (Declarant Unavailable)

People v. Reed, 216 P.3d 55 (Colo. App. 2008). Circumstances of witness unavailability set out in CRE 804(a) are not limited to subsections enumerated in rule; declarant's status as codefendant in joint trial renders him/her unavailable, even if declarant ultimately chooses to testify.

People v. Lawrence, 55 P.3d 155 (Colo. App. 2001). Witness is definitively unavailable to testify when he asserts 5th amendment right against self-incrimination when called to testify at defendant's trial.

Former Testimony: CRE 804(b)(1)

Thomas v. People, 803 P.2d 144 (Colo. 1990). In a footnote, CSC stated that §18–3–413(4) provides that a videotaped deposition taken pursuant to §18–3–413 may be admitted as former testimony under CRE 804(b)(1).

People v. Madonna, 651 P.2d 378 (Colo. 1982). Our decision in *People v. Smith*, 597 P.2d 204 (Colo. 1979), precluded PH testimony to be introduced at trial if the witness is unavailable, is based upon the limited purposes of a PH as a screening device for unwarranted charges. Considering the broader purpose of suppression hearings which involve questions of credibility and fact-finding, we see no reason to extend the rationale of *Smith* to this factual setting. This is especially true where, as here, the witness was extensively cross-examined

at the suppression hearing on the very matters for which the evidence is offered at trial which would also allow admission of this testimony.

Statements Against Interest: CRE 804(b)(3)

Nicholls v. People, 2017 CO 71. Under CRE 804(b)(3), third party's nontestimonial statement against interest is admissible if: (1) witness is unavailable, and (2) statement tends to subject declarant to criminal liability. Admissions against interest no longer need to be supported by corroborating circumstances that clearly indicate statement's trustworthiness. If one part of statement is admissible as statement against interest, then all parts related to precise statement against interest are admissible unless: (1) statement was so self-serving as to be unreliable, or (2) declarant had significant motivation to curry favorable treatment such that entire statement should be excluded.

People v. Thompson, 2017 COA 56. Defendant contends that trial court erred in admitting dozens of hearsay statements made by co-defendant (who was deceased at time of trial) and by child-victims; statements were admissible as statements against interest because they were inculpatory, voluntary, reasonably detailed and reflective of co-defendant's personal knowledge, and supported by corroborating circumstances.

People v. Hagos, 250 P.3d 596 (Colo. App. 2009). Shortly after victim's murder, shooter told fellow gang member that he "had killed a guy," had "emptied a whole clip into the car," and had never before "seen such an amount of blood." Those nontestimonial statements bore particularized guarantees of trustworthiness because: (1) shooter made them to fellow gang member several days following shooting after gang member asked shooter, "What happened?" (2) shooter's statements clearly implicated him as shooter but did not directly implicate defendant because shooter said nothing to his fellow gang member about defendant's involvement; (3) shooter's statements were made to person whom shooter appeared to have trusted as fellow gang member and did not appear to have been made as a boast; and (4) shooter's statements were made before he was arrested, and there were no later contradictory or inconsistent statements by him.

Bernal v. People, 44 P.3d 184 (Colo. 2002). Although it expressly purported to exculpate defendant, codefendant's statement against interest was inferentially inculpating: (1) codefendant admitted he was involved in theft of getaway car; (2) this, along with other evidence, suggested that defendant was involved in theft of getaway car; (3) this, in turn, suggested that defendant planned and participated in robbery next day. Because statement lacked individual indicia of reliability, its admission was erroneous under CRE 804(b) (3) and violated defendant's right to confrontation; admission was harmless beyond a reasonable doubt because of other evidence at trial, coupled with limiting instruction that statement could not be used to determine defendant's guilt.

People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001). Where codefendant's statement exposed her to criminal liability, potentially for lesser charges, statement was against her penal interest for purposes of CRE 804(b)(3); but admission of this statement violated the defendant's constitutional right of confrontation.

People v. Jensen, 55 P.3d 135 (Colo. App. 2001). The 3-part Newton test governs admissibility of statements against interest offered under CRE 804(b)(3). Here: showing of "unavailability" under CRE 804(a)(1) was met; co-defendant need not be brought into court to assert his privilege, defense appeared to stipulate to unavailability, and there was no indication that co-defendant wished to testify; showing of "trustworthiness" was met because co-defendant made statement to friend.; statement was not made while in police custody, as a result of leading questions or coercion, or with hope of lenity or favorable treatment. Confrontation clause concerns were satisfied because statement was made to friend who was subject to cross-examination.

People v. Barnum, 23 P.3d 1237 (Colo. App. 2001), aff'd operation of law, 53 P.3d 646 (Colo. 2002). Statement against penal interest may be admitted under CRE 804(b)(3) only if proponent shows that declarant is

unavailable. To show unavailability, it is preferable to have declarant assert 5th amendment privilege in person, although assertion through counsel may suffice. Unavailability must relate to time of trial; it is insufficient that declarant asserted his privilege in earlier proceedings.

People v. Newton, 966 P.2d 563 (Colo. 1998). Federal construction of CRE 804(b)(3) is too restrictive; in Colorado, it is unnecessary to sever collaterally neutral statements from every precise self-incriminatory remark; but statements that are so self-serving as to be unreliable should not be admitted; if declarant had significant motive to curry favorable treatment, the entire narrative is inadmissible.

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). Written statements by witnesses who allegedly saw victim alive 2 days after date of killing were not against penal interest and were inadmissible hearsay.

Dying Declarations

People v. Cockrell, 2017 COA 125. Defendant argued that dying declarations are categorically barred by Confrontation Clause and that Colorado's dying declaration statute is unconstitutional. COA disagreed noted that "[i]tis generally accepted that Confrontation Clause should be read to include only those exceptions that existed at time of its adoption," and "most notable exception at that time was admissibility of dying declarations." Colorado's dying declaration statute is constitutional. A dying declaration "is admissible as an exception to the hearsay rule because it poses a guarantee of trustworthiness based on the assumption that the belief of impending death excludes the possibility of fabrication by the declarant."

Residual Hearsay Exception: CRE 807

People v. Jackson, 2018 COA 79; People v. Fuller, 788 P.2d 741 (Colo. 1990). Before admitting statements under residual exception, court must make five findings: (1) statement is supported by circumstantial guarantees of trustworthiness; (2) statement is offered as evidence of material facts; (3) statement is more probative on points for which it is offered than any other evidence that could be reasonably procured; (4) general purposes of rules of evidence and interests of justice are best served by admission of the statement; and (5) adverse party had adequate notice in advance of trial of proponent's intention to offer the statement into evidence.

People v. Brown, 2014 COA 155. Murder victim's statements to her sister, mother, and co-workers were all properly admitted at trial because (1) victim was deceased; (2) "statements were more probative than any other evidence prosecution could procure through other reasonable efforts"; (3) victim-declarant had personalized knowledge of statements' contents; and (4) statements were reliable, detailed, and had particularized guarantees of trustworthiness.

Vasquez v. People, 173 P.3d 1099 (Colo. 2007). Reliability to support residual hearsay exception may not be based on corroborative evidence, but rather should be determined by circumstances of statement.

People v. Garrison, 109 P.3d 1009 (Colo. App. 2004). Rejects argument that residual hearsay exception violates confrontation clause under Crawford.

People v. Fry, 92 P.3d 970 (Colo. 2004). PH testimony admitted at trial pursuant to CRE 807 violates Confrontation Clause; prior testimony from unavailable hearsay declarant complies with Confrontation Clause only if defendant had adequate opportunity to cross-examine declarant.

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). Defense witness's testimony that victim traveled to U.S. as drug courier, that others were afraid to identify real killer, and that defendant was "taking the rap" for another person did not qualify under residual hearsay exception of CRE 807. Witness had no independent knowledge of these facts, and there were no circumstantial guarantees of trustworthiness.

Lab Technician Requirement: §16-3-309(5)

People v. Cropper, 251 P.3d 434 (Colo. 2011). *Hinojos-Mendoza* continues to be viable after Melendez-Diaz v. Massachusetts 129 S.Ct. 2527 (2009). *Here:* defendant waived his right to confront lab technician on results of his forensic tests because he failed to comply with requirements of §16-3-309(5); Colorado's notice-and-demand statute does not fail for lack of specific notice provision because providing report through discovery is sufficient to put defendant on notice that, absent specific request under §16-3-309, a lab report can be introduced without live testimony.

Hinojas-Mendoza v. People, 169 P.3d 662 (Colo. 2007). §16-3-309(5) is constitutional on its face/as applied. Requiring defendant to request a witness's presence is an acceptable, minimal precondition to exercise of right of confrontation.

People v. Williams, 183 P.3d 577 (Colo. App. 2007). CRE 803(6) provides for the admission of any "memorandum, report, record, or data compilation ... of acts, events, conditions, opinions, or diagnosis, made at or near the time by ... a person with knowledge, if kept in the course of a regularly conducted business activity." *Here:* defendant made a timely request pursuant to §16-3-309(5) to have the person who conducted the testing present to testify at trial. Thus, even if the COA assumed the laboratory report constituted a business record, the specific requirement in §16-3-309(5) that the testing technician be made available at trial upon timely request overrides the general hearsay exception of CRE 803(6). Therefore, the trial court erred by admitting the laboratory report without the testimony of the CBI agent who conducted the testing.

People v. Walters, 148 P.3d 331 (Colo. App. 2006). Testimony regarding laboratory report did not violate defendant's confrontation rights, even though laboratory technician did not testify, because report was not testimonial hearsay.

People v. Cruthers, 124 P.3d 887 (Colo. App. 2005). Trial court did not err in admitting laboratory report of defendant's blood alcohol content under §16-3-309(5) because defendant had not requested the technician appear at trial; he waived his foundational challenge that Chematox Laboratory was not "criminalistics laboratory" under the statute.

People v. Mojica-Simental, 73 P.3d 15 (Colo. 2003). §16-3-309(5) is constitutional on its face. Requiring defendant to request a witness's presence is an acceptable, minimal precondition to exercise of right of confrontation. Court cautioned that application of statute could create problems: "if a defendant does not have actual notice of the requirements of the statute, or mistakenly fails to notify the prosecution to have the technician present to testify, there is a significant possibility that defendant's failure to act may not constitute voluntary waiver of his fundamental right to confrontation."

Evidence of Value: §18-4-414

People v. Jaeb, 2018 COA 179. Affidavit attesting to value of a stolen object does not fall under hearsay exception in §18-4-414; this exception is limited to "price indicators." §18-4-414(2) is not a catchall exception to hearsay rule whenever value of stolen item is at issue.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). Kelly Blue Book valuation is admissible under §18-4-414(2).

People v. Schmidt, 928 P.2d 805 (Colo. App. 1996). Statute making a price tag attached to an item stolen from a store, prima facie evidence of item's value in theft prosecution (§18-4-414) creates a specific hearsay exception and does not violate defendant's right to confrontation.

Child Hearsay: §13-25-129 [8]

People v. Argomaniz-Ramirez, 102 P.3d 1015 (Colo. 2005). The child hearsay statute permits out-of-court statements made by a child describing sexual contact to be admitted in a proceeding where a child is the victim of an alleged sexual offense, if the court finds the statement to be sufficiently reliable, and the child declarant testifies at trial. Prior videotaped statements made by children to law enforcement official could be introduced into evidence, under child hearsay statute, when children testified at trial without violating confrontation clause. CSC did not address child hearsay viability after *Crawford* where child will not testify at trial because in this case the DA assured the court that the child would testify at trial.

People v. Bowers, 801 P.2d 511 (Colo. 1990). Statute allowing admission of a hearsay statement of a child victim of sexual abuse constitutes exclusive basis for admitting the child victim's hearsay statement of a sexual act committed against the child when such hearsay statement is not otherwise admissible under any other specific hearsay exception created by statute or court rule.

Stevens v. People, 796 P.2d 946 (Colo. 1990). Enactment of statute allowing admission of an out-of-court statement made by a child describing an act of sexual contact performed with, by, on, or in presence of the child in a proceeding in which the child is alleged to be a victim of unlawful sexual offense represents the legislature's attempt to insure that child abusers do not go free merely because the prosecutor is unable to obtain witnesses to the abuse other than the child who is unable to testify about the abuse.

People v. Phillips, 2012 COA 176. Where a child's hearsay statement offered under §13-25-129 is nontestimonial, the federal confrontation clause is not implicated. If a child's out-of-court statements are admissible either as relevant non-hearsay or under another evidentiary exception to the hearsay rule, the child hearsay statute does not apply. List of factors used to determine whether a child's out-of-court statement is reliable and, therefore, admissible provide guidance and direction but are not an immutable set of standards for the trial court in determining that the rather amorphous standard of "sufficient indicia of reliability" has been met; indeed, even if fewer than all of the factors favoring admission are established, the admissibility of the statements is not foreclosed. Appellate court reviews for abuse of discretion a trial court's decision to admit child hearsay; although the court should make specific findings on which factors establish "sufficient safeguards of reliability," its decision to admit the child declarant's hearsay statements will be upheld even absent such findings if the record shows an adequate factual basis to support its decision.

People v. District Court, 776 P.2d 1083 (Colo. 1989). Factors providing guidance in determining whether child's out-of-court statement is reliable are: whether statement was made spontaneously; whether statement was made while child was still upset or in pain from alleged abuse; whether language of statement was likely to have been used by child the age of the declarant; whether allegation was made in response to leading question; whether child or hearsay witness had any bias against defendant or any motive for lying; whether any other event occurred between time of abuse and time of statement which could account for contents of statement; whether more than one person heard the statements; and general character of the child.

Chirinos-Raudales v. People, 2023 CO 33; Orellana-Leon v. People, 2023 CO 34. CSC considers whether the trial court properly admitted statements the victim made when she was fifteen years old under the child hearsay

[8] There is a *Crawford* issue with the collaboration prong of the child hearsay statute if dealing with testimonial statements from the child.

statute, which provides that out-of-court statements describing an offense of unlawful sexual behavior are admissible if made by a child "as child is defined under the statutes that are the subject of the action." 13-25-129(2). CSC hold that, pursuant to the plain language of the child hearsay statute, the "subject of the action" for sexual assault on a child by one in a position of trust is the substantive offense, which applies when the child is under eighteen, rather than the sentence enhancer, which applies when the child is under fifteen.

People v. Thompson, 2017 COA 56. The trial court properly admitted the child-victims' statements concerning the abuse they suffered under the child hearsay statute. Also, defendant argued that the trial court erred by refusing to allow the children to testify at the pretrial evidentiary hearing. The COA rejected this argument. The testimony of the witnesses to whom the children made the statements, as well as the audio/video recordings of those statements, were what truly illuminated whether the children's statements were reliable when they were made. Therefore, there was no need for the children to testify at the pretrial hearing.

People v. Cernazanu, 2015 COA 122. Trial court did not abuse its discretion in admitting child hearsay where: (1) the court held a pretrial hearing as required by §13-15-129; (2) it considered the eight factors for determining the reliability of the child hearsay statements and made findings as to six; and (3) its findings were supported by the record.

People v. Stackhouse, 2012 COA 202. Child sexual assault victim's statements were sufficiently reliable to be admissible, even if they were hearsay; two statements implicating defendant were spontaneous outbursts which reflected pain and fear, statement to forensic interviewer was elicited without a leading question and was consistent with the earlier declarations, other statement to aunt was consistent with prior statements, and all statements were made in age-appropriate language. Child sexual assault victim's failure to remember prior statements she made about defendant to any witnesses other than her foster father did not render statements inadmissible or violate defendant's confrontation rights; prior statements were sufficiently reliable so as to be admissible, victim testified at trial regarding the same abuse that was described by other witnesses, victim was available for cross-examination, and, notwithstanding her inability to remember having told others about the incidents, defendant in fact conducted an effective cross-examination of her. When a witness takes the stand and is available for cross-examination, prior out-of-court statements may be admitted without violating confrontation clause even if the witness does not remember making them.

People v. Orozco, 210 P.3d 472 (Colo. App. 2009). In determining the admissibility of statements under §13-25-129, witnesses who will ultimately testify to a victim's hearsay statements at trial need not participate in the pretrial hearing.

People v. Cook, 197 P.3d 269 (Colo. App. 2008). Definition of "sexual contact" includes the situation where defendant intimidates the victim into touching her own genitals. *Here*: defendant intimidated children into masturbating in front of him. Court held this was a "constructive touching" that was sufficient to meet the definition of sexual contact. Therefore, the child's statements were properly admitted under §13-25-129 because they described acts of sexual contact.

People v. Rojas, 181 P.3d 1216 (Colo. App. 2008). When child testifies at trial, and statements are admitted pursuant to §13-25-129, *Crawford* and the defendant's confrontation rights are not implicated. *Here*: Despite a lack of findings by the trial court, the record revealed ample evidence to support the admission of the child's statements pursuant to §13-25-129.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). Although child victims had difficulty articulating the concepts of "truth" and "lie" and gave some incorrect answers to questions unrelated to the charge, they were properly found competent to testify under §13-90-106(1)(b)(II) where they could convey the details of the events, identify the defendant, and answer questions by both counsel. Evidence establishing the surrounding

circumstances of a sexual assault is often necessary to provide an adequate description of the conduct and is admissible under §13-25-129. But where the admitted child hearsay statements exceed this purpose, it may not be plain error. *Here:* it was not plain error where statements were admitted which described: (1) the victims' reactions and emotional states when they told their grandmother about the assaults; (2) their reactions to the events as recalled by an uncle and their father; and (3) their answers to some questions posed during their videotaped forensic interview.

Frasco v. People, 165 P.3d 701 (Colo. 2007). The procedure to be used when providing a jury with a videotaped interview during deliberations will be left to the discretion of the trial court. Control over the use of exhibits during jury deliberations in criminal proceedings must remain firmly within the discretion of the trial court. The trial court has an obligation to assure that juries are not permitted to use exhibits in a manner that is unfairly prejudicial to a party.

People v. Gookins, 111 P.3d 525 (Colo. App. 2004). Under the child hearsay statute, the victim/declarant must be a "child," as defined by the statute setting forth the substantive offense, at the time of the hearsay statements. However, the victim/declarant need not be a "child" at the time of trial.

People v. Melendez, 80 P.3d 883 (Colo. App. 2003), aff'd other grounds, 102 P.3d 315 (Colo. 2004). A trial court need not make particularized findings on the reliability of a victim's videotaped statement in order for it to be admitted into evidence where defendant does not request such findings, and the trial court makes generalized findings regarding all the victim's statements, including the videotaped statement.

People v. Strean, 74 P.3d 387 (Colo. App. 2002). Under §13-25-129(1), trial court properly admitted child victim's hearsay statements to his mother and a police detective, finding that each statement was made in age-appropriate language and demonstrated knowledge the child would not otherwise have had. These factors ensured that the statements were reliable. When the trial court admits multiple hearsay statements of a child victim of sexual assault, it is preferable to make independent rulings as to the admissibility of each statement. However, no error where the record supported the trial court's combined ruling as to each statement. Trial court acted properly when it did not give the jury a contemporaneous limiting instruction sua sponte upon admitting hearsay statements of the child victim under §13-25-129(1).

People v. Underwood, 53 P.3d 765 (Colo. App. 2002). Child hearsay properly admitted where the child victim was answering questions, but not leading ones, and other stressful events had intervened between the crime and the disclosure, but she was still upset by the crime when she disclosed. Also, she had no motive to accuse the defendant falsely.

People v. Pineda, 40 P.3d 60 (Colo. App. 2001). Under §13-25-129, otherwise inadmissible child hearsay describing acts of child abuse is admissible when: (1) that child is a victim of, or a witness to, child abuse; (2) the time, content and circumstances of the statement provide sufficient safeguards of reliability; and (3) the child testifies at trial. *Here*: hearsay information from the victim's brother (who was also a victim) was admissible as other acts evidence.

People v. Juvenile Court, 937 P.2d 758 (Colo. 1997). §13-25-129, which provides the exclusive basis for admitting out-of-court statements by child sexual assault victims when the statements are not admissible under any other hearsay exception, does not require the child declarant to testify at the pretrial hearing on admissibility. The requirements of the statute are met once the prosecution represents that the child will testify at trial.

Witnesses

Competency/Personal Knowledge: CRE 601, CRE 602, §13-90-106

Williams v. People, 403 P.2d 436 (Colo. 1965). Unless provided otherwise by statute or rule, every person with personal knowledge of matter on which they are to testify is competent to be witness.

People v. Valencia, 257 P.3d 1203 (Colo. App. 2011). Lay witness may not testify unless he/she has personal knowledge of subject of tendered testimony. In determining whether witness has sufficient personal knowledge, CRE 602 is a specialized application of provisions of CRE 104(b) on conditional relevancy; unless evidence is manifestly insufficient, whether witness possesses personal knowledge is jury question. Personal knowledge CRE 602 requirement is satisfied if there is any credible basis from which jury could determine witness has personal knowledge; any inconsistencies in witness's testimony are for jury to resolve when determining credibility.

Howard-Walker v. People, 2019 CO 69. Cumulative effect of trial court's errors and prosecutorial misconduct violated defendant's right to fair trial, even though individually they were harmless or failed to affect defendant's substantial rights, in prosecution for first degree burglary and conspiracy to commit first degree burglary; detective's improper testimony about whether gun used in burglary was real, and whether defendant would have used the gun had he "engaged" the homeowner during the burglary helped establish defendant's guilt and thus undermined the fairness of the trial, prosecutor's decision to ask detective to opine on defendant's veracity was highly prejudicial, and by drawing attention to the fact that stolen goods were still missing and suggesting only defendant knew where they were, the prosecutor suggested defendant chose not to testify because he was guilty, which penalized defendant for exercising his right to remain silent.

People v. Alley, 232 P.3d 272 (Colo. App. 2010). Witness's intoxication does not necessarily require trial court to conduct competency hearing; trial court has wide latitude in determining admissibility of an intoxicated witness's testimony, and it is jury's role to determine witness's credibility.

Child Competency: §13-90-106(1)(b)(II)

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). Trial court must determine whether witness under 10 is competent to testify. §13-90-106(1)(b)(II) requires a court finding that child witness is "able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined." Whether child is competent to testify is addressed to trial court's discretion. There is no per se rule against conducting child competency proceedings in front of jury. Although some preliminary matters are required by rule to be conducted outside presence of the jury, competency of child witness is not one of them CRE 104. Instead, competency of child witness falls under blanket rule that preliminary matters should be conducted outside presence of jury when "interests of justice require." CRE 104(c). Better practice is to hold child competency proceedings outside jury's presence to minimize danger of unfair prejudice resulting from child's responses to competency questions - does not mean that interests of justice dictate that such questioning may never be held with jury present. If trial court decides to hold child competency proceeding in jury's presence, it bears risk that defendant will be prejudiced to degree that requires reversal on appeal; if competency questioning is conducted in front of jury, a limiting instruction is most likely necessary to minimize jury confusion.

People v. Lopez, 2024 COA 26. Where the trial court asked the child witness a few preliminary questions prior to giving him the oath, there was no error as the court simply gave an age-appropriate oath to tell the truth under CRE 603 even though child was 10 and didn't need a competency finding prior to testifying. State and federal courts have held it is proper for trial courts to ask child witnesses to demonstrate that they understand the difference between truth and falsehood as part of administering an age-appropriate oath. *[Cert Accepted (12/23/24) in case #24SC244: (1) Whether a criminal defendant can open the door to expert witness testimony that another witness told the truth on a particular occasion. (SAAG Frank Lawson)]*

People v. Stackhouse, 2012 COA 202. Child competent to testify where court found she understood the nature of the oath, the difference between truth and a lie, and the importance of being truthful. Based on its observations of the child's demeanor and responses, the court further found that child was able to describe, in language appropriate for a six-year-old, the events respecting which she was being examined. Permitting child to testify not an abuse of discretion where it assessed the child's competency under the correct standard, and its findings are supported by the record. COA notes that, at trial, child was able to relate, in age-appropriate terms, the events about which she was being examined, and she was able to explain what she meant by those terms when asked to do so.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). Although child victims had difficulty articulating concepts of "truth" and "lie" and gave some incorrect answers to questions unrelated to charge, they were properly found competent to testify under §13-90-106(1)(b)(II) where they could convey details of events, identify defendant, and answer questions by counsel.

Impeachment: CRE 613, CRE 801(d)(1), CRE 410 §13-90-101, §16-10-201 [9]

People v. Reynolds-Wynn, 2024 COA 33. Applying the reasoning of *Margerum*, the COA holds that it is constitutional error to prohibit the defense from cross-examining the witness about the charge because the fact that a witness is being prosecuted in the same judicial district is always relevant to show that the witness's testimony might be influenced by a promise for, or hope or expectation of, immunity or leniency. Because the trial court violated defendant's right to confrontation and because the People failed to show harmlessness, judgment is reversed.

People v. Melendez, 2024 COA 21. The rule in *Margerum*, that defendant must be permitted to question a prosecution witness about their probationary status when they are on probation in the same jurisdiction as the prosecution is not a watershed rule of criminal procedure under *Teague*; the rule announced in *Margerum* does not apply retroactively. Because the CSC has not followed USSC in abandoning the watershed rule, the rule remains embedded in Colorado jurisprudence.

People v. Gonzalez-Quezada, 2023 COA 124. The victim was charged with aggravated incest with defendant's son as the victim. Trial court prohibited defendant from asking victim who the victim of the alleged incest was but permitted defendant to introduce evidence that she was charged with sexual assault involving incest allegations. Defendant claimed victim's pending criminal matter was inextricably linked to the case and by precluding that testimony, the trial court deprived him of the opportunity to establish the victim's bias and motive to testify against him. The COA held: (1) that allowing the victim to testify knowing that she would invoke her right to remain silent concerning the identity of the alleged victim of the incest did not deprive defendant of his right to confrontation: (2) the identity of the alleged incest was not inextricably linked to the shooting; (3) defendant was not aware of the alleged abuse of his son until after his arrest so it could not have impacted his mental state at the time of the shooting; (4) the victim was a critical witness because she was the only person who could describe certain events surrounding the shooting; the trial court erred by concluding that Rule 608 displaced the common law rule permitting the introduction of extrinsic evidence through a third-party witness that impeaches another witness's testimony; (5) CRE 608(b) does not limit impeaching testimony to that which is elicited solely through the cross-examination of the witness whose testimony is being impeached; but (6) for independent reasons, that the trial court properly excluded testimony that the identified victim in Nancy's sexual assault charges was Quezada's son. Defendant argued that the victim had a motive to lie because she understood defendant was likely to be called as a witness at her incest trial, and she would benefit if defendant was convicted of the homicide charges because he could then be impeached with his prior felony conviction, but any such motivation had nothing to do with the incest victim's identity – the victim had a motive to lie to convict defendant regardless of whether the alleged victim in her case was defendant's son or some other relative.

People v. Margerum, 2018 COA 52. Witness's probationary status alone does not implicate defendant's constitutional right to cross-examine witnesses; facts of case must show that a logical connection exists between probationary status and witness's motive to testify in favor of one party.

People v. Leverton, 2017 COA 34. Testimony that witness does not remember making statements to police amounts to denial of making the statements; prosecution was entitled impeach witness with prior statements under CRE 613, and §16-10-201(1)(a).

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[9]CRE 613 (prior inconsistent statements), CRE 801(d)(1)(prior consistent rebut fabrication/inconsistent statements), CRE 410 plea bargain statements as impeachment; §13-90-101 (prior felony convictions), §16-10-201 (prior inconsistent statement – admitted for impeachment and substantive).

People v. Marko, 2015 COA 139. State psychiatrist's testimony that defendant was malingering his amnesia symptoms and that psychiatrist did not "believe" defendant's version of events was not improper as it directly addressed issues raised by insanity plea. Testimony also did not violate rule that witness may not opine as to whether another witness was telling truth on specific occasion, as psychiatric evaluation is "necessary to establish a firm factual basis" for sanity opinion and therefore a "critical part of the experts' evaluation."

People v. Miranda, 2014 COA 102. When witness's credibility is broadly attacked, prior statements are admissible to give jury a complete picture of credibility; scope of impeachment determines scope of rehabilitation evidence. When victim's credibility is broadly attacked, her entire forensic interview may be admitted, to rehabilitate her and give jury complete picture of credibility.

People v. Thomas, 2014 COA 64. Testimony regarding victim's prior identification of defendant as driver during DUI-related crash properly admitted under §16-10-201(1)(a); victim's testimony that she could not remember events surrounding crash and could not recall her prior answers to questions about who was driving sufficiently satisfied inconsistency requirement; victim was still available to testify after her prior inconsistent statements were admitted, and defendant was given opportunity to cross-examine.

People v. Banks, 2012 COA 157. Recorded police interviews with 3 witnesses who testified inconsistently with their recorded statements at trial were properly admitted under §16-10-201 as prior inconsistent statements because: (1) witnesses were given "an opportunity to explain or deny" their previous recorded statements, and (2) recorded statements related to "a matter within the witness's own knowledge."

People v. Krueger, 2012 COA 80. Evidence of defendant's prior felony convictions was properly introduced because defendant elicited his own hearsay statements during cross-examination of prosecution witness.

People v. Krutsinger, 219 P.3d 1054 (Colo. 2009). COA erred in presuming that exclusion of defense impeachment evidence could rise to level of federal constitutional error only if its admission would have, considering trial as a whole, created a reasonable doubt; proper inquiry is whether trial court's evidentiary ruling, in and of itself, deprived defendant of any meaningful opportunity to present complete defense.

People v. Chavez, 190 P.3d 760 (Colo. App. 2007). Evidence of defendant's refusal to consent to search of his apartment, properly admitted to impeach defendant's trial testimony claiming that he did not live at apartment; admission of impeachment evidence did not impermissibly burden defendant's 4th Amendment right to be free from unreasonable search.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). Trial court properly precluded defense from eliciting details of witness's felony conviction (smuggling marijuana); details were immaterial to her bias or motivation for testifying.

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). Defendant's suppression hearing testimony may be used to impeach character witness's testimony if trial court determines it is appropriate after balancing defendant's Sixth Amendment right to present evidence with Fourth/Fifth Amendment rights, but that same evidence may not be used to establish defendant's guilt.

People v. Welsh, 80 P.3d 296 (Colo. 2003). Defendant's failure to respond to questions about shooting did not directly contradict her later statements to mental health experts that she did not recall shooting; it did not constitute impeachment evidence.

People v. McNeely, 68 P.3d 540 (Colo. App. 2002). Witness's credibility may be impeached with prior conviction even though direct appeal of that conviction is still pending; once trial court has entered judgment of conviction, conviction can be used for impeachment purposes. Where prosecutor improperly impeached

defendant's credibility with conviction that was suppressed, error was harmless under all circumstances of case, including trial court's curative instruction to jury to disregard evidence of conviction because it does not exist. People v. Trujillo, 49 P.3d 316 (Colo. 2002). Defendant's voluntary custodial statements, made without *Miranda* warnings, may only be used to impeach defendant if he testifies at trial and may not be used either to rebut defense theory or impeach witnesses other than defendant.

People v. Caldwell, 43 P.3d 663 (Colo. App. 2001). Defendant was not allowed to cross-examine witness about insurance-fraud charges pending in California: (1) because outcome of pending charges did not depend on witness's cooperation here-charges were not probative of witness's bias, motive, or prejudice; (2) once witness denied knowledge of unrelated pending charges-defendant could not introduce extrinsic evidence to impeach him.

People v. Saiz, 32 P.3d 441 (Colo. 2001). Extrinsic evidence of prior inconsistent statement must be competent - admissible, relevant, and with sufficient incremental probative value to satisfy CRE 403. *Here*: court properly excluded, as cumulative, videotape of prior inconsistent statement. CSC discusses relationship between §16-10--201 and CRE 613.

People v. Bradley, 25 P.3d 1271 (Colo. App. 2001). Under §13-90-101, defendant who takes stand may be impeached with felony convictions that he sustained after original charges were filed in instant case.

People v. Garcia, 17 P.3d 820 (Colo. App. 2000). Error in limiting defense's cross-examination of witness with prior inconsistent statements was harmless because witness was impeached on more significant matters.

People v. Johnson, 30 P.3d 718 (Colo. App. 2000). Trial court properly allowed prosecutor to recall defense witness in order to impeach witness with prior felony conviction.

People v. Copenhaver, 21 P.3d 413 (Colo. App. 2000). Defendant was properly impeached with: (1) a written statement he submitted in support of a rejected plea agreement; and (2) a letter from him to court that was attached to his motion to continue sentencing hearing. CRE 410 specifically permits statements made in connection with plea bargaining to be used for impeachment where statements are voluntary and reliable, and made in court, on record.

People v. Gholston, 26 P.3d 1 (Colo. App. 2000). Trial court properly barred, under rape shield statute, any cross-examination of victim about victim's sexual assault of younger sibling. This ruling did not violate defendant's right of confrontation: evidence was excluded because defendant failed to follow statutory procedures for admissibility; evidence was properly regarded as more prejudicial than probative under CRE 403; and there was no evidence that victim received leniency in exchange for his testimony. Trial court did not abuse its discretion when it refused to permit defendant to cross-examine victim about results of a breathalyzer test that revealed no alcohol because test results were consistent with victim's testimony.

People v. Fisher, 9 P.3d 1189 (Colo. App. 2000). Witness's concession that she remembered some details differently at trial from those in her previous statement was sufficient deviation from prior statement to allow impeachment under CRE 801(d)(1)(A) as prior inconsistent statement.

People v. Gilbert, 12 P.3d 331 (Colo. App. 2000). Trial court's refusal to permit defendant to impeach 2 prosecution witnesses with prior misdemeanor convictions for providing false information to police was at most harmless where defendant was permitted to cross-examine witnesses and elicit fact that they had provided false information.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). When defense called witness and impeached him with his prior felony convictions, trial court correctly permitted prosecution to rehabilitate witness by eliciting on cross-examination fact that he had been drug addict at the time but had changed his life.

People v. Diaz, 985 P.2d 83 (Colo. App. 1999). Under statute allowing witness impeachment with prior convictions, trial court does not have discretion to preclude impeachment of defendant's testimony.
People v. Johnson, 987 P.2d 855 (Colo. App. 1998), rev'd other grounds, 13 P.3d 309 (Colo. 2000). Witness's statements were properly admitted, to rebut express or implied charge of fabrication because statements were made before witness's motive to cooperate with DA arose.

People v. Lowe, 969 P.2d 746 (Colo. App. 1998). Prosecutor can impeach defendant with his notice of alibi.

People v. Gallegos, 950 P.2d 629 (Colo. App. 1997). Trial court cannot foreclose use of the name, date, and nature of witness's prior felony conviction for impeachment; nature of conviction can be established by brief recital of circumstances, but extent of examination is within court's discretion. *Here:* defendant could impeach his accomplice with evidence that he pleaded guilty to charges in connection with same incident.

People v. Thomas, 962 P.2d 263 (Colo. App. 1997). Defendant sought to impeach an evaluating doctor, who testified for prosecution, with stipulation from another state that contained a finding of improper conduct; because the stipulation did not contain admission of wrongdoing, trial court did not abuse its discretion in denying defendant's motion.

Sequestration: CRE 615

People v. Melendez, 102 P.3d 315 (Colo. 2004). Trial court has duty of diligent inquiry into allegations of sequestration violation; court must first determine whether violation actually occurred and, if so, whether prejudice will result from allowing the testimony. Court must then address propriety of a sanction and should consider: involvement, or lack thereof, of a party or counsel in the violation of the order by witness- there must be evidence of party's/counsel's consent, connivance, procurement or knowledge regarding violation before sanction can be imposed against party; witness's actions and state of mind in violation of sequestration order, and whether violation was inadvertent or deliberate; whether proffered evidence would be material to party's case and whether it would be unduly cumulative-even if evidence is somewhat cumulative, it is admissible if it is only evidence introduced to corroborate defendant's own statement. Court need not hold "mini-trial," but may question prosecutor, defense counsel, defendant, and witness involved; party seeking exclusion of another party's witness bears burden of demonstrating that such relief is appropriate under circumstances. Sanctions for sequestration violation fall into 3 categories: (1) citing witness for contempt; (2) permitting court/counsel to comment to jury on witness's non-compliance as a reflection on credibility; and (3) precluding witnesses testimony. Disqualifying witness testimony is severe sanction to be imposed only after careful consideration. Sanctioning defense witness for violating sequestration order implicates important rights of defendant.

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). CRE 615 and sequestration orders prohibit witnesses from conferring with each other concerning their testimony; they do not prohibit counsel from questioning witnesses about testimony of other witnesses in case.

People v. Jones, 2020 CO 45. In a footnote CSC recognized that courts still generally agree that there are certain situations where the exclusion of specific individuals does not constitute a closure that would implicate a defendant's right to a public trial. For example, it is well-accepted that sequestration orders do not implicate this right.

People v. Lopez, 2016 COA 179. Under Article II, §16a of Colorado Constitution and related provisions of Colorado's Victims' Rights Act, court has discretion to exclude victim-witnesses where necessary to ensure

defendant receives a "fair trial." Though this is different than absolute rule applied in *Coney*, court here properly applied its discretion in allowing testifying victim-witnesses to be present at all critical stages.

People v. Coney, 98 P.3d 930 (Colo. App. 2004). Trial court erred in ruling that CRE 615 barred deceased's victim's father from attending trial after his testimony was complete; Article II, §16a of Colorado Constitution and Colorado's Victims' Rights Act take precedence over evidentiary rule regarding witness sequestration.

People v. Dashner, 77 P.3d 787 (Colo. App. 2003). No violation of witness sequestration order was shown where witnesses, who were police officers, made minor references to their testimony to each other and passed around document that may have been police report, because defendant did not demonstrate any resulting prejudice.

People v. Sherman, 45 P.3d 774 (Colo. App. 2001). Court observer repeatedly left courtroom, conversed with witnesses, and made comments that disparaged defendant's character. *Here*: court properly denied motion for new trial because: (1) no evidence showed that observer discussed proceedings; and (2) after violation, court instructed observer to cease further contact with witnesses, and she said she would comply.

People v. Graham, 53 P.3d 658 (Colo. App. 2001). Police detective was "imprudent" in talking to defense witness, but he did not violate sequestration order because he did not reveal any trial testimony.

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998). DA endorsed expert on toxicology and did not use him in case-in-chief, but expert was allowed to hear defendant's testimony and testified, on rebuttal, that defendant's version of events was inconsistent with his measured blood-alcohol level; court did not abuse its discretion by allowing this exception to its sequestration order; purpose of sequestration was not violated because there was no hint of witness collusion.

Immunity: §13-90-118

People v. Paglione, 2014 COA 54. Trial court does not have authority to order prosecution to grant immunity to witness, nor does it have authority to grant immunity on its own initiative or at request of the defense. Prosecutor's failure to request, and trial court's failure to grant, use immunity to defense witness who chose not to testify at theft trial after receiving perjury warning did not deprive defendant of due process or fundamental fairness; witness's anticipated testimony was cumulative and not essential to defendant's defense. The refusal to grant immunity did not violate defendant's due process rights.

People v. Stevenson, 228 P.3d 161 (Colo. App. 2009). Without knowing particulars of defendant's immunized testimony, court could not make required finding that prosecution's evidence derived entirely from sources other than immunized testimony. Court's ruling that prosecution made no reference or improper use of defendant's immunized testimony during trial was legally insufficient because court did not find, nor was there any record basis for finding, that none of prosecution's evidence derived from immunized testimony. There are ways, undetectable from trial record, in which there could be an impermissible derivative use of immunized testimony, and any communications by prosecutor or investigator in witness preparation meetings relaying information derived from defendant's immunized testimony is impermissible. In determining whether immunized testimony has been improperly used, court must precisely identify the information in defendant's immunized testimony not previously known to prosecutors, and prosecution must then prove by preponderance of evidence that none of information was used directly/indirectly in defendant's prosecution.

People v. Russom, 107 P.3d 986 (Colo. App. 2004). On application of prosecution, court has discretion to grant immunity to witness; prosecution has considerable discretion in determining when to request use immunity for a witness; if prosecution believes that witness's testimony is necessary in interest of justice and record clearly shows that testimony is essential to prosecution's case, no error in grant of immunity.

People v. Merrill, 816 P.2d 958 (Colo. App. 1991). Grants of immunity are solely within prosecutor's discretionary power under §13-90-118.

Invocation 5th Amendment

People v. Gonzalez-Quezada, 2023 COA 124. The victim was charged with aggravated incest with defendant's son as the victim. Trial court prohibited defendant from asking victim who the victim of the alleged incest was but permitted defendant to introduce evidence that she was charged with sexual assault involving incest allegations. Defendant claimed victim's pending criminal matter was inextricably linked to the case and by precluding that testimony, the trial court deprived him of the opportunity to establish the victim's bias and motive to testify against him. The COA held: (1) that allowing the victim to testify knowing that she would invoke her right to remain silent concerning the identity of the alleged victim of the incest did not deprive defendant of his right to confrontation: (2) the identity of the alleged incest was not inextricably linked to the shooting; (3) defendant was not aware of the alleged abuse of his son until after his arrest so it could not have impacted his mental state at the time of the shooting; (4) the victim was a critical witness because she was the only person who could describe certain events surrounding the shooting; the trial court erred by concluding that Rule 608 displaced the common law rule permitting the introduction of extrinsic evidence through a third-party witness that impeaches another witness's testimony; (5) CRE 608(b) does not limit impeaching testimony to that which is elicited solely through the cross-examination of the witness whose testimony is being impeached; but (6) for independent reasons, that the trial court properly excluded testimony that the identified victim in Nancy's sexual assault charges was Quezada's son. Defendant argued that the victim had a motive to lie because she understood defendant was likely to be called as a witness at her incest trial, and she would benefit if defendant was convicted of the homicide charges because he could then be impeached with his prior felony conviction, but any such motivation had nothing to do with the incest victim's identity – the victim had a motive to lie to convict defendant regardless of whether the alleged victim in her case was defendant's son or some other relative.

Rios-Vargas v. People, 2023 CO 35. In a 4-3 opinion, CSC holds that defendant is entitled, in the presence of the jury, to question a nonparty alternate suspect who intends to invoke their 5th Amendment privilege under the circumstances and procedures set forth in this opinion. First, at a hearing outside the jury's presence, the court should determine whether: (1) there is a non-speculative connection between the alternate suspect and defendant's charged crime, and (2) the alternate suspect has a valid 5th Amendment claim. Then, the court should exercise discretion to impose reasonable limits on questioning that implicates the 5th Amendment to avoid unnecessary courtroom drama. Finally, after defendant has questioned the witness before the jury, the court should instruct jurors that a witness has a constitutional right to invoke the 5th Amendment. *Here:* because the court did not do use this procedure, the error was not harmless and the judgment is reversed and case remanded for a new trial. Overruled People v. Dikeman, 555 P.2d 519 (Colo. 1976)

People v. Clark, 2015 COA 44. Party may not call witness to testify before jury if it knows witness will exercise his/her privilege against self-incrimination.

People v. Mares, 263 P.3d 699 (Colo. App. 2011). Where prosecutor calls witness knowing witness will invoke his privilege not to testify, or jury is instructed that witness invoked privilege, reversal is only warranted in two situations: (1) where prosecution engaged in misconduct consisting of "conscious and flagrant attempt to build its case out of inferences arising from use of testimonial privilege"; or (2) when inferences arising from refusal to answer add "critical weight to prosecution's case in form not subject to cross-examination." Following factors are relevant to these inquiries: (1) prosecutor's intent in calling witness; (2) number of questions asked; (3) their importance to state's case; (4) whether prosecutor draws any inference in closing argument from refusal to answer; and (5) whether trial court gives a curative instruction. *Here*: Prosecutor did not commit

misconduct in asking that jury be instructed that witness had refused to testify and was held in contempt because: (1) prosecutor did not ask jury to draw any inference from refusal and did not specifically reference witness's privilege against self-incrimination;(2) no leading questions were asked during trial; and (3) prosecutor's stated purpose of request was to alleviate any concern that prosecution had failed to call witness when he was so frequently mentioned during trial. Because two inferences could have been drawn from refusal, one that benefitted prosecution and one that benefitted defendant, inferences arising from instruction did not add "critical weight" to prosecution's case.

People v. Smith, 275 P.3d 715 (Colo. App. 2011). Defendant was convicted of conspiracy to commit theft; at trial, counsel called his co-conspirator, who was convicted but not sentenced, to testify; trial court permitted her to invoke Fifth Amendment right against self-incrimination when asked if she knew defendant. Witness cannot invoke Fifth Amendment right against self-incrimination prospectively; witness can invoke Fifth Amendment right against self-incrimination only in response to questions that would incriminate witness; appellate courts review de novo question of whether witness properly invoked Fifth Amendment (acknowledging split in authorities).

People v. Blackwell, 251 P.3d 468 (Colo. App. 2010). Privilege against self-incrimination can be invoked by anyone whose statements/answers might admit commission of illegal acts or furnish link in chain of evidence needed to prosecute that person for crime; burden lies with person invoking privilege to establish that it is properly invoked; once court finds privilege is properly invoked, it has no obligation to inquire further. Court may only compel a response or punish witness for refusing to testify if it is perfectly clear from careful consideration of all circumstances that witness's answers cannot possibly have tendency to incriminate him.

People v. Graybeal, 155 P.3d 614 (Colo. App. 2007). Privilege against self-incrimination is personal in nature; defendant has no standing to assert this right on behalf of witness called to testify against her.

People v. Martinez, 987 P.2d 884 (Colo. App. 1999). OK to keep defendant from inquiring into an area about which witness invoked his 5th amendment privilege; court would have permitted defendant to ask whether state had promised anything to witness in exchange for favorable testimony, but defendant did not ask.

Miscellaneous on Witnesses

In Re: People v. Honstein, 2024 CO 34. The advocate-witness rule, Colo. RPC 3.7 generally forbids counsel from maintaining dual roles as advocate and witness in the same matter before the same tribunal. Relatedly, when asked to disqualify a prosecutor or prosecutor's office when they are called as a witness, a trial court should disqualify the prosecutor if their testimony is "of sufficient consequence to prevent a fair trial." A defendant who wishes to call a participating prosecutor as a witness must demonstrate a compelling and legitimate reason to do so. This standard requires the testimony in question to be both vital to the case and unobtainable from other sources. Trial courts have discretion to determine whether the proffered reason is compelling and legitimate and should quash subpoenas eliciting testimony when this standard is not met. *Here:* the CSC finds that defendant lacked a compelling and legitimate reason because the testimony he sought constituted impeachment evidence and was obtainable from another witness; trial court erred in ordering the prosecutor to testify and makes the rule to show cause absolute.

People v. Lopez, 2024 COA 26. Where the trial court asked the child witness a few preliminary questions prior to giving him the oath, there was no error as the court simply gave an age-appropriate oath to tell the truth under CRE 603 even though child was 10 and didn't need a competency finding prior to testifying. State and federal courts have held it is proper for trial courts to ask child witnesses to demonstrate that they understand the difference between truth and falsehood as part of administering an age-appropriate oath. *[Cert Accepted*

(12/23/24) in case #24SC244: (1) Whether a criminal defendant can open the door to expert witness testimony that another witness told the truth on a particular occasion. (SAAG Frank Lawson)]

People v. Collins, 2021 COA 18. Permitting a witness to testify in the presence of a courthouse facility dog does not violate defendant's confrontation rights. Defendant's right to confrontation does not carry with it the right to impose discomfort on an accusing witness. No showing of necessity, in the absence of a statute imposing such a requirement, is required prior to the use of a courthouse facility dog; rather, requiring a lesser showing is consistent with the CVRA and a judge's considerable latitude to control courtroom decorum.

People v. Ray (Lindecrantz), 2018 COA 36. In death penalty postconviction proceeding concerning effectiveness of trial counsel's pretrial investigation, counsel's investigator refused to testify in response to prosecution subpoena, on ground that she was opposed to death penalty on religious grounds, and her testimony could be used to prove that trial counsel's representation was effective. It does not matter that this was death penalty case; state has compelling interest in ascertaining truth and rendering just judgment in accordance with law; witness had to testify under subpoena.

People v. Blackwell, 251 P.3d 468 (Colo. App. 2010). Claim that People intentionally interfered with defense witness/intimidated witness into not testifying is considered under totality of circumstances. Among factors to consider are: (1) manner in which prosecutor raised issue, including warnings' extent and timing, language employed, and whether prosecutor communicated directly with witness or through attorney; (2) prosecutor's basis in record for believing witness might lie; (3) warnings' effect on witness's willingness to testify; (4) whether court attempted to remedy any misconduct; and (5) whether prosecutor capitalized on witness's absence by directing jury's attention to it during closing argument. An intentional, concerted effort to deprive defendant of exculpatory testimony through witness intimidation may deprive defendant of a fair trial. To prevail on such a claim, defendant must show, by preponderance of evidence, governmental interference with defense witness's choice to testify; unnecessarily strong admonitions against perjury aimed at discouraging defense witnesses from testifying, or comments amounting to threat beyond what record indicates is necessary and appropriate, may deprive defendant of Sixth Amendment right to obtain witnesses.

Privileges: §13-90-107

Marital/Spousal Privilege: §13-90-107(1)(a)

People v. Ford, 100 P.3d 540 (Colo. App. 2004). Under §13-90-107(1)(a) marital privilege is unavailable in prosecution for F3. For privilege purposes, distinction between sentence enhancer and statutory element of offense is irrelevant when factor is specifically alleged in charging document. *Here*: defendant charged with second-degree burglary of a dwelling cannot invoke privilege; defendant argued that since "dwelling" raised offense to F3 as a sentence enhancer and was not an element, his offense should be considered a F4 for purpose of privilege.

People v. Wickham, 53 P.3d 691 (Colo. App. 2001). Marital privilege is a statutory, not a constitutional, right; if defendant is being tried for F1, F2, or F3, marital privilege belongs to testifying-spouse, not defendant-spouse. If testifying spouse fails to claim privilege, it is waived. *Here:* defendant's wife testified on a grant of immunity after being advised by her lawyer, incorrectly, that privilege did not exist; this waived her privilege.

People v. James, 40 P.3d 36 (Colo. App. 2001), overruled other grounds, McDonald v. People 2021 CO 64. Trial court properly allowed defendant's wife to testify despite his assertion of spousal immunity, where they were actively engaged in criminal activity, and her testimony concerned statements defendant made to obtain her help with ongoing criminal activity.

People v. Inman, 950 P.2d 640 (Colo. App. 1997). Spousal privilege statute creates two different privileges with respect to spousal testimony: (1) privilege against adverse spousal testimony, known as rule of spousal

disqualification; and (2) privilege against disclosure of confidential communications made during marriage. Confidential communication privilege applies only to conversations made during marriage. *Here:* contested statements were made prior to marriage and were admissible.

Doctor-Patient: 13-90-107(1)(d)

Liggett v. People, 2023 CO 22. When a defendant presents psychiatric evidence supporting an insanity defense, it opens the door to the admission of psychiatric evidence rebutting that defense, even if that evidence includes defendant's voluntary but non-Mirandized statements. §16-8-103.6 waiver of privilege as to communications made by defendant to a psychologist or physician includes communications to their agents too. *Here:* because the nonphysician medical providers who testified at trial each made their observations as agents of defendant's physicians, defendant waived the privilege he shared with those witnesses.

People v. Moon, 2015 COA 23. Hospital and medical records, including prescriptions, fall within scope of physician-patient privilege §13-90-107(1)(d). §18-18-415(1)(b) operates as an exception to physician-patient privilege and doctor's unaltered prescription falls within that exception.

People v. Herdman, 2012 COA 89. If defendant's pleas or filings at any stage trigger court-ordered mental exam, exam may be admitted, to rebut defense evidence of mental condition, even if defense theory ultimately chosen would not trigger a court-ordered exam. (§16-8-107(1)(a); (1.5)(a); 107(3)(b)). When defendant gives notice of intent to introduce mental-condition evidence for some purpose other than to establish legal insanity, §16-8-107(3)(b) authorizes court-ordered mental exam and allows prosecution to admit evidence of defendant's communications during such exam to rebut defense expert's opinion on defendant's mental condition. As used in statute, "mental condition" is broadly interpreted to include learning disabilities, clinical depression, anxiety disorder, and involuntary intoxication. *Compare People v. Garcia*, 113 P.3d 775 (Colo. 2005)(assertion involuntary intoxication does not mandate court-ordered exam).

People v. Sexton, 2012 COA 26. Because §13-90-107 (doctor/patient privilege), rather than §18-18-406.3(5)(criminalizing disclosure of confidential information contained in medical marijuana registry absent written authorization), governs medical marijuana patient-defendant's waiver of privilege, waiver need not be in writing. *Here:* by asserting affirmative defense of medical use, defendant waived his privilege to prevent rebuttal testimony by physician who recommended defendant's medical marijuana registry renewal with extended plant counts.

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). Error for COA to review child victim's medical records in camera. *Here:* child victim had waived medical privilege to medical records concerning initial disclosure and PTSD diagnosis but had not waived (either expressly/impliedly) her privilege as to her ongoing therapy records.

People v. Harte, 131 P.3d 1180 (Colo. App. 2005). §18-18-415(1)(b) operates as an exception to physician-patient privilege found at §13-90-107(1)(d).

People v. Garrison, 109 P.3d 1009 (Colo. App. 2004). Patient-physician privilege did not apply to statements made by defendant to nurse where statements related to preparation for defendant's release from hospital and were not necessary to enable nurse to prescribe or act for defendant.

People v. Herrera, 87 P.3d 240 (Colo. App. 2003). Defendant's due process rights and privilege against self-incrimination were violated when, at unitary trial, state psychiatrist related defendant's statements made during sanity exam and rendered opinions relating to substantive elements of whether defendant intended to and deliberated before killing his father.

People v. Palomo, 31 P.3d 879 (Colo. 2001). Employees' drug screening and physical ability tests were neither medical records nor covered by physician-patient privilege because they were not performed on employees'

behalf or in order to treat them; physician-patient privilege is personal to patient or her estate and cannot be invoked by third party.

People v. Covington, 19 P.3d 15 (Colo. 2001). Police officer investigating DV incident asked a physician's assistant to take photographs of female victim's wound; at trial, victim sought to bar admission of photographs, citing physician-patient privilege statute; photos were protected by privilege, but were admissible anyway because they revealed no more information than basic medical facts that physicians are required to report under §12-36-135. This "reporting statute" suspends privilege in DV episodes or gunshot wounds with regard to basic medical facts received from physician's observations of patient but does not abrogate privilege with regard to any statements patient may have made to physician. Even though physician assistant did not need photographs of wound to administer treatment, photographs memorialized observations necessary for treatment and came within physician-patient privilege.

People v. Meyer, 952 P.2d 774 (Colo. App. 1997). Trial court did not err in refusing to examine in camera (or otherwise permit defense access to) subpoenaed hospital records: (1) defendant provided no basis for asserting that records may have contained evidence to support his theory that victim set the fire in a suicide attempt; and (2) defendant failed to overcome physician-patient privilege protecting these records. Trial court did not err in refusing to examine in-camera (or otherwise permit defense access to) subpoenaed high school records of defendant's son or his son's girlfriend because privacy interests of son and girlfriend in their school records precluded defendant's attempted foray.

Therapist/Psychologist Privilege: §13-90-107(1)(g)

Zoll v. People, 2018 CO 70. When COA determines that trial court erred in failing to disclose certain documents from a file reviewed in camera, the proper remedy is to remand the case to the trial court with instructions to provide the documents to the parties and to afford the defendant an opportunity to demonstrate a reasonable probability that, had the documents been disclosed before trial, the result of the proceeding would have been different. Disapproved of People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

People v. Kailey, 2014 CO 50. If mental health treatment provider believes patient statements during a therapy session threaten imminent physical violence against specific person or persons -- and accordingly trigger provider's legal "duty to warn" under §13-21-117(2) - patient's threatening statements are not protected by psychologist-patient privilege provided by §13-90-107(1)(g) and are admissible as evidence in subsequent court proceedings.

People v. Krutsinger, 121 P.3d 318 (Colo. App. 2005). Trial court erred in excluding testimony by sexual assault victim's therapist, since victim waived psychologist-patient privilege; mere fact that trial court disallowed testimony did not constitute constitutional error; erroneous exclusion of testimony is of constitutional dimension only if defendant shows that excluded testimony is favorable and material to defense; specifically, that evidence would have affected outcome of trial.

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). Victim's information on victim impact statement about receiving mental therapy did not waive psychologist/ patient privilege as to substance of the therapy or victim's post-offense mental condition.

People v. Kyle, 111 P.3d 491 (Colo. App. 2004). COA conducted its own in camera review of victim's treatment and DHS records and determined that information in the files would probably not have changed outcome of defendant's trial and that nondisclosure was harmless beyond a reasonable doubt. Disapproved of in Zoll v. People, 2018 CO 70.

People v. Sisneros, 55 P.3d 797 (Colo. 2002). Without a waiver of privilege, court may not conduct an in-camera review of psychologist's records to see if they might contain relevant evidence; CSC will not hastily

find an implied waiver of psychologist-patient privilege because relationship is one where trust is paramount, and mere threat of disclosure destroys sanctity of relationship. To determine whether there has been a waiver of psychologist-patient privilege, proper inquiry is not whether information sought may be relevant, but whether privilege holder has injected her physical/mental condition into case as basis of claim of an affirmative defense. *Here*: no waiver of psychologist-patient privilege at PH where, in response to defendant's cross-examination, child victim explained that her counselor helped her remember exact date of sexual assault. witness received treatment after alleged assault; her post-assault mental state was not in issue, and circumstances of her testimony did not indicate her intent to waive protections of psychologist/patient privilege.

People v. Ullery, 984 P.2d 586 (Colo. 1999). When defendant asserts insanity/IMC, he waives his psychologist-physician privilege; DA can obtain the records and reports of any expert who has examined defendant or who is endorsed to testify; this waiver does not extend to attorney "work-product." When defense asserts that doctor's file contains work product, trial court should conduct an in-camera review and excise portions of documents that record mental processes of defense counsel. *Here:* defense counsel abandoned work-product claim by failing to make record that would enable review.

Dill v. People, 927 P.2d 1315 (Colo. 1996). Psychologist-client privilege does not apply to any communication that is the basis for report of child abuse to social services/law enforcement (§19-3-304, §19-3-311); privilege applies to communications between abused child and psychologist after legal proceedings based on report begin.

Attorney-Client/Work Product Privilege: §13-90-107(b)

People v. Delgadillo, 2012 COA 33. Attorney-client privilege operates to protect communications between attorney and client relating to legal advice; client holds the privilege, and only client may waive it. *Here*: Defense counsel's revelations made under oath during in camera proceeding were improper disclosures of attorney-client privileged information.

People v. Gabriesheski, 205 P.3d 440 (Colo. App. 2008), aff'd in part/rev'd in part, 262 P.3d 653 (Colo. 2011). Under attorney/client privilege, child sexual assault victim's GAL in D&N proceeding could not be called to testify in connection with child's recantation in related criminal case.

People v. Medina, 72 P.3d 405 (Colo. App. 2003). Defendant waived his attorney-client privilege by authorizing his attorney to deliver letter to victim's family; defendant gave letter in an envelope to his attorney, who then gave it to victim's family through pastor of attorney's and victim's mutual church.

Gall v. Jamison, 44 P.3d 233 (Colo. 2002). Under the Rules of *Civil* Procedure, attorney work product loses its privileged status when it is disclosed to, and considered by, testifying expert.

People v. Lesslie, 24 P.3d 22 (Colo. App. 2000). At meeting with co-defendant and co-defendant's attorney, defendant admitted placing an illegal listening device in a bathroom; at trial, co-defendant testified to defendant's admissions; defendant later claimed admissions should have been excluded under "joint-defense" theory of attorney-client privilege. *Here:* admissions were not privileged, because testifying co-defendant was aware of defendant's role, totally independent from, and before, any admissions in attorney's office.

Miscellaneous Privilege

People v. Trammell, 2014 COA 34. Person claiming that a communication is protected under clergy member/communicant privilege in §13-90-107(1)(c) must establish that communication was: (1) made to clergy member in his/her professional capacity; (2) confidential; and (3) made in course of discipline expected by religious body to which clergy member belongs. *Here*: no evidence defendant took measures to keep communications confidential, particularly in light of fact that police officer was in room; no evidence

concerning whether communication was made in course of discipline expected by clergy member. Common law bonding agent's privilege to enter principal's residence was abrogated by statute and does not exist in this state.

People v. Gabriesheski, 205 P.3d 440 (Colo. App. 2008), aff'd in part/rev'd in part, 262 P.3d 653 (Colo. 2011). Pursuant to §19-3-207(2), social worker involved in D&N proceeding could not be called to testify in related criminal case in connection child sexual assault victim's recantation without consent of child or her mother.

People v. Turner, 109 P.3d 639 (Colo. 2005). Victim-advocate privilege in §13-90-107(1)(k) applies to records of assistance provided by a victim's advocate because those records are part of "any communication" made to such advocate by DV victim.

People v. Agado, 964 P.2d 565 (Colo. App. 1998). Following most jurisdictions, court declined to find common-law parent-child privilege.

Sufficiency of Evidence Generally [10]

People v. Donald, 2020 CO 24. To determine whether prosecution presented sufficient evidence to support a conviction, we ask "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that defendant is guilty of the charge beyond a reasonable doubt." This test requires us to give the prosecution the benefit of all reasonable inferences that might fairly be drawn from the evidence. Such inferences must be supported by a "logical and convincing connection between the facts established and the conclusion inferred." Thus, "[a] verdict cannot be supported by guessing, speculation, conjecture, or a mere modicum of relevant evidence." Inference stacking is one factor that a court may consider in determining whether the evidence satisfied the prevailing substantial evidence test for evidence sufficiency. although inference stacking is not absolutely prohibited, the reliance on stacked inferences is pertinent to the analysis because a chain of inferences can become so attenuated that reliance on it to sustain a conviction would be unreasonable and amount to speculation.

McCoy v. People, 2019 CO 44. Sufficiency of the evidence claims may be raised for the first time on appeal and are not subject to plain error review; appellate courts should review unpreserved sufficiency claims de novo, in the same manner as if the claims were preserved, including when such claims involve preliminary questions of statutory construction. Overrules People v. Lacallo, 2014 COA 78; People v. Heywood, 2014 COA 99.

People v. Herold, 2024 COA 53. Under *Gorostieta*, the description of a person with a prior conviction as a "caucasian male" with the same name and date of birth as the current defendant is not sufficiently "specific corroborating evidence of identification connecting the defendant" to the person with the prior conviction for purposes of proving that the current defendant has a prior conviction when that prior conviction is an element of the charged offense. COA reversed defendant's felony DUI conviction and remanded for entry of a judgment of conviction for misdemeanor DUI.

People v. Johnson, 2016 COA 15. Rejecting witness's testimony cannot substitute for evidence. *Here:* while jury could choose not to believe defendant's testimony that he was asleep, it could not, without any other evidence, decide beyond a reasonable doubt that he was awake and aware.

[10] To see cases addressing sufficiency of evidence as to a particular crime, please see the Lookit Crime Section.

People v. LaRosa, 2013 CO 2. In determining whether evidence is sufficient to support a conviction, Colorado will no longer follow corpus delicti rule, which required prosecution to present evidence other than defendant's confession to prove that the crime at issue occurred. Instead, the confession must be corroborated by facts that prove the trustworthiness or reliability of the confession, such as: (1) facts that corroborate facts contained in the confession; (2) facts that establish the crime which corroborate facts contained in the confession; or (3) facts under which the confession was made that show the confession is trustworthy or reliable.

People v. Oslund, 2012 COA 62. "When the sufficiency of the evidence is challenged on appeal, we must determine whether the evidence, viewed as a whole, and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable juror that the defendant is guilty of the crime charged beyond a reasonable doubt."

Clark v. People, 232 P.3d 1287 (Colo. 2010). In reviewing a sufficiency of the evidence claim, we review the record de novo to determine whether the evidence presented was sufficient in both quantity and quality to sustain the defendant's conviction.

People v. Harper, 205 P.3d 452 (Colo. App. 2008). When assessing the sufficiency of evidence, a reviewing court determines whether the evidence, viewed in the light most favorable to the prosecution, is sufficient to support a rational conclusion that the defendant is guilty of the offense beyond a reasonable doubt.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). Convictions will not be reversed for lack of evidence simply because a different result could have been reached.

People v. Williams, 183 P.3d 577 (Colo. App. 2007). In considering whether evidence was sufficient to support defendant's conviction for purposes of determining whether he may be retried on a specific charge, appellate court may consider evidence that was improperly admitted at trial.

People v. Vanrees, 125 P.3d 403 (Colo. 2005). Except with respect to strict liability crimes, prosecution must prove not only that the defendant committed the proscribed act but that he acted with the culpable mental state required for the crime charged. Because culpable mental state is an essential element of a crime, due process requires that the prosecution prove mental culpability beyond a reasonable doubt.

People v. Dash, 104 P.3d 286 (Colo. App. 2004). Mere inconsistencies in testimony or admitted lies by a witness should be left to the jury to weigh in its credibility determination; unless witness's testimony is "palpably incredible and totally unbelievable" or "describes events she could not possibly have seen or that are not possible under the laws of nature," the trial court may not reject it as incredible as a matter of law.

People ex rel. J.G., 97 P.3d 300 (Colo. App. 2004). Standards for reviewing sufficiency of evidence supporting judgment of juvenile delinquency are the same as those for reviewing sufficiency of evidence supporting judgment of conviction in a criminal case.

People v. Minjarez, 81 P.3d 348 (Colo. 2003). Trial court may conclude that testimony is "incredible as a matter of law" only when witness's testimony conflicts with nature or fully established facts.

People v. Clemons, 89 P.3d 479 (Colo. App. 2003). Where jury instruction sets out alternative means of establishing an element in the conjunctive, jury's general verdict may be sustained where the evidence is sufficient to support one of the alternatives, because nothing more is required by the statute defining the offense.

Miscellaneous on Evidence

People v. Salazar, 2023 COA 102. A police officer and detective did not impermissibly testify about a screening process to prosecute certain cases by testifying about having probable cause to arrest defendant in two fleeting

instances and if error it was harmless. *Here:* court gave a limiting instruction not to consider defendant's arrest or incarceration evidence of his guilt; the testimony was brief, lacked detail, no one described how cops obtain probable cause, and DA never mentioned the testimony.

People v. Grudznske, 2023 COA 36. Where part of a CD exhibit contained information related to defendant's prior alcohol related driving offenses as well as other properly admitted evidence, any error in sending the CD back to the jury room during deliberations was harmless where record was devoid of any indication that the jury was provided access to the hardware necessary to view the CD and there was overwhelming independent evidence of defendant's guilt.

GENERAL DEFENSES

Alibi: §16-7-102

People v. Cox, 2021 COA 68. CSC has held that a statute requiring a defendant to make timely pretrial disclosure of alibi witnesses, or lose the chance to call those witnesses, did not infringe on the defendant's constitutional right to call witnesses in his own defense.

Fisher v. People, 2020 CO 70. Prosecution's amendment of information charging defendant with five counts of sexual assault on child to expand date range of charged offenses prejudiced defendant's substantial right to prepare and present defense, and trial court abused its discretion in permitting amendment on third day of trial, even if defendant was still able to present his partial alibi, and amendment did not totally destroy defense, where defendant's alibi placed him out of state for first alleged assault, amendment changed date range to one where first assault fell partly outside alibi timeline, and defendant was unable to marshal evidence to dispute expanded timeframe or to cross-examine prosecution's witnesses.

People v. Jackson, 2018 COA 79, aff'd other grounds, 2020 CO 75. Alibi disclosure requirements are designed to provide the DA with adequate means to evaluate and meet the alibi testimony of defense witnesses. *Here:* previously undisclosed alibi evidence elicited from murder defendant's ex-wife was outside the court's control, and created a manifest necessity for declaring a mistrial, where defense did not provide advance notice to the DA of ex-wife's new claim that defendant was with her during the planning and commission of the crimes; despite receiving it one month before trial, defense elicited the new information during ex-wife's cross-examination rather than during the discovery period, and ex-wife's response on re-direct, which was permitted by trial court, was unknown and may have mooted arguments.

People v. Lowe, 969 P.2d 746 (Colo. App. 1998). Defendant's notice of alibi can be admitted at trial as a prior inconsistent statement when defendant testifies at trial contrary to the notice.

People v. Nunez, 841 P.2d 261, 266 (Colo. 1992). Defendant is entitled to an instruction based on the theory of defense of alibi if the record contains evidence of alibi and the theory is not incorporated or included in other jury instructions.

People v. Huckleberry, 768 P.2d 1235 (Colo. 1989). Alibi is not an affirmative defense; it does not require proof/disproof of factual issues beyond those necessary to establish the elements of offense charged; rather alibi emphasizes the significance of particular issues of fact DA must establish in every criminal case-defendant was present or, in some cases, represented at scene of the event and defendant was personally responsible for prohibited conduct.

People v. Hampton, 696 P.2d 765, 774 (Colo. 1985). Rule as to disclosure of alibis neither prevents defendant from exercising his right to present a defense nor restricts the nature or content of his alibi evidence. All the rule does is to condition the presentation of alibi evidence on a timely pretrial disclosure, so that the surprise and

prejudice incident to the eleventh-hour introduction of the alibi defense may be avoided and the reliability of the factfinding process correspondingly enhanced.

Alternate Suspect (AS)

People v. Elmarr, 2015 CO 53. Admissibility of AS evidence ultimately depends on strength of connection between AS and charged crime; touchstone of relevance in this context is whether evidence establishes non-speculative connection/nexus between AS and crime charged; where evidence concerns other acts by AS, court must look to whether all similar acts/circumstances, taken together, support finding that same person probably was involved in both other act and charged crime. CRE 404(b) principles guide this analysis; where evidence concerns statements by AS, court must determine whether AS's statements meet CRE 404(b)(3) requirements or any other applicable hearsay exception; even relevant AS evidence may be excluded if probative value is substantially outweighed by countervailing policy considerations under CRE 403, such as danger of confusion of issues or misleading jury, or by considerations of undue delay.

In re People v. Dye, 2024 CO 2. *Elmarr* established the proper framework for analyzing the admissibility of AS evidence. This case outlines the procedural mechanics litigants and trial courts should employ to implement that framework. The language of "any defense" in Crim. P. 16(II)(c) means any defense, not just any affirmative defense, and necessarily includes the AS defense. The AS defense–including the identity/identifying characteristics (DNA results) of any AS–must be endorsed no less than 35 days before trial. The trial court should then conduct the *Elmarr* test before trial and resolve any such disputes before trial. *Here:* defendant told the trial court he was contemplating presenting AS information but moved the court to rule that he was under no obligation to endorse an AS defense or disclose any information related to that defense before trial. The trial court, while acknowledging no Crim. P. 16 provision specifically addressed pretrial AS disclosures, ordered disclosure of "all evidence" related to that defense 45 days before trial–relying on Crim. P. 16(II)(c) (directing disclosure of "the nature of any defense, other than alibi"). Because the trial court's discovery order in this case was overly broad, the CSC makes absolute the rule to show cause.

Rios-Vargas v. People, 2023 CO 35. In a 4-3 opinion, CSC holds that defendant is entitled, in the presence of the jury, to question a nonparty alternate suspect who intends to invoke their 5th Amendment privilege under the circumstances and procedures set forth in this opinion. First, at a hearing outside the jury's presence, the court should determine whether: (1) there is a non-speculative connection between the alternate suspect and defendant's charged crime, and (2) the alternate suspect has a valid 5th Amendment claim. Then, the court should exercise discretion to impose reasonable limits on questioning that implicates the 5th Amendment to avoid unnecessary courtroom drama. Finally, after defendant has questioned the witness before the jury, the court should instruct jurors that a witness has a constitutional right to invoke the 5th Amendment. *Here:* because the court did not do use this procedure, the error was not harmless and the judgment is reversed and case remanded for a new trial. Overruled People v. Dikeman, 555 P.2d 519 (Colo. 1976)

People v. Shanks, 2019 COA 160. COA reviews a trial court's evidentiary decisions, including whether to admit AS evidence, for an abuse of discretion. CSC has held on numerous occasions that merely showing that an AS had the motive or the opportunity to commit the charged offense, without some additional proof connecting the AS to the offense, is insufficient to prove that necessary nexus. *Here:* trial court's error, if any, in precluding certain AS evidence, was harmless in prosecution for kidnapping, burglary, robbery, felony menacing, assault, and false imprisonment, although jury instruction on AS evidence was not received; jury had before it sufficient evidence and argument to understand defendant's defense, district court did not preclude

defense counsel from mentioning AS or arguing his theory of defense, and defense counsel was still permitted to attack co-defendant's credibility.

People v. Johnson, 2019 COA 159. A defendant pursuing an AS theory may introduce evidence of that suspect's other acts to prove identity — that the same person who committed the other act also committed the charged crime. However, "an inference that the AS committed the other acts and the charged crime is permissible only where the prior acts and the charged crime share sufficient similar characteristics or details." The overarching relevance inquiry remains whether the evidence, taken collectively, establishes a non-speculative connection between the AS and the charged crime. Even relevant AS evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Ruibal v. People, 2018 CO 93. As part of harmlessness analysis on an expert issue, CSC outlines standards governing admission of evidence of "alternate suspect," and expresses some skepticism that district court properly permitted introduction of such evidence in this case. *Here:* even evidence of motive and opportunity of the AS was extremely weak, if not entirely lacking; the only evidence of opportunity—that victim was in the same area near the same time as the AS—came from defendant himself and an Albertsons employee who believed she saw someone matching victim's description buying milk on the night in question; apart from medical evidence indicating the strong likelihood that after sustaining such severe injuries the victim could not have walked the distance from Albertsons, video footage from the store was unable to substantiate the employee's observation, and the presence of a twenty dollar bill in the victim's pocket appeared to dispel any suggestion that she ever purchased milk with the money reportedly given her by defendant for that purpose. With regard to motive, robbery and sexual assault were clearly ruled out, and although there was testimony to the effect that the AS was abusive in the past to a domestic partner, there was no evidence of pattern, a unique modus operandi, or any prior connection to the victim providing a motive for attacking her; not only was there no direct evidence, either physical or testimonial, but in fact no meaningful circumstantial evidence of contact between the two.

People v. Folsom, 2017 COA 146M. AS evidence should have been admitted since defendant presented more than an unsupported inference, or a possible ground for suspicion, that another individual had committed the crime of peeping. *Here:* defendant's proffered evidence established not only that this individual was convicted of a similar crime in the same geographic area, but also that he was linked to numerous other incidents of peeping in the area in the same general timeframe, and victim actually identified this individual in one incident as a person whom she recognized from neighborhood, even though she could not definitively identify him as the peeper in that incident, and defendant's primary defense at trial was misidentification, and the existence of another viable suspect was highly relevant to that defense.

People v. Cook, 2014 COA 33. Where defendant seeks to introduce AS evidence to show motive and opportunity, there must be proof that AS committed an act directly connecting him to charged crime. Where AS evidence seeks to challenge identity of perpetrator, AS's prior act/crime must be similar to present crime to be relevant/admissible. *Here:* victim's prior victimization by her brother did not meet criteria for admission and trial court properly denied defendant's request to pierce rape shield statute for purposes of establishing AS.

People v. Salazar, 2012 CO 20. This case involves intersection of competing evidentiary considerations: defendant's right to present complete defense, including relevant evidence of an alternate suspect; use of prior transaction evidence similar to that contemplated by CRE 404(b) for defensive purposes; presumption of irrelevance with regard to witness's prior sexual conduct under rape shield statute; and general evidentiary principles of relevancy and probativeness.

Intoxication: §18-1-804

People v. Mion, 2023 COA 110. In an issue of first impression in Colorado, the COA holds that the affirmative defense of involuntary intoxication is legally cognizable when: (1) defendant knowingly ingests what he believes to be a particular intoxicant; (2) in so doing, he unknowingly ingests a different intoxicant; and (3) it is the different intoxicant that deprives him of the capacity to conform his conduct to the requirements of the law. *Here:* defendant presented sufficient evidence, a low threshold, at trial to entitle him to a jury instruction on involuntary intoxication. The defense was based on defendant's claim that, before he committed the crimes at issue, he smoked a joint that he thought contained only marijuana, but which actually contained a stimulant that deprived him of the capacity to conform his conduct to the requirements of the law. Because the trial court refused the requested instruction, and because the COA can't conclude that the error was harmless beyond a reasonable doubt, the judgment is reversed, and the case is remanded for a new trial. *Accepted (8/19/24) in case #24SC2: (1) Whether the court of appeals erred in adopting a rule that does not require defendants to provide some evidence of innocent mistake when invoking the affirmative defense of involuntary intoxication. [AAG Jaycey DeHoyos]*

People v. Kelley, 2023 CO 32. When defendant endorses an involuntary intoxication affirmative defense, they impliedly waive their physician-patient privilege. The waiver is limited to the records and information pertinent to defendant's endorsement of the affirmative defense. The court did not address whether defendant's refusal to release her medical records was admissible at trial because the parties did not have an opportunity to litigate that issue in the trial court.

People v. Grudznske, 2023 COA 36. COA agreed with other divisions that voluntary intoxication is not a defense to the circumstances element of extreme indifference first degree murder. *Here:* judge gave a limiting instruction that read "You may not consider evidence of self-induced intoxication as a defense to any of the charges in this case. But in helping you to evaluate the circumstances under which the alleged crimes occurred, the lawyers may draw your attention to all of the evidence, including evidence of self-induced intoxication." Defendant argued the court should have instructed the jury that voluntary intoxication may be used to traverse the circumstances element (universal malice).

People v. Stone, 2020 COA 23. §18-1-804 which precluded jury from considering evidence of voluntary intoxication as a defense to elements of general intent crimes did not violate defendant's due process rights as it did not lighten prosecution's burden to prove every element beyond a reasonable doubt, nor did it prevent defendant from presenting complete defense; statute was part of statutes that discuss general criminal liability not rules of evidence, prosecution still had to prove defendant acted knowingly beyond reasonable doubt, legislature instructed courts trying cases involving general intent crimes "to treat a sober person and a voluntarily intoxicated person as equally responsible for conduct," and there was lengthy common-law tradition of barring defendants from using voluntary intoxication as an excuse to a crime. Voluntary intoxication is not a true element-negating defense because it is possible for an intoxicated person to form specific intent. The rationale for barring defendants from introducing evidence of voluntary, self-induced intoxication to negate general intent arises from a recognition that "voluntary impairment of one's mental faculties with knowledge that the resulting condition is a source of potential danger to others" involves "moral blameworthiness." Distinguishes Montana v. Egelhoff, 116 S.Ct. 2013 (1996).

People v. Sabell, 2018 COA 85. When both voluntary and involuntary intoxication exist, jury must decide beyond reasonable doubt whether defendant was voluntarily or involuntarily intoxicated. *Here:* pattern jury instruction contained in COLJI-Crim. H:34 cmt. 7, lessened prosecution's burden of proof by allowing jury to decide threshold question of involuntary intoxication without burden of proof; not plain error though.

In Re People v. Voth, 2013 CO 61. A virus is not a "substance" introduced into the body that would support an involuntary intoxication affirmative defense.

People v. Lucas, 232 P.3d 155 (Colo. App. 2009). A jury instruction informing the jury that it "may" consider evidence of involuntary intoxication is not erroneous where separate instructions inform the jury that the prosecution is required to prove all of the elements, including culpable mental state, beyond a reasonable doubt.

People v. Sommers, 200 P.3d 1089 (Colo. App. 2008). Trial court did not err by instructing jury that any mental illness suffered by defendant was not a defense because defendant's bipolar condition did not support a defense of involuntary intoxication because it constituted evidence of insanity and defendant had not entered a special plea before trial as required to allow for evidence of insanity.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Trial court properly rejected defendant's request to assert involuntary intoxication defense based on argument that his addiction to drugs rendered him unable to know and appreciate long-term effects of intoxicants.

People v. Grant, 174 P.3d 798 (Colo. App. 2007). Defendant may not claim that he was insane because of a mental state he contracted through his voluntary use of intoxicants; in an appropriate case, jury instructions are inadequate where they do not explicitly advise that intoxication and mental impairment must be considered in connection with "intent" and "after deliberation" elements of first degree murder. Even in case where defendant cannot claim that he was insane due to self-induced intoxication, if evidence shows that his level of intoxication led him to believe that he was killing or assaulting demons, dragons, or the devil, then evidence is insufficient.

People v. Vigil, 127 P.3d 916 (Colo. 2006). In a SAOC prosecution, trial court correctly instructed the jury that "intoxication of the accused is not a defense to a criminal charge." SAOC under §18-3-405(1) is a general intent crime, notwithstanding the fact that knowing "sexual contact" must be for the "purpose of sexual arousal or gratification." SAOC is general intent crime, intoxication is not a defense.

People v. Garcia, 113 P.3d 775 (Colo. 2005). As matter of law, medical condition of insulin-induced hypoglycemia may, depending upon particular facts and circumstances of case at issue, constitute affirmative defense of involuntary intoxication. *Here:* diabetic defendant who claimed he attacked his wife because of his low blood sugar, which prevented him from conforming his conduct to requirements of law, was entitled to assert intoxication defense, and trial court erred in requiring him to plead insanity; whether defendant's low blood sugar caused him to be involuntarily intoxicated is question for jury even if facts tending to support involuntary intoxication are inconclusive.

People v. Miller, 113 P.3d 743 (Colo. 2005). Where a voluntary intoxication instruction is warranted, trial court should affirmatively instruct jury that "after deliberation" is part of the culpable mental state required by first-degree murder and may be negated by evidence of voluntary intoxication.

People v. Harlan, 8 P.3d 448 (Colo. 2000), overruled other grounds, People v. Miller, 113 P.3d 743 (Colo. 2005). Intoxication statute sets forth a rule concerning admissibility of evidence of intoxication by defendant to counter prosecution's evidence that defendant had requisite specific intent of charged offense. Such evidence does not excuse or justify criminal conduct, absolving defendant of criminal liability, as do affirmative defenses. Statute absolves defendant of liability only for specific intent offense when evidence of intoxication negates existence of specific intent. Defendant, after introducing such evidence, remains liable for a lesser-included general intent offense.

AFFIRMATIVE DEFENSES

Generally

People v. Nelson, 2014 COA 165. Affirmative defenses do not apply where a defendant denies committing the crime.

People v. Miller, 113 P.3d 743 (Colo. 2005). An affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it.

People v. Hill, 934 P.2d 821 (Colo. 1997). An affirmative defense cannot be considered by the jury until some quantum of evidence relevant to the affirmative defense is admitted. Once some credible evidence, viewed in a light most favorable to the defense, supports an affirmative defense, the prosecution is required to disprove it as though it were an element of the offense.

Ignorance or Mistake of Fact: §18-1-504

People v. Borrego, 738 P.2d 59 (Colo. App. 1987). Person is not relieved of criminal liability for conduct on ground that he engaged in that conduct under mistaken belief of fact, unless it negatives existence of particular mental state essential to commission of offense; if defendant does every act within his power to commit offense and would have committed completed offense if facts had been as he believed them to be, then he may not escape criminal liability.

People v. Manyik, 2016 COA 42. Language for a mistake of fact jury instruction that is almost identical to the statutory language is proper.

People v. Gutierrez-Vite, 2014 COA 159. Even assuming the adverse possession doctrine could apply to criminal charges, defendant's misunderstanding of this doctrine did not justify mistake of law defense; an incorrect understanding of how the law applies to a situation does not transform this misapprehension into a mistake of fact defense.

People v. Bruno, 2014 COA 158. Defendant's own misunderstanding of statute cannot justify a mistake of law defense.

People v. Walden, 224 P.3d 369 (Colo. App. 2009). Mistake of fact instruction was not warranted where theory of defense merely negated an element of offense.

People v. Rester, 36 P.3d 98 (Colo. App. 2001). Defendant complained that he was not advised his failure to comply with bond conditions could yield a separate criminal conviction.; no separate advisement is necessary because defendant is deemed to have constructive knowledge of penal statutes.

People v. Lesslie, 24 P.3d 22 (Colo. App. 2000). Mistake of law defense is available only if actor's conduct is permitted by administrative regulation, order, grant of permission by an official authorized to make such a grant, or by official written interpretation of law relating to offense. *Here*: defendant's claim that he mistakenly relied on his sheriff's direction to install listening device did not qualify, since sheriff was not himself authorized to permit device's installation.

Consent: §18-1-505

People v. Nelson, 2014 COA 165. Notwithstanding the consent affirmative defense statute, an element-negating traverse (if accepted by the jury, they would have negated the element of deception) is not an affirmative defense; although defendant was free to argue that the evidence of consent and mistake of fact showed that he had not deceived the victim, he was not entitled to separate instructions on those defenses characterizing them as affirmative defenses which the prosecution was required to disprove beyond a reasonable doubt; also no instruction is necessary where proof of elements of crime necessarily disproves defense.

People v. Garcia, 2012 COA 79. Sexual assault is enhanced to F3 if defendant impairs victim by employing, without victim's consent, any drug, intoxicant, or other means for purpose of causing submission (§18-3-402(4)(d)). *Here*: although victim voluntarily took pill defendant gave her, she thought she was taking something similar to Aleve and did not know/expect that pill would render her unconscious/disoriented; evidence was sufficient that defendant induced her to take pill without consent.

Oram v. People, 255 P.3d 1032 (Colo. 2011); Weinstein v. People, 255 P.3d 1057 (Colo. 2011). Under §18-1-505(1), consent to an entry must come from named victim to relieve defendant from criminal liability for burglary.

People v. Platt, 170 P.3d 802 (Colo. App. 2007), aff'd, 201 P.3d 545 (Colo. 2009). Consent is not a defense to a charge under §18-3-402(1)(b)(causing submission); trial court properly refused to instruct jury on consent as either an affirmative defense or part of theory of defense.

People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006). In defining term "consent" as used in unlawful sexual contact, trial court did not err in giving supplemental jury instruction based on language from §18-3-401(1.5) and §18-1-505(3)(d).

People v. Martinez, 36 P.3d 154 (Colo. App. 2001). Trial court properly refused defendant's request for a consent affirmative defense instruction; because elements of second-degree sexual assault require proof of facts that negate existence of consent, and because jury was instructed on defendant's theory of the case - "mutual consent" - issue was adequately presented.

People v. Bush, 948 P.2d 16 (Colo. App. 1997). Trial court properly refused instruction on consent affirmative defense of theft (includes element of "without authorization"), and unauthorized use of financial transaction device (includes element of "intent to defraud").

People v. Cruz, 923 P.2d 311 (Colo. App. 1996). In first-degree sexual assault, it was unnecessary for trial court to give separate jury instructions on affirmative defense of consent, because first-degree sexual assault statute requires that prosecution prove lack of consent.

Choice of Evils: §18-1-702

People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990); People v. Fontes, 89 P.3d 484 (Colo. App. 2003). Under choice-of-evils, acts that would otherwise be criminal may be justifiable if such acts were performed under extraordinary circumstances out of some immediate necessity to prevent a greater harm; party seeking to employ such defense must prove that criminal act was "necessary because of the sudden and unforeseen emergence of a situation requiring the actor's immediate action to prevent the occurrence of an imminently impending injury." Defendant must make an offer of proof that establishes the necessary foundation outlined in the statute. Before defense can be presented to the jury, trial court must make a preliminary finding of whether the facts, as presented by defendant, if proven, would constitute legal justification for the prohibited conduct.

Andrews v. People, 800 P.2d 607 (Colo. 1990). To be sufficient, defendant's offer of proof of choice of evils defense must establish that all other potentially viable and reasonable alternative actions were pursued, or shown to be futile, that action taken had direct causal connection with harm sought to be prevented and would bring about abatement of harm, and that action taken was emergency measure pursued to avoid specific, definite, and imminent injury about to occur.

People v. Ragsdal, 2025 COA 9. Trial court properly denied defendant choice-of-evils defense based on an insufficient offer-of-proof so denial of mistrial was not an abuse of discretion. *Here:* before trial, defense counsel endorsed choice-of-evils as an affirmative defense, and during voir dire, the court indicated defendant would be pursuing a choice-of-evils defense. Shortly before opening statements, the prosecutor argued defendant didn't have a sufficient evidentiary basis to pursue such a defense. The court asked defense counsel for an offer of proof in support of choice-of-evils. After providing defense counsel with multiple opportunities to present an offer of proof, the trial court ruled that defense hadn't presented an adequate basis for pursuing the choice-of-evils defense at trial. Following the court's ruling defense counsel moved for a mistrial based on "ineffective assistance of counsel," arguing that he wasn't adequately prepared to present the requisite offer of proof and needed more time to investigate the factual basis for asserting a choice-of-evils defense. COA affirmed trial court's denial of mistrial because defense counsel: (1) would be effective because counsel said that he was "prepared to go to trial and argue things in the absence of that choice of evils defense"; (2) hadn't provided the court with a "reason to believe anything would change in terms of [his] trial preparation or arguments [he] would make" if given more time; and (3) hadn't indicated or given the court a reason to believe "that any of the offer of proof would be different in the future." Lastly, the trial court encouraged defense counsel to bring to the court's attention any additional information that came to light to support the choice-of-evils defense.

People v. Wingfield, 2014 COA 173. Defendant is not entitled to choice of evils defense where he has "viable alternatives" to committing offense.

People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006). Court may refuse to give choice of evils instruction when defendant fails to comply with the statutory procedural requirements where the trial court gave defendant reasonable opportunity to comply.

People v. Fontes, 89 P.3d 484 (Colo. App. 2003). Economic necessity alone cannot support choice of evils defense. *Here:* defendant failed to establish direct causal connection between forgery and harm he sought to prevent (his children's starvation), because of forgery circumstances and relatively large amount of the forged

instrument; court did not err in refusing to give choice of evils instruction, or to allow defendant to use the theory as general defense.

People v. Shepherd, 43 P.3d 693 (Colo. App. 2001). No plain error in failing *sua sponte* to instruct jury on choice of evils when defendant failed to lay statutory foundation and expressly disavowed reliance on defense; prosecutor properly argued that criminal intent to enter a home may co-exist with a more beneficent intent; acting upon good motives is not, in and of itself, sufficient to invoke choice-of-evils principles to avoid responsibility for violating law.

Self-Defense & Defense of a Person: §18-1-704

People v. Perez, 2024 COA 94. There was sufficient evidence to support the provocation instruction for self-defense. While the COA acknowledged that the provocation evidence was weak, because "some evidence" includes any credible, even if improbable, the record supports the court's decision to instruct on the provocation exception. COA also found that "provocation" is not a technical term the court was required to further define and nothing in the record indicates that the jury was confused about its meaning. *Here:* record supports the inference that victim came to the apartment complex armed and pulled a gun on defendant because he had heard that defendant was angrily looking for him, banging on doors, and making threatening comments.

In re People v. Howell, 2024 CO 42. An uncovered, unenclosed, and unsecured doorstep is not part of a "dwelling" for the purposes of the deadly force-against-intruders statute, §18-1-704.5. A person that merely stands on defendant's doorstep is a non-entrant and use of force against that person is not shielded by immunity under the force-against-intruders statute. CSC discharges the rule to show cause.

People v. Wade, 2024 COA 13. The trial court is not an advocate and need not serve as counsel for either party and a court's general duty to instruct does not extend to crafting theory of the case instructions when defense counsel fails to do so. *Here:* the trial court did not err by not sua sponte instructing the jury on self-defense where a year and a half before trial, defendant filed an endorsement of self-defense that appeared to be, at best, only a tentative theory of the case at trial. Defendant did not mention self-defense during his opening statement, he was unable to elicit any further evidence that he acted in self-defense, he did not request or tender a self-defense instruction, did not mention self-defense or refer to the testimony quoted above during closing argument, and his decision appeared to be a tactical one.

People v. Jones, 2023 COA 104. Using the analysis in *Toler*, the trial court properly refused to give a self-defense instruction under §18-1-704(2)(b) and (2)(c). The trial court properly recognized that giving such an instruction would be based only on the actual belief of defendant; self-defense statute takes into account both the reasonable belief and the actual belief of defendant.

People v. Mosely, 2021 CO 41. Defendant was not entitled to unanimity instruction on the components of self-defense, as long as the jurors unanimously agreed that self-defense had been disproven.

People v. Roberts-Bicking, 2021 COA 12. In this multiple-assailants case, the self-defense instruction and a supplemental instruction sufficiently informed the jury regarding all applicable principles of self-defense, including the jury's obligation to consider the totality of the circumstances. *Here:* the trial court did not err by declining to give either a multiple-assailants instruction or an apparent-necessity instruction; jury need not unanimously agree on which exception to self-defense—provocation or initial aggressor—the prosecution has proved, because "jury unanimity is not required with respect to alternate means or ways of satisfying an element of an offense."

Galvan v. People, 2020 CO 82. When a trial court instructs the jury on the affirmative defense of self-defense, it should instruct the jury on an exception to that defense if there is "some evidence" to support the exception. *Here:* defendant's taunts at alleged victims were fighting words and were not protected by First Amendment; those words could be considered in determining whether there was some evidence that defendant provoked victims, thereby authorizing a provocation instruction.

People v. Coahran, 2019 COA 6. Self-defense may be raised as affirmative defense to criminal mischief. Self-defense permits use of physical force "upon another person" to defend oneself from that other person, and dictionary defines "upon" to include "having a powerful influence on" and "in or into close proximity or contact with by way of or as if by way of attack." Therefore, using physical force that has a powerful influence on or is in close proximity with another person is a broad concept that may be applied directly or indirectly. *Here:* defendant was charged with criminal mischief after she kicked victim's car door; she claimed she did so because victim had grabbed her wrist and she needed to kick door both to distract him and gain leverage to pull away. To disallow self-defense instruction under these circumstances would "create a perverse incentive" where persons in defendant's situation are encouraged to direct physical force exclusively against the other person (kick other person rather than kick car door). This not only encourages violent behavior, but it's also inconsistent with legislature's mandate in the self-defense statute that an individual use only "a degree of force which [s]he reasonably believes to be necessary" to defend herself.

People v. DeGreat, 2018 CO 83. Self-defense can apply to aggravated robbery, where unique facts and conflicting evidence raise a factual question of whether defendant's use of force and act of taking are simultaneous and inseparable from one another.

People v. Koper, 2018 COA 137. Defendant got into a fist-fight at a bar; after being punched in face, defendant pulled a gun on his assailant in self-defense; victims were two innocent bystanders who were in the line of fire; defendant argued that trial court erroneously rejected his transferred-intent self-defense instruction. Although theory of defense instruction incorporated defendant's argument, prosecution was not required to disprove self-defense beyond a reasonable doubt. Under these circumstances, COA held that defendant's intent to defend himself against a third party was transferred to victims.

People v. Jones, 2018 COA 112. Where court instructs jury on make-my-day statute, §18-1-704.5(2), in order to limit applicability of defendant's claim of self-defense, instruction must require trespasser/defendant's entry be "knowingly" unlawful.

People v. Monroe, 2018 COA 110. Prosecutor's repeated argument that, although defendant had no duty to retreat, she had ability to leave her encounter with victim if she were afraid for her safety, may have been understood by jury as assertion that any person who does not take advantage of a path of retreat does not believe force will be used against her; this imposed a de facto duty to retreat, and instructions were inadequate to cure the error.

Castillo v. People, 2018 CO 62. Defines "initial aggressor" as person who initiated the physical conflict by using or threatening the imminent use of unlawful physical force. Initial aggressor exception applies only to initial aggressor for the entire episode. *Here:* no evidence that defendant was the initial aggressor as to entire episode; erroneous instruction on initial aggressor exception was not harmless because of prosecution's extensive reliance on it during closing arguments.

People v. Wakefield, 2018 COA 37. *Vigil* indicated that a person can both hold a firearm in self-defense and still kill victim accidentally, and that in such circumstances, jury must be instructed on self-defense. *Here:* where defendant claimed both accident and self-defense and presented at least a scintilla of evidence supporting self-defense, he was entitled to such an instruction.

People v. Tardif, 2017 COA 136. Self-defense is not a defense to conspiracy to commit first degree assault; because self-defense justifies use of physical force, it can be an affirmative defense only to crimes of physical force; criminal conspiracy is not one of these crimes.

Roberts v. People, 2017 CO 76. *Pickering* held that trial court properly instructed jury that prosecution did not bear burden of disproving beyond reasonable doubt defendant's claim of self-defense to charge of reckless manslaughter; *Pickering* did not establish a broad rule that self-defense is a defense to all crimes requiring intent, knowledge, or willfulness; *Pickering* did not require that jury be instructed that self-defense was an affirmative defense to harassment.

People v. Opana, 2017 CO 56. Court held that statutory definition of "deadly physical force" is not subjective and instead "convey[s] the notion of an objective likelihood that, in the absence of some intervening circumstance, a result will occur." *Here:* because the force actually inflicted "could not reasonably be characterized as anything other than force, the intended, natural, and probable consequence of which was to produce death, and there was no dispute that victim died as the result of being shot in chest, a non-deadly physical force instruction was inappropriate. COA was reversed. Overruling People v. Vasquez, 148 P.3d 326 (Colo. App. 2006).

Montoya v. People, 2017 CO 40. When self-defense is a traverse to charged offense, People disprove self-defense beyond reasonable doubt by proving elements of charged offense. In such cases, it is unnecessary to distinguish for jury the prosecution's burden of proof relative to legal justification or excuse from its burden relative to traverse, or element-negating defense.

People v. Newell, 2017 COA 27. When trial court is presented with some evidence that a defendant used force in self-defense, and some evidence that defendant was the initial aggressor, court should instruct jury on both self-defense and initial aggressor exception. It is reversible error to decline to instruct on self-defense because defendant has not put forward evidence that he is not initial aggressor, which is an exception to self-defense.

People v. Sandoval, 2016 COA 14. U.S. and Colorado Constitutions do not protect an individual's right to possess a short shotgun for self-defense; trial court did not err by precluding defendant from raising affirmative defenses based on right to bear arms and self-defense.

People v. DeGreat, 2015 COA 101. Self-defense is an available defense against charge of aggravated robbery where the taking of unpaid cab fare was entangled with defendant's belief that use of physical force against cab driver was necessary. Disagreed with People v. Beebe, 557 P.2d 840 (Colo. App. 1976).

People v. McClelland, 2015 COA 1. Self-defense instructions given as traverse pursuant to §18-1-704(4) must include all elements of self-defense law as outlined in §18-1-704(1)-(3). *Here:* court plainly erred when it instructed jury that it could consider evidence of self-defense as to reckless manslaughter but failed to include elements of self-defense in those instructions.

People v. Lane, 2014 COA 48. Smith v. U.S., 133 S. Ct. 714 (2013), did not effectively overrule People v. Pickering, 276 P.3d 553 (Colo. 2011).

People v. Gross, 2012 CO 60M. Trial court should always instruct jury on self-defense where there is evidence to support the instruction, even where self-defense is not a true element-negating affirmative defense but is instead a traverse, as in extreme indifference murder. *Here*: no plain error in failing to instruct on self-defense in relation to extreme indifference murder because (1) jury acquitted defendant of extreme indifference murder and convicted him of second degree assault, and (2) court did properly instruct jury on self-defense in relation to second degree assault. Jury's verdicts demonstrated that prosecution proved defendant's guilt beyond reasonable doubt as to all charges because jury rejected defendant's self-defense theory vis-à-vis second degree assault, which required a higher burden of proof than self-defense vis-à-vis extreme indifference murder.

Riley v. People, 266 P.3d 1089 (Colo. 2011); People v. Jones, 675 P.2d 9 (Colo. 1984). does not require trial court to give specific "multiple assailants" instruction in every case involving both multiple assailants and self-defense. Interpreting the case in that fashion would inappropriately infringe on discretion trial courts have to tailor jury instructions to fit each unique case. Trial court's self-defense instruction must direct jury to consider totality of the circumstances, including number of persons who reasonably appear to be threatening defendant (1) when evaluating the reasonableness of defendant's belief that he needed to use self-defense in the given situation, and (2) when evaluating the reasonableness of the actual force used by defendant to repel the apparent danger. *Here*: pattern instruction on self-defense accurately informed jury that it should consider "totality of the circumstances, including number of persons reasonably appearing to be threatening accused," thus satisfying *Jones* requirement. Trial court also gave jury an "apparent necessity" instruction, instructing it to consider the reasonableness of defendant's actions in light of surrounding circumstances. Those two instructions, read together, properly defined self-defense in recklessness context and were broad enough to encompass defendant's multiple-assailants theory of defense.

People v. Pickering, 276 P.3d 553 (Colo. 2011). So long as trial court properly instructs jury regarding elements of charged crime, instructing jury pursuant to §18-1-704(4) that prosecution bears no burden of disproving self-defense with respect to crimes to which self-defense is not an affirmative defense is an accurate statement of Colorado law and does not improperly shift prosecution's burden to prove recklessness, extreme indifference, or criminal negligence. Overruling People v. Lara, 224 P.3d 388 (Colo. App. 2009); People v. Taylor, 230 P.3d 1227 (Colo. App. 2009).

People v. Bergerud, 223 P.3d 686 (Colo. 2010). Defendants have no fundamental constitutional right to choose whether to present an "innocence-based defense."

People v. Barrus, 232 P.3d 264 (Colo. App. 2009). Self-defense is available defense against charge of Obstructing a Peace Officer when defendant reasonably believes that unreasonable or excessive force is being used by peace officer, or that its use is imminent.

People v. Martinez, 224 P.3d 1026 (Colo. App. 2009). Trial court was not required to give a no-retreat instruction where defendant did not request one and prosecutor did not argue that defendant had duty to retreat. *Here:* prosecutor's statement during closing argument that "they could have left" did not raise issue of retreat but rather rebutted defendant's claim that he acted in self-defense.

Kaufman v. People, 202 P.3d 542 (Colo. 2009). Person is justified in using deadly physical force to defend himself if he reasonably believes that a lesser degree of force is inadequate and he has reasonable grounds to believe, and does believe, that the other person is committing, or reasonably appears, about to commit, first or second degree assault. *Here:* plain error occurred where elements instruction incorrectly required jury to find that other person intended to commit serious bodily injury and not bodily injury.

People v. Mullins, 209 P.3d 1147 (Colo. App. 2008). Self-defense is an affirmative defense to inciting a riot, §18-9-102; and engaging in a riot, §18-9-104.

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Court properly instructed jury regarding prosecution's burden of disproving that defendant had "reasonable belief" he needed to employ deadly physical force in self-defense; instructions given tracked language of §18-1-704(2)(a),(c) and CJI-Crim. 7:17, and otherwise permitted jury to consider, from defendant's viewpoint whether he was justified in using physical force in self-defense; court correctly rejected defendant's request to additionally instruct jury on "apparent necessity."

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008). Person may act in self-defense if he reasonably believes that a law enforcement officer is using or is about to use unreasonable or excessive force; person must hold a reasonable belief that appearance of danger, whether real or apparent, justifies his or her actions. Self-defense is

defense to felony menacing if defendant: (1) threatened force upon another person to defend against use or imminent use of unlawful physical force, and (2) reasonably believed the degree of force threatened was necessary for that purpose. Defendant may present evidence that he acted in self-defense if charges involve reckless or criminally negligent conduct; court should instruct jury that, in determining whether defendant acted recklessly, it must consider whether defendant reasonably believed it necessary for him to defend himself or another person from victim's use or imminent use of unlawful physical force. Where instructions contradictorily directed jury (1) to consider self-defense as to felony menacing and reckless endangerment and (2) to only consider self-defense with regard to first degree murder after deliberation, the instructions were "plainly wrong." However, error did not so undermine fundamental fairness as to cast serious doubt on the reliability of jury's verdict – no jury could have found that defendant acted in reasonable self-defense against imminent use of unlawful physical force; reversal not warranted.

Cassels v. People, 92 P.3d 951 (Colo. 2004). Undisputed evidence established that victim was initial aggressor; defendant left confrontation with victim and went to his bedroom to retrieve his handgun before returning with it to living room and shooting victim 9 times. Trial court erred in failing to instruct jury that defendant had no duty to retreat before defending himself.

People v. Darbe, 62 P.3d 1006 (Colo. App. 2002). Stock instruction on self-defense is sufficient to tell jury to consider totality of circumstances, including victim's prior acts of violence, when determining reasonableness of defendant's conduct; court did not have to instruct that DV evidence generally may be considered in determining whether defendant acted in self-defense.

People v. Ferguson, 43 P.3d 705 (Colo. App. 2001). Self-defense instruction for use of deadly force is improper where victim did not die; such instruction improperly holds defendant to a higher standard. *Here:* error was prejudicial in light of evidence and closing arguments.

People v. Garcia, 28 P.3d 340 (Colo. 2001). Trial court must tailor instructions to the circumstances of a given case when instructions, taken as a whole, do not adequately apprise jury of law of self-defense from defendant's standpoint. *Here*: defendant, who testified that her husband tried to sexually assault her before she killed him with an ax, was entitled to an instruction indicating that she could use deadly force to defend against first- or second-degree sexual assault.

People v. Toler, 9 P.3d 341 (Colo. 2000). COLJI 7:68-7(15) stands only for proposition that, in a self-defense case, a non-aggressor has no duty to retreat; language, "was where he had a right to be" is not designed to confer any duty to retreat on trespassers.

People v. Castro, 10 P.3d 700 (Colo. App. 2000). Although COA would not have reversed on this ground, defendant is entitled to an instruction on retrial, if he lays proper foundation, that fists could be considered deadly weapon; testimony regarding victim's boxing lessons may be admissible in relation to whether fists could be a deadly weapon; People v. Garcia, 826 P.2d 1259 (Colo. 1992), does not support trial court's ruling that defendant cannot take incompatible positions at trial.

People v. Gilbert, 12 P.3d 331 (Colo. App. 2000). Trial court did not err in giving self-defense instruction over defendant's objection where there was evidence from which jury may have believed that defendant had right to use self-defense and would be required to properly apply law of self-defense.

Make-My-Day: §18-1-704.5

Wood v. People, 255 P.3d 1136 (Colo. 2011). Purpose of make-my-day immunity is to spare defendant burden of trial if conditions of statute are satisfied; review of pretrial make-my-day determination should occur, if at all, prior to trial. Pre-trial denial of motion to dismiss based on make-my-day immunity is not a final order subject to immediate appeal; defendant may seek immediate review of such ruling only by invoking CSC's original jurisdiction under CAR 21; after trial, jury's verdict subsumes court's pre-trial ruling, and defendant's recourse is to appeal jury's verdict. Court's pre-trial denial of immunity under §18-1-704.5 does not implicate court's subject matter jurisdiction and is not reviewable on direct appeal.

Martinez v. People, 2024 CO 48. The force-against-intruders defense provided by §18-1-704.5(2), is a traverse and not an affirmative defense to crimes involving reckless conduct. The force-against-intruders defense, like self-defense, only protects defendants who acted justifiably and reasonably. These requirements make the defense irreconcilable with reckless conduct, which is intrinsically unjustifiable and unreasonable. CSC affirms the COA and concludes the trial court properly instructed the jury that the prosecution was not required to affirmatively disprove defendant's force-against-intruders defense against a charge of reckless manslaughter.

People v. Jones, 2018 COA 112. Where trial court instructs jury on make-my-day statute in order to limit the applicability of defendant's claim of self-defense, the instruction must require defendant's entry be knowingly unlawful.

People v. Alaniz, 2016 COA 101. An inmate's DOC prison cell constitutes a "dwelling" under make-my-day statute; effective on 8/10/16, §18-1-704.5 was amended to exclude place of habitation in detention facility; courts have broadly interpreted term "dwelling" §18-1-901(3)(g) to include an attached garage, hospital room, hotel room, and jail cell. Prison cell met the definition of dwelling because it was used by persons for habitation- prisoners slept in their cells, stored personal belongings there, and could lock and unlock their own cell doors. *Here:* at pretrial hearing on immunity under make-my-day statute, defendant is not required to prove that he used physical force against victim; People charged defendant with murder/assault, and People never argued defendant was barred from immunity because he did not use any physical force against victim; under these circumstances, defendant was merely required to establish that circumstances justifying charged use of force were present.

Wood v. People, 255 P.3d 1136 (Colo. 2011). After jury rejects defendant's make-my-day defense, defendant may appeal whether jury verdict is supported by sufficient evidence but cannot challenge denial of motion for dismissal based on defense. *Here*: defendant shot victim after inviting victim into his home for drug deal; court found evidence sufficient to support jury's verdict because victim's girlfriend testified victim remained calm even as defendant shot him; court found that defendant could not have reasonably believed victim was going to use force against him, as described in make-my-day statute; defendant may not appeal denial of his motion for dismissal under make-my-day statute; his only recourse is to raise issue as defense at trial, and, if unsuccessful, appeal jury's verdict.

People v. Zukowski, 260 P.3d 339 (Colo. App. 2010). COA reversed for instructional error because: (1) in order for make-my-day defense to apply, intruder's entry must be unlawful-this requires only that intruder knowingly engaged in criminal conduct; it does not require that intruder knew he was violating criminal statute; (2) instruction did not limit or define "good faith," it allowed the view that an intruder's broad subjective belief that he/she had right to enter another person's home might make that entry lawful-mistaken belief that an entry, although uninvited, is lawful does not make it lawful; and (3) reading a good faith exception into "unlawful

entry" element of make-my-day defense would go against public policy-allowing intruder to have mistaken, but good faith, belief that entry is lawful places onus on occupant to determine whether intruder's entry is in good faith before acting in self-defense-such a determination would conflict with occupant's right to act on his/her reasonable belief that intruder is committing/intends to commit crime. Because pre-trial make-my-day immunity hearing has a different procedure and burden of proof than affirmative make-my-day defense at trial, issue preclusion does not prevent independent resolution of same issue in each proceeding. Although court found that victim's entry into defendant's condo constituted an "unlawful entry" at pre-trial immunity hearing, the court could in its discretion submit that same issue to jury given that the burden shifted to prosecution at trial. An instruction defining "unlawful entry" that tracked definition in §18-4-201(3) correctly defined the term for purposes of make-my-day defense and permitted defense to argue that even if victim was once invited, his entry was unlawful because it was outside scope of invitation. *Here:* defendant let himself into neighbor-victim's condo; victim ordered defendant to leave; defendant complied, but returned few minutes later and jiggled victim's doorknob; victim opened the door, saw defendant walking to his own condo and followed him; once victim entered defendant's condominium, defendant emerged from bathroom and attacked victim with machete; trial court erroneously instructed jury that make-my-day defense did not apply if People proved beyond reasonable doubt that victim entered in "good faith belief that [his entry was] lawful."

People v. Hayward, 55 P.3d 803 (Colo. App. 2002). Victim claimed defendant forced his way into her home and stabbed her. Defendant claimed victim came to door brandishing knife and was accidentally stabbed in struggle. Trial court gave instruction on self-defense and "make my day" law. *Here*: instruction proper-defendant may use force to defend himself if he reasonably believes that he is about to be subjected to *unlawful* force; whether defendant's belief is objectively reasonable depends, in part, on whether he knew or should have known that occupant was entitled to use force while in her dwelling; if defendant makes an unlawful entry into dwelling, he is presumed to know that victim can employ lawful force against him.

People v. Janes, 982 P.2d 300 (Colo. 1999). When former lover returned to defendant's house and became assaultive, defendant shot him; defendant asserted make-my-day and self-defense. COA reversed for instructional error, and CSC agreed: (1) in order to warrant pre-trial dismissal of charges under make-my-day defense defendant must establish (by preponderance of evidence) certain elements-victim made an unlawful entry; (2) when make-my-day defense is asserted at trial, the elements are the same, but burden is different: if defendant provides "some credible evidence," defense is raised, and prosecution must disprove all elements beyond reasonable doubt; and (3) here instructions contained proper elements but did not clearly inform jury of prosecution's burden to disprove.

Duress: §18-1-708

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). To be entitled to a duress instruction, defendant must show: (1) an immediate threat of death/bodily injury; (2) a well-grounded fear the threat will be carried out; and (3) no reasonable opportunity to escape the threatened harm. *Here*: evidence that defendant witnessed drug-related homicide, that victim's sister feared that cooperating with police would jeopardize her safety, and that people were killed at victim's funeral did not establish defense of duress because no evidence of an immediate, specific threat.

People v. Speer, 255 P.3d 1115 (Colo. 2011). Duress defense requires that threatened force exceed any objectively reasonable ability to resist; defense is unavailable in absence of a specific and imminent threat of injury under circumstances leaving defendant no reasonable alternative other than to violate law for which he stands charged. *Here:* duress instruction properly rejected as record was devoid of any evidence to support finding that accomplice's threats were sufficiently imminent to strip defendant of any reasonable legal alternative to committing robbery at gunpoint: defendant and accomplice spent day together after accomplice's initial threats, at various points during which defendant was either in sole possession of accomplice's gun or completely out of his presence. Although defendant claimed that accomplice also threatened his brother, there was no suggestion that brother was at any time under control of accomplice.

People v. Sauser, 2020 COA 174. Portions of defendant's testimony, that he argued supported his duress defense, was not admissible other act evidence/res gestae in prosecution for menacing and aggravated robbery; defendant's testimony regarding victim's possession of drugs, handgun, and saw blade was, at most, only minimally probative of whether defendant acted under duress when he brandished gun at victims and demanded money from them, and danger of unfair prejudice outweighed minimal probative value of testimony.

People v. Doubleday, 2012 COA 141, rev'd other grounds, 2016 CO 3. Defendant was not entitled to duress instruction as to charge of second-degree murder, where defendant testified that gang member threatened to kill his family if he failed to repay a debt and then gave him a gun, and that another gang member drove him to convenience store, but evidence established that defendant entered convenience store alone, there was no evidence that any threats motivated defendant to shoot store clerk, and defendant testified that gun discharged accidentally and that he did not intend to shoot anyone.

People v. Nunn, 148 P.3d 222 (Colo. App. 2006). **S**tandard jury instruction on duress defense is not plainly erroneous; instruction does not contain a prejudicial presumption that defendant "engaged in prohibited conduct," because duress defense presupposes that defendant engaged in conduct which is "prohibited" absent the existence of the affirmative defense.

Entrapment: §18-1-709

People v. Sprouse, 983 P.2d 771 (Colo. 1999). Entrapment statute creates subjective test that focuses on a particular defendant's state of mind and does not set general standard for police conduct; this does not mean that police conduct should be ignored, but rather that the existence of any predisposition on part of defendant must be determined first, then extent of any such predisposition must be considered in relation to character of the inducements; inducement does not become irrelevant to entrapment inquiry because the stronger the inducement, the more likely that any resulting criminal conduct by defendant occurred as result of the inducement rather than of defendant's own predisposition.

People v. Wilson, 2013 COA 75. Trial court acted within its discretion in denying defendant's request to give jury instruction on defense of entrapment during voir dire of prospective jurors in prosecution for possession of a controlled substance; jurors were adequately informed at close of evidence of governing law, and court permitted defense counsel to question prospective jurors thoroughly about their views on defense of entrapment.

People v. Taylor, 2012 COA 91. Entrapment instruction in undercover drug sale case was properly rejected where defendant made hand and head signals which caused police to contact him, and officers' 2 to 3 questions on where to buy drugs were not such "persistent inducements" that they would make anybody act in criminal manner; entrapment defense is not available to defendant who denies commission of crime.

People v. Santana, 240 P.3d 302 (Colo. App. 2009), rev'd other grounds, 255 P.3d 1126 (Colo. 2011). Because entrapment is affirmative defense, it does not apply where defendant denies committing crime. *Here*: Because defendant disputed that composition of substance that he distributed was crack cocaine, he did not admit all elements of charged crime and was not entitled to entrapment instruction.

People v. Grizzle, 140 P.3d 224 (Colo. App. 2006). Defendant must admit to having engaged in proscribed conduct to be entitled to entrapment instruction. *Here:* defendant was convicted of attempted sexual assault and enticement of a child (under 15) for arranging meeting through an Internet chat room with officer claiming to be 13-year-old girl; he testified he believed she was in early twenties and engaging in "fantasy role-play;" because defendant did not admit he believed "victim" to be under 15, he did not admit all elements of crimes, and was not entitled to assert entrapment.

Abandonment & Renunciation: §18-2-101 (Abandonment); §18-2-203 (Renunciation)

O'Shaughnessy v. People, 2012 CO 9. Defendant must present "some credible evidence" on claimed affirmative defense in order to merit jury instruction on that defense. *Here:* where defendant stabbed victim 6 times while demanding money and telling her she was going to die, but fled without taking her purse, he was not entitled to abandonment instruction because he failed to present some credible evidence that he abandoned his attempts to rob/murder victim; his mere withdrawal before completing murder/robbery, particularly when faced with resistance by victim, was insufficient evidence of abandonment. Evidence showing defendant injured victim does not necessarily foreclose defendant's ability to present abandonment defense to jury.

People v. Jacobs, 91 P.3d 438 (Colo. App. 2003). Abandonment and renunciation are not affirmative defenses to Soliciting For Child Prostitution.

People v. Gandiaga, 70 P.3d 523 (Colo. App. 2002). As a matter of law, abandonment is not available to charge of attempted murder after a gun is pointed at victim's head and trigger is pulled.

People v. Scialabba, 55 P.3d 207 (Colo. App. 2002). Abandonment is a defense to inchoate offenses prosecuted under general attempt statute, §18-2-101; it is not a defense to crime of tampering with a witness because that crime is completed by an attempt to interfere with a witness.

Intervening & Supervening Causation

People v. Reynolds, 252 P.3d 1128 (Colo. App. 2010). Independent intervening cause defense is treated as an affirmative defense for purpose of determining the quantum of evidence necessary to submit defense to jury; whether defendant has met this burden is a question of law for trial court. To destroy causal connection, intervening cause must be conduct in which defendant did not participate; when a later event contributes to outcome but would not have occurred but for defendant's own conduct, the later event is not independent of defendant's conduct and does not operate to relieve defendant of liability. *Here:* victim's alleged intentional collision with defendant's car, even if grossly negligent/unforeseeable, did not constitute an independent intervening cause sufficient to break chain of events that began with defendant's admitted swerving in front of victim and engaging his brakes.

Auman v. People, 109 P.3d 647 (Colo. 2005). To warrant conviction for homicide, death must be the natural and probable consequence of the unlawful act, and not the result of an independent intervening cause in which accused does not participate, and which he could not foresee; if it appears that the act of accused was not the proximate cause of death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected, and but for which death would not have occurred, such supervening cause is a defense to homicide.

People v. Stewart, 26 P.3d 17 (Colo. App. 2000), rev'd other grounds, 55 P.3d 107 (Colo. 2002). Failure to instruct jury with respect to independent intervening cause as it applied to reckless second-degree assault was plain error.

People v. Saavedra-Rodriguez, 971 P.2d 223 (Colo. 1998). Discusses general principles. Like an affirmative defense, defendant needs only some credible evidence of intervening cause to get an instruction. *Here:* proffered evidence - that adequate medical care might have prevented death - does not show that inadequate care actually caused death; whether victim had a better chance of survival with proper medical care is a different inquiry from whether he would have been likely to survive absent medical care he received.

Execution of a Public Duty: §18-1-701

People v. Lesslie, 24 P.3d 22 (Colo. App. 2000). Defendant was not entitled to defense of execution of public duty because it requires the actor to be performing a duty imposed by law, and defendant had no legal authority to install a listening device without getting a court order.

Defense of Property: §18-1-706

People v. Neckel, 2019 COA 69. A sign alone does not revoke implied license to approach the front door of a home; although the implied license may be revoked, process server's conduct remains statutorily privileged to extent that it is consistent with laws governing execution of legal process; process server's entry onto a property with "No Trespassing" signs does not automatically render him a trespasser; court is not required to instruct on

"no duty to retreat" because it is inconsistent with concept of defense of premises; court is not required to instruct on definition of "unlawful trespass" in context of defense of premises.

People v. Oslund, 2012 COA 62. Defense of property instruction may only be given when there is some credible evidence demonstrating that defendant used force to prevent a theft; once the property is moved to an area outside of defendant's control.

Heat of Passion

People v. Gonzalez-Quezada, 2023 COA 124. There was sufficient evidence that the People disproved the heat of passion mitigator beyond a reasonable doubt where: defendant lied in wait for the victim; defendant knowingly placed himself in a situation where he could discover the victim's relationship, thus undermining the suddenness component of the mitigator; there was time for defendant to reflect before he fired the fatal shot; defendant's statement about "messing" with married women may have indicated premeditation; and defendant's question to the victim about whether this is what she wanted also may have led the jury to conclude that he was not acting under a heat of passion.

Felony Murder

People v. Gallegos, 2023 COA 47. Unlike other affirmative defenses of entrapment and self-defense, the elements of the felony murder affirmative defense are distinct from the elements of felony murder - because a defendant can be convicted of felony murder even if another person caused the victim's death, the felony murder affirmative defense focuses on elements that allow the jury to weigh defendant's responsibility and whether defendant should be convicted of murder for a death he did not directly cause. Thus, a defendant need not be compelled to admit the predicate felony, and thus admit felony murder, to assert the felony murder affirmative defense. *Here:* because some credible evidence supported defendant's affirmative defense, the trial court erred by rejecting defendant's tendered felony murder affirmative defense instruction; defendant's conviction for felony murder dismissed ad case remanded for retrial. Finding no other reversible error, the division affirms the defendant's remaining convictions. *[Cert Accepted (2/12/24) in case #23SC605: (1) Whether the division erred in concluding that a defendant need not be compelled to admit the predicate felony to raise the statutory felony murder affirmative defense when the evidence conflicted as to whether the defendant was involved in the predicate felony (AAG Brenna Brackett)]*

JURY INSTRUCTIONS

Generally

People v. Stewart, 55 P.3d 107 (Colo. 2002). A trial court has a duty to properly instruct the jury on all the elements of the offenses charged.

People v. Benzor, 100 P.3d 542 (Colo. App. 2004). A jury instruction defining an offense that is framed in the language of the statute is generally sufficient and proper.

People v. Gonyea, 195 P.3d 1171 (Colo. App. 2008). The trial court has substantial discretion in formulating jury instructions so long as they are correct statements of the law and fairly and adequately cover the issues presented. A conviction will not be reversed on a claimed deficiency in a jury instruction if the instructions, read as a whole, adequately inform the jury of the law. *Here*: given the evidentiary dispute concerning whether an entry into the premises was made, an instruction informing the jury that "the intrusion of any body part into the prohibited premises is sufficient to constitute entry," was appropriate. Further, the instruction was a correct statement of the law.

People v. Cuevas, 2024 COA 84. Where proper instructions are given concerning the presumption of innocence, the prosecution's burden of proof, reasonable doubt, the essential elements of the offenses, and the definition of the requisite mens rea, the so called "mere presence" instruction – "The guilt of a defendant cannot be established by mere presence at the scene of a crime, even with knowledge that a crime is being committed"– is necessarily encompassed by the instructions as a whole.

People v. Grudznske, 2023 COA 36. The clear structure of the extreme indifference statutes demonstrate that knowingly applies only to the action and outcome elements of the statutes, not the circumstances element. The circumstances element is described in the independent introductory clause, and only after that clause is completed does the word knowingly make its appearance, where it then modifies the action and outcome elements. Thus, under the plain language of the statute, the General Assembly has indicated its intention that knowingly modifies the action and outcome elements but not the circumstances element. *Here:* defendant argued that because the CSC did not address whether knowingly applied to the circumstances elements of the crime in Montoya v. People, 2017 CO 40, it implicitly concluded that knowingly also applies to the introductory phrase: "[u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally." §18-3-102(1)(d). COA rejected that analysis, in part, because the trial court's interpretation of *Montoya's* silence as an implicit suggestion that knowingly does not apply to the circumstances element was reasonable. The trial court's instructions correctly reflected this interpretation and were not erroneous.

People v. Cox, 2023 COA 1. COA concludes that trial court did not abuse its discretion in denying defendant's proposed jury instruction regarding the sixteen-year time gap between the offense and trial that the jury asked about during deliberations.

Tibbels v. People, 2022 CO 1. To determine whether trial court's instructions to jury lowered prosecution's burden of proof, CSC is guided by USSC case law regarding standard for assessing allegedly defective jury instructions. Not every statement that trial judge makes in course of trial amounts to statement of law that jury must apply. Whether it is reasonably likely that jury would have understood trial court's statements regarding applicable law so as to lower prosecution's burden of proof depends on nature of statements, context in which they were made, any other explanations or instructions that court may have provided, and court's final jury charge. Proper test for determining whether a trial court's statements to the jury lowered the prosecution's

burden of proof below reasonable doubt is a functional test, rather than one that, as matter of law, excludes from consideration all statements by trial judge other than those contained in formal jury instructions, and will allow reviewing courts to consider trial judge's statements as to the applicable law in context, with realistic eye as to how jurors would likely have understood those statements. *Here:* it was reasonably likely that prospective jurors understood court's statements during voir dire, equating concept of reasonable doubt to doubt a prospective home buyer would have upon observing a structurally significant, floor-to-ceiling crack in home's foundation, to allow conviction for possession of contraband based on standard lower than beyond a reasonable doubt, and thus statements violated due process and created a structural error requiring automatic reversal of conviction; trial court undermined pattern instruction, then immediately gave its own nonlegal example to explain principle, and later came back to illustration, but never instructed jury to disregard example, and example arguably suggested that jurors were to start with presumption of guilt and then look for evidence to create a reasonable doubt.

People In Int. of B.D., 2020 CO 87. Dual-mental-state requirement for complicitor liability, requiring that complicitor have both the intent to aid, abet, advise, or encourage the principal in his criminal act or conduct and an awareness of those circumstances attending the act or conduct that are necessary for commission of the offense, applies only to the elements of the underlying offense and not to strict liability sentence enhancers related to the nature of the offense, and at-risk victim statute, imposing greater penalties when a theft happens in presence of an at-risk victim, is a sentence enhancer rather than an element of offense.

People v. Ramirez, 2019 COA 16; People v. Martinez, 2019 COA 16. Defense counsel's statement that "I believe this to be a correct statement of the law, so I don't have any objection," which concerned an erroneous jury instruction on the application of deadly force to self-defense as an affirmative defense, constituted a forfeiture, not a waiver, because there is no indication in the record that defense counsel recognized the error, and there would be no rational, strategic reason for the defense to want to such an erroneous instruction to be given. Indeed, counsel's statement shows that he failed to notice that it was an *incorrect* statement of the law *as applied* in this case. Defense counsel's failure to perceive and address the error in the instruction was patently attributable to neglect, and we therefore conclude that the instructional error was not waived, but merely forfeited. Because defense counsel did not affirmatively modify, draft, tender, or request the instruction challenged on appeal, neither invited error nor waiver applied and plain error review was appropriate under forfeiture principles. Distinguished People v. Kessler, 2018 COA 60; People v. Tee, 2018 COA 84; People v. Smith, 2018 CO 33.

People v. Sandoval, 2018 COA 156. The holding of Rosemond v. U.S., 572 U.S. 65 (2014), which interprets the federal aiding and abetting statute to include a temporal element that requires a complicitor to have advance knowledge of another participant's intent to commit a crime, is inapplicable to Colorado's complicity statute.

People v. Lewis, 2017 COA 147. §18-1-202(11), which provides that venue is not an element of a criminal offense, is constitutional. The trial court's jury instruction informing the jury that venue was not an element of any offense was proper.

People v. Hoggard, 2017 COA 88. Second degree forgery is a lesser-included offense of felony forgery. For that reason, instructing the jury on the greater offense did not result in constructive amendment or reversible instructional error.

People v. Archuleta, 2017 COA 9. The court's instruction defining "cause" was not error. A defendant must take his victim as he finds him, and it is no defense that the victim is suffering from physical infirmities.

People v. Stellabotte, 2016 COA 106. "Knowingly" when set off as a separate element modifies all succeeding elements in an instruction.

People v. Hunt, 2016 COA 93. Although the statutory language for second degree murder statute does not expressly incorporate the doctrine of transferred intent like the first degree murder statute, the doctrine of transferred intent nonetheless applies to second degree murder.

People v. Theus-Roberts, 2015 COA 32. Defendant tendered three jury instructions that, in accordance with the reasoning in U.S. v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), would have provided guidance on evaluating the reliability of eyewitness identification testimony. The majority held that trial court did not err in refusing to give the instructions because the CSC has consistently held that it is not error for the trial court to refuse tendered *Telfaire* instructions when the jury receives a general instruction on the credibility of the witnesses. In a special concurrence, Judge Berger wrote to express his concerns about the use of eyewitness identification evidence against criminal defendants. Specifically, the "reconsideration of the issue seems timely and appropriate" because "much of the relevant scientific data and judicial thinking [concerning eyewitness identification] has been accumulated after the CSC last addressed this issue."

People v. Bertrand, 2014 COA 142. In a prosecution for sexual assault, it was error to charge the jury that a sleeping victim "*is* incapable of appraising the nature of her conduct." Instead, Platt v. People, 201 P.3d 545 (Colo. 2009), held that "a sleeping victim *may* be incapable of appraising the nature of her conduct." The given instruction relieved the jury of its duty to determine an essential element of the crime and was tantamount to a directed verdict.

People v. Rios, 2014 COA 90. The trial court's error in instructing the jury regarding the co-defendant's plea agreement and its refusal to include any caution that such information could not be used as evidence of defendant's guilt was not harmless beyond a reasonable doubt.

People v. Cisneros, 2014 COA 49. Where defendant was charged under Colorado's special offender sentence enhancement statute (§18-18-407(1)(f)), the trial court did not err by refusing to instruct the jury on the right to bear arms because it could not have found defendant used his weapon solely for self-defense purposes and the verdict shows the jury found a nexus between defendant's possession of a weapon and his possession of narcotics with intent to distribute.

People v. Chase, 2013 COA 27. "Knowingly" when offset from other elements modifies all succeeding conduct elements in an instruction.

People v. Hopper, 284 P.3d 87 (Colo. App. 2011). §18-18-407(1)(f)(I) of the special offender statute which authorizes an enhanced sentence for defendant who uses, displays, or possesses a deadly weapon at the time he possessed drugs, does not include an implicit mental state, and does not require one. Given the well-known potential for danger that exists whenever drugs and deadly weapons are present, the General Assembly could well have concluded that a person possessing drugs is obliged to ensure that guns are not available for use, or risk increased punishment. Thus, no mental state element is required in the special offender interrogatory.

Townsend v. People, 252 P.3d 1108 (Colo. 2011). The elemental and definitional jury instructions, when read as a whole, properly informed the jury of the elements of escape from ISP; because the defense drafted and tendered the jury instruction broadly defining the "extended limits of confinement," defendant invited any error arising from the possibility that the jury could have convicted him for failing to report to his parole officer; and any error in the inclusion of instructional language implying that merely thinking about escaping could constitute the offense of escape from ISP was harmless in light of the People's theory that defendant escaped by failing to remain within the extended limits on his confinement, not merely by thinking about failing to remain within them.

People v. Duran, 272 P.3d 1084 (Colo. App. 2011). Attempted first-degree murder - extreme indifference is a lesser-included offense of first-degree murder - extreme indifference. For that reason, where defendant is

charged with the greater offense, instruction on the lesser attempt cannot constitute a constructive amendment of the charge.

People v. Robb, 215 P.3d 1253 (Colo. App. 2009). The trial court did not erroneously instruct the jury concerning the definition of reasonable doubt where: (1) informing the jury that reasonable doubt "arise[s] from… the evidence, or lack of evidence" does not undermine the presumption of innocence; (2) phrases such as proof of "utmost certainty" or proof excluding every reasonable hypothesis of innocence are not required; and (3) the use of the "hesitate to act" language has been repeatedly approved.

People v. Gibson, 203 P.3d 571 (Colo. App. 2008). The failure to inform the jury that the mental state "knowingly" applied to the theft element "without authorization" was not structural error and did not qualify as plain error because authorization was not a contested issue in the case.

Medina v. People, 163 P.3d 1136 (Colo. 2007). Defendant was charged with accessory to crime as a F4. The jury instruction submitted by the prosecutor, however, listed the elements of accessory as a F5. Upon defendant's conviction, the court sentenced defendant for the F4. CSC held that this was structural error, requiring reversal regardless of prejudice.

People v. Ramirez, 155 P.3d 371 (Colo. 2007). The offense of SAOC does not include a requirement of specific intent. Jury instruction that SAOC requires only a "knowingly" mental state was not in error.

People v. Pahl, 169 P.3d 169 (Colo. App. 2006). The determination of whether a general partnership or joint venture is an investment contract, and therefore a security, is to be made on the basis of substance or economic reality, not form. This is a fact-specific inquiry, and the instruction indicating that the jury was to consider the totality of circumstances in determining whether the venture was a security adequately explained the law. Generally, using an excerpt from an opinion in a jury instruction is an unwise practice because opinions and instructions have very different purposes; trial court properly refused defendant's tendered instructions. Trial court did not err in requiring the jury to find that defendant acted willfully; willfully is the proper mental state for securities fraud, and the instruction tracked the language of the securities fraud statute. Court rejected defendant's argument that a person cannot act both "indirectly" and "willfully," finding that the two terms are not mutually exclusive. Trial court did not err in instructing the jury that the prosecution did not have to prove he was aware he was selling a security; requiring proof of a defendant's awareness that an instrument is a security would undermine the purpose of the securities fraud statute.

People v. Santana-Medrano, 165 P.3d 804 (Colo. App. 2006). The circumstances set forth in §18-3-402(4), elevating sexual assault to a F3, do not require proof of a mens rea because they are analogous to penalty provisions.

People v. Bostic, 148 P.3d 250 (Colo. App. 2006). Although the elemental instructions on various drug charges referred to the locations where the drugs were found, location is not an element of those crimes and the locations were not contested at trial. No plain error.

People v. Souva, 141 P.3d 845 (Colo. App. 2005). The verbs "negate" and "negative" have identical meanings and are interchangeable. Thus, it was not plain error for the court to instruct the jury that it could consider whether defendant's self-induced intoxication "negated" his specific intent.

People v. Weinreich, 119 P.3d 1073 (Colo. 2005). A jury instruction should substantially track the language of the statute describing the crime; a material deviation from the statute can result in reversible plain error, depending on the facts of the case. *Here*: instruction on child abuse resulting in death that tracked an obsolete version of the statute was plain, reversible error. "May have endangered" language exposed defendant to the risk of conviction for an act that the jury may have perceived as endangering the child's life or health, but which did not cause his daughter's death.

People v. Miller, 113 P.3d 743 (Colo. 2005). Where a voluntary intoxication instruction is warranted, the trial court should affirmatively instruct the jury that "after deliberation" is part of the culpable mental state required by first-degree murder and may be negated by evidence of voluntary intoxication.

People v. Auman, 109 P.3d 647 (Colo. 2005). Theft instruction that did not advise jury that defendant had to know that his taking of another's property was "without authorization" was erroneous and rose to the level of plain error requiring reversal of conviction for felony murder based on burglary with intent to commit theft.

People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004). Trial court properly instructed jury on sexual assault – deadly weapon; §18-3-402(5)(a). It was sufficient to instruct the jury that it must find that "defendant was armed with a deadly weapon," and "used a deadly weapon to cause submission." The jury need not determine whether submission was obtained by "the actual application of physical force or physical violence," or by "means of sufficient consequence reasonably calculated to cause submission," or both, and that a deadly weapon was used. If a deadly weapon was used to cause submission, that is sufficient.

People v. James, 117 P.3d 91 (Colo. App. 2004). Even though the jury was only explicitly instructed on the elements of aggravated robbery, rather than the simple robbery needed to sustain a conviction for second-degree kidnapping—victim robbed, the instructions adequately informed the jury of the elements necessary to find the defendant guilty of second-degree kidnapping—victim robbed.

People v. Sa'ra, 117 P.3d 51 (Colo. App. 2004). There was no plain error in the escape elements instruction omitting the "extended limits" language of §17-27.5-104, where the elements instruction for escape essentially tracked the pattern instruction and the court's definition of "custody and confinement" informed the jury that ISP constitutes custody and confinement.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Under the "offset" rule, the standard instruction on the elements of theft adequately informs the jury that the element "knowingly" modifies the element "without authorization." Failure to instruct the jury properly as to an enhancement factor that increases the class of felony is not plain error where the subject of the instructional error was not contested at trial. *Here*: the failure to instruct the jury that it could find the existence of an enhancement factor only if that factor had been proved beyond a reasonable doubt was not plain error because the existence of the enhancement factor was not disputed at trial.

People v. Clemons, 89 P.3d 479 (Colo. App. 2003). Where a jury instruction sets out alternative means of establishing an element in the conjunctive, the jury's general verdict may be sustained where the evidence is sufficient to support one of the alternatives, because nothing more is required by the statute defining the offense.

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). Legislative silence on the element of intent in a criminal statute is not to be construed as an indication that no culpable mental is required. A requisite mental state may be inferred from the statute. However, not all offenses have a culpable mental state. Where the plain language of the statute reflects the General Assembly's intent to make the offense a strict liability crime, no mental state need be proved. *Here*: public indecency statute, §18-7-301(1), employs an objective standard and is applicable to the performance of sexual acts "in a public place or where the conduct may *reasonably* be expected to be viewed by members of the public." Because this objective standard depends not on what a particular defendant actually knew, but rather on what a reasonable person should have known, the crime of public indecency is a strict liability offense. Where, in violation of §18-3-408, the trial court neglects to submit an instruction regarding gender bias in a sexual assault prosecution, and the defendant neglects to submit such an instruction or object to its omission, the plain error standard of review applies. *Here*: defendant feared unfair treatment due to his homosexuality. The trial court did not commit plain error in failing to give the instruction against gender

bias because: (a) defendant's argument erroneously equates gender bias with bias against homosexuals (and there is no reason to believe the jury would have confused the two concepts); and (b) defendant's concern was adequately addressed by the court's instruction that the jury should not allow prejudice to influence its decision.

People v. Madden, 87 P.3d 153 (Colo. App. 2003), rev'd other grounds, 111 P.3d 452 (Colo. 2005). Even if the elements instruction for patronizing a prostituted child could be read to apply the "knowingly" *mens rea* only to the sex act and not to the coercion, the facts of the case did not suggest that the alleged coercion, threat, or intimidation was not knowingly done. Thus, no plain error.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). No plain error where assault elements instruction included superfluous phrase "attempted to cause" because neither the evidence nor the arguments referred to an attempt to commit the crime. Further, the defendant's theory of the case was mistaken identity, and he did not dispute that the victim had been assaulted. No error in limiting the culpable mental state of "knowingly" to engaging in a riot and not applying it to the term "employing a deadly weapon" because the statutory structure demonstrates no legislative intent to apply "knowingly" to sentence enhancing factors, including employing a deadly weapon. No plain error in second-degree assault instruction, even though it improperly failed to offset the *mens rea* requirement so that it modified all the conduct elements. The instruction defining "intentionally" adequately informed the jury that it applied to "the specific result proscribed by the statute defining the offense."

People v. Suazo, 87 P.3d 124 (Colo. App. 2003). "Knowingly" when offset from other elements modifies all succeeding conduct elements in an instruction.

People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003). The elemental instructions for two counts of robbery stated that defendant took property from the presence of victim A "and/or" victim B. Because a reasonable jury would not interpret these instructions to permit two robbery convictions where the defendant took property from only one victim, there was no plain error.

People v. Klausner, 74 P.3d 421 (Colo. App. 2003). Omission of elements from a jury instruction is reviewed for plain or harmless error, not structural error. *Here:* court's error in omitting elements from first-degree sexual assault instruction was harmless beyond a reasonable doubt, because those elements were uncontested at trial and because the evidence thereon was overwhelming.

People v. Gregor, 26 P.3d 530 (Colo. App. 2000). The instruction required the jury to find that defendant drove "knowing his privilege to drive a motor vehicle in this state was revoked pursuant to the habitual offender statute." Even though it combined elements that are listed separately in COLJI 37:03, this instruction was proper.

Omitted Elements

Neder v. United States, 527 U.S. 1 (1999); Griego v. People, 19 P.3d 1 (Colo. 2001). When a trial court fails to include an element of the offense in a jury instruction, this is error of constitutional dimension, but it is not "structural error." If defendant objects at trial, reversal is not required if the prosecution can show that the omission was harmless beyond a reasonable doubt.

People v. Miller, 13 P.3d 743 (Colo. 2005). If defendant fails to object, he must establish that the error contributed to the verdict and affected his substantial rights.

People v. Smith, 2018 CO 33. Because the instructions, evidence, and statements by counsel, considered together, did not obviously risk a non-unanimous verdict, the simple variance in failing to specifically identify the victim of the menacing charge did not amount to reversible plain error.

People v. Howard-Walker 2017 COA 81M, rev'd on cumulative error grounds, 2019 CO 69. Although the trial court failed in properly instruct the jury on the elements of burglary because it did not include the underlying crime of theft, there was no plain error. The complaint alleged defendant broke into the victim's home and committed theft, the jury viewed the surveillance video depicted a person, identified as defendant, stealing the contents of the victim's safe, and defendant did not assert that the crime depicted on the video was not theft. Moreover, the prosecutor's opening and closing arguments asserted that defendant broke into the home to with the intent to commit theft. Finally, theft was not a controverted element of the burglary offense.

People v. Ridgeway, 2013 COA 17. The elemental instruction for possession of burglary tools must include the mental requirement that defendant intended to use the tools in the commission of a burglary, and not for some other innocent use.

People v. Rubio, 222 P.3d 355 (Colo. App. 2009). In attempted extreme indifference murder case, although the attempt instruction did not expressly require that defendant acted with universal malice, this omission was not plain error because the instructions as a whole, which included the elements for extreme indifference murder, made this requirement sufficiently clear.

People v. Collins, 187 P.3d 1178 (Colo. App. 2008). Omission of the requisite mental state from the elemental instruction for attempt, while constituting error, was not reversible error because a separate instruction contained language defining the requisite mental state. However, the better practice is to include all statutory elements in one instruction. The omission of the predicate crime of robbery from the burglary elemental instruction was error. Use of the pattern complicity instruction, which excluded the language, "with the intent to promote or facilitate" and included language "all or part of the crime" was not error.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). The elemental instruction on harassment by stalking did not include the required mental state, "knowingly." However, this element was not a contested issue at trial, and the record afforded no basis for concluding that the communications were other than knowing. Thus, omission of the mens rea element was not plain error.

People v. Weare, 155 P.3d 527 (Colo. App. 2006). Failure of defendant's information and the jury instructions to include the "bodily injury" element that elevates first degree kidnapping to a F1 did not matter since defendant's kidnapping conviction merged into his felony murder conviction; the evidence was uncontested that the victim had died during the kidnapping; and any level of kidnapping would have supported defendant's felony murder conviction.

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). Although trial court erred by omitting the culpable mental state elements of "intentionally" and "after deliberation" from the attempted first degree murder instruction, error was not plain because the applicable mental states were otherwise set forth in separate instructions for first degree murder. Attempted murder instruction was not plain error where redundant language permitted the defendant to be convicted upon a showing of an "an attempt to attempt" the offense of murder, but the jury was properly instructed in a separate instruction on the definition of attempt. Any error in the attempted murder instruction was not plain, where the defendant did not contest the assault, she only contested her identity as the perpetrator, and the evidence against the defendant was overwhelming.

People v. Petschow, 119 P.3d 495 (Colo. App. 2004). Omission or erroneous description of the required mens rea does not render an instruction constitutionally deficient when the instructions taken as a whole clearly instruct the jury regarding the omitted or erroneous element. *Here:* although elemental instruction was erroneous, the instructions as a whole kept the prosecution to its proper burden of proof concerning all the elements of attempted first degree murder; since the error did not affect defendant's right to have the jury determine the elements of the charged offense beyond a reasonable doubt, it did not affect defendant's

substantial rights or constitute an error of constitutional dimension.

People v. Beatty, 80 P.3d 847 (Colo. App. 2003). Although the jury instruction defining attempted murder should have included "after deliberation" as an element, the instructions as a whole adequately advised the jury of the required *mens rea*, and there was no plain error.

People v. Johnson, 74 P.3d 349 (Colo. App. 2002). Although the jury instruction defining attempted murder should have included "after deliberation" as an element, there was no plain error since the instructions as a whole adequately advised the jury of the required *mens rea*. The elemental jury instruction for child abuse omitted the required element that the child be "unreasonably placed in danger," stating instead that the defendant "without justifiable excuse," knowingly permitted his children to be endangered. No plain error. Defendant was unable to demonstrate that, under the facts of this case, there was any significant difference between the required element and the instruction as given.

People v. Honeysette, 53 P.3d 714 (Colo. App. 2002). An instruction for pattern child sexual assault failed to require the jury to find that the act of sexual contact establishing the "pattern" act occurred "within ten years prior to" the predicate act. No plain error. The time period alleged in the pattern count was less than 10 years, and the victim was under 10 years of age when she testified at trial. Distinguished People v. Gholston, 26 P.3d 1 (Colo. App. 2000).

Griego v. People, 19 P.3d 1 (Colo. 2001). A trial court's failure to include in its instructions the complete definition of "knowingly," as that term is statutorily defined, constitutes constitutional error. Error harmless beyond a reasonable doubt.

People v. Ramirez, 18 P.3d 822 (Colo. App. 2000). Pattern jury instruction on burglary, COLJI 14:01, properly instructs jury on the elements of intent to commit a crime and trespass.

People v. Peoples, 8 P.3d 577 (Colo. App. 2000). In a prosecution for first-degree trespass, the elemental instruction omitted the statutory language that the defendant had to knowingly enter the dwelling "of another." This was plain error because the omitted element was "vigorously contested" at trial.

Elements vs. Sentence Enhancers and Mitigators

Apprendi v. New Jersey, 530 U.S. 466 (2000). Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Blakely v. Washington, 542 U.S. 296 (2004). The "statutory maximum" for *Apprendi* purposes is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* additional findings."

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). Neither Apprendi v. New Jersey, 530 U.S. 466 (2000) nor Ring v. Arizona, 536 U.S. 584 (2002) hold that a sentence enhancer constitutes an element of the offense for Fifth Amendment double jeopardy/merger purposes. They only hold that a sentence enhancer is the functional equivalent of an element of a greater offense for purposes of determining whether the enhancer must be proved to a jury beyond a reasonable doubt.

People v. Rodriguez, 2021 COA 38. The pregnant victim sentence enhancer that is applicable to certain crimes under §18-1.3-401(13) must, consistent with *Blakely*, and notwithstanding that the statute requires the court to make findings, be found by a jury beyond a reasonable doubt because it increases the penalty for the crime at issue beyond the statutory maximum.

People in the Interest of B.D., 2020 CO 87. The dual-mental-state requirement for complicitor liability, requiring that complicitor have both the intent to aid, abet, advise, or encourage the principal in his criminal act or conduct and an awareness of those circumstances attending the act or conduct that are necessary for commission of the offense, applies only to the elements of the underlying offense and not to strict liability sentence enhancers related to the nature of the offense.

People v. Tardif, 2017 COA 136. Heat of passion provocation is a mitigating factor for attempted second degree murder and first degree assault that, if applicable, the prosecution is required to disprove beyond a reasonable doubt.

People v. Becker, 2014 COA 36. In a prosecution for child abuse/second or subsequent offense, the prior conviction is a sentence enhancer and not an element of the offense; thus, it is prejudicial to inform the jury of the existence of the old conviction. Because it was a sentence enhancer and not an element of the offense, the trial court alone decides the prior conviction issue and not the jury.

People v. Alvarado, 284 P.3d 99 (Colo. App. 2011). The date on which a defendant was charged with a prior offense is a *Blakely*-exempt fact related to his conviction of that offense and did not need to be decided by a jury.

People v. Aguilar-Ramos, 224 P.3d 402 (Colo. App. 2009). Jury instruction that did not require the jury to find that defendant committed the sexual assault in determining the sexual assault aggravator for kidnapping was proper. The jury was only required to find that the person kidnapped was a victim of sexual assault.

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). Court did not err in failing to instruct the jury that acting in the absence of "heat of passion" is an element or sentence enhancer of first degree assault, as provocation is neither an element of that offense, nor is it a sentence enhancer. Court did not commit plain error in failing to sua sponte submit a provocation instruction to the jury as such an assertion would have been inconsistent with the defendant's position at trial that she was not the attacker, and because there was not sufficient evidence to support such a theory.

People v. Benzor, 100 P.3d 542 (Colo. App. 2004). The nature of the prior conviction in the escape from custody statute, §18-8-208, is a sentence enhancer, not an element of the offense.

People v. Howard, 89 P.3d 441 (Colo. App. 2003). Provocation is not an element of second degree assault; nor does it implicate *Apprendi*, because it does not operate to increase the defendant's punishment. Instead, provocation allows sentencing in a range to which defendant is already subject.

Whitaker v. People, 48 P.3d 555 (Colo. 2002). Defendant made an *Apprendi* challenge to the findings required to enhance his sentence under §18-18-405(3)(a), for possession of more than 1000 grams of a controlled substance, and under §18-18-407(1) (d) for importation. While the prosecution must prove that defendant knowingly possessed a controlled substance, it was not required to prove that defendant knew that the amount he possessed was over 1000 grams, or that he knew that he transported the drug across state lines.

People v. Garcia, 28 P.3d 340 (Colo. 2001). Jury instructions should not treat second-degree murder upon provocation as a separate offense from second-degree murder. Instead, provocation (heat of passion) should be instructed as a mitigating factor to second-degree murder as it is for first-degree assault. The jury should be instructed that it is the prosecution's burden to disprove provocation.

People v. Lee, 30 P.3d 686 (Colo. App. 2000). It is not structural error to omit a heat of passion mitigator from an instruction on the elements of second-degree murder. The mitigator should be presented in a separate interrogatory, when the defense requests it and when there is evidence to support it. Because the defense did not request an instruction on heat of passion, no error occurred.

People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999), aff'd operation of law, 43 P.3d 611 (Colo. 2001). Defendant was convicted of possession with intent to distribute under a complicity theory. Her sentence was properly enhanced under the "Drug Special Offender" statute although the jury instructions did not require the jury to find that defendant knew that there was more than 28 grams of cocaine and more than 100 lbs. of marijuana.

People v. Whitley, 998 P.2d 31 (Colo. App. 1999). In Colorado, there are three kinds of sentence enhancers (1) factors that increase the length of sentence based on circumstances that are connected to the commission of the crime (e.g., "dwelling" in second-degree burglary). These must be proved to a jury beyond a reasonable doubt; (2) recidivism schemes that, by statute, require proof beyond a reasonable doubt. E.g., habitual criminal statute requires proof beyond a reasonable doubt; and (3) recidivism enhancers that do not contain a statutory burden of proof (e.g., increased sentence if the defendant is on probation or parole when he commits his offense). *Here:* due process is satisfied if defendant receives reasonable notice, and the prosecution proves the enhancer by a preponderance to the judge. §18-18-405(2) increases the level of felony when defendant has received a prior conviction for drug distribution. This constitutes an enhancer of the third sort, so there was no need to obtain a jury finding and, consequently, no need to bifurcate the trial.

Definitional Instructions

People v. Kwiatkoski, 671 P.2d 982 (Colo. App. 1983), aff'd other grounds, 706 P.2d 407 (Colo. 1985). Although an instruction defining terms used in an instruction is not always required, the court must define those phrases which have been given a distinctive meaning by law, so that the jury is able to apply the law to the facts of the case.

People v. Dunlap, 975 P.2d 723 (Colo. 1999). A trial court need not provide the jury with definitions of words with commonly understood meanings.

People v. Duncan, 2023 COA 122. "Protracted" in the SBI definition means "prolonged, continued, or extended" but doesn't mean permanent. Under that definition, there was sufficient evidence to support defendant's conviction for second degree assault where the damage he caused to the victim's eardrum also caused her to lose some of her hearing for 5 months. COA rejected defendant's argument that the statutory SBI definition is facially unconstitutionally vague, finding no plain error; COA didn't review defendant's unpreserved as-applied challenge.

Plemmons v. People, 2022 CO 45. Prolonged psychological harm from fear of infection qualifies as the intended "harm" under second-degree assault statutes; second-degree assault statute prohibiting use of saliva to infect, injure, or harm a peace officer did not violate equal protection; trial court's jury instruction did not accurately convey meaning of term "harm"; instructional error was harmless as to conviction for spitting on deputy in patrol car; instructional error was not harmless as to convictions for spitting on deputies in home; and double jeopardy principles did not bar retrial on charges involving spitting in home.

Johnson v. People, 2019 CO 17. The trial court's extraneous definition of "hesitate to act" (part of the definition of reasonable doubt) during voir dire was nonsensical, confusing, and improper, but it could not have prejudiced defendant because the court provided the instruction to the jury verbally and only once. It was not mentioned or referenced again throughout the entirety of the proceedings, and the court correctly instructed the jury numerous times regarding the presumption of innocence, reasonable doubt, and the burden of proof. Accordingly, the instruction did not lower the prosecution's burden of proof in violation of due process.

People v. Lozano-Ruiz, 2018 CO 86. Where defendant was convicted of misdemeanor sexual assault of a victim between the ages of 15 and 17, it was not plain error for the trial court to fail to give an instruction providing the statutory definition of "sexual penetration." Defendant's sole defense at trial was mistake of age, and he did not contest that sexual penetration occurred or challenge the evidence suggesting that it had.

People v. Jones, 2018 COA 112. Where the trial court instructs the jury on the make-my-day statute, §18-1-704.5(2), in order to limit the applicability of defendant's claim of self-defense, the instruction must require the trespasser/defendant's entry be knowingly unlawful.

People v. Thompson, 2018 COA 83. Definitional jury instructions that accurately track the language of the applicable statute are generally proper and sufficient. At the time of trial, no Colorado case law directly addressed the issue of whether "any note" is a security. Accordingly, at the time of the defendant's trial, the law was not well settled; and any error in the jury instruction defining "security," which included "any note"" would not have been obvious or plain

People v. Robles-Sierra, 2018 COA 28. The trial court's definition of "offer", which was taken from People v. Rowe, 2012 COA 90, did not direct a verdict, and the court did not err by giving a definitional instruction on the term offer. And, in any event, the error was not plain.

People v. Van Meter, 2018 COA 13. The trial court gave a jury instruction defining possession in its common and ordinary way. The court's use of this instruction, which was not challenged by the defense and responsive to issues raised in voir dire, was not plain error.

People v. Howard-Walker 2017 COA 81M, rev'd on cumulative error grounds, 2019 CO 69. Failure to define the word "intent" used in the burglary instruction was not plain error, where defendant did not argue that person in surveillance video did not act "with intent." Instead, defendant claimed he was not the person depicted in the video.

People v. Archuleta, 2017 COA 9. The court's instruction defining "cause" was not error. A defendant must take his victim as he finds him, and it is no defense that the victim is suffering from physical infirmities.

People v. Waller, 2016 COA 115. The word "should" in a reasonable doubt instruction conveys a sense of duty and obligation and is no less obligatory than the use of the word "will." An instruction so worded does not constitute a directed verdict for the State.

People v. Stellabotte, 2016 COA 106. The trial court did not abuse its discretion in giving a supplemental jury instruction, in response to a jury question, defining the term "authorization" as "to provide someone with jury authority to perform an act" because it was related to a legal issue, the court's response was simple and direct, and the jury expressed confusion over the term's meaning. The court was not required to use the definition of "authorization" or "without authorization" from published decisions, and the definition given fit the facts of the case, related to the issues the jury needed to resolve, and was appropriate in the circumstances of the case.

People v. Serra, 2015 COA 130. A "contact" definition is unnecessary with respect to jury instructions on violation of bail bond conditions and violation of a protective order. However, a trial court has a duty to correctly instruct the jury; here, the court's erroneous instructional definition of "contact" required reversal because it expanded on the commonly understood meaning of "contact" by not including a "communication" element. A proper definition of contact should have addressed an intentional action by defendant to pierce the protective barrier between him and the victim such as touch or direct or indirect communication or attempted communication. To "contact" does not mean incident or unintentional contact.

People v. Lopez, 2015 COA 45. The trial court did not err in instructing the jury on the definition of attempt, which is an element of menacing, because it was clearly a definition rather than an additional crime of attempt.

Martinez v. People, 2015 CO 16. A jury instruction defining "after deliberation" as an interval of time "sufficient for one thought to follow another" is legally incorrect pursuant to Key v. People, 715 P.2d 319 (Colo. 1986). *Here*: defense counsel did not object to the instruction on that basis, so the standard of review was plain error. The error did not amount to plain error because overwhelming evidence proved that defendant had deliberated, and the jury instructions, as a whole, adequately explained the law.

People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011). The trial court did not need to give supplemental jury instructions defining "extreme indifference to human life" or "grave risk of death" because the terms consist of commonly understood words. Before an object can be found to be a deadly weapon as defined by §18-1-901(3)(e), it must have been "used in connection with assaultive conduct directed toward an intended opponent or adversary." Thus, defendant could not have been convicted of second degree assault (recklessly causing serious bodily injury by means of a deadly weapon) or third degree assault (negligently causing bodily injury by means of a deadly weapon), where at the conclusion of a long automobile chase with the police, he crashed his vehicle into another person's car, injuring the other car's driver and his own passenger.

Townsend v. People, 252 P.3d 1108 (Colo. 2011). The elemental and definitional jury instructions, when read as a whole, properly informed the jury of the elements of escape from ISP; because defense drafted and tendered the jury instruction broadly defining the "extended limits of confinement," defendant invited any error arising from the possibility that the jury could have convicted him for failing to report to his parole officer; and any error in the inclusion of instructional language implying that merely thinking about escaping could constitute the offense of escape from ISP was harmless in light of the People's theory that defendant escaped by failing to remain within the extended limits on his confinement, not merely by thinking about failing to remain within them.

People v. Alvarado-Juarez, 252 P.3d 1135 (Colo. App. 2010). Colorado's pattern jury instruction defining reasonable doubt is constitutional. Specifically, the language "would cause reasonable people to hesitate to act in matters of importance to themselves" accurately describes the standard.

People v. Munoz, 240 P.3d 311 (Colo. App. 2009). Reasonable doubt instruction stating "after considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you *should* find the defendant guilty" and "after considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you *should* find the defendant not guilty" satisfied the requirements of due process. The instruction clearly informed the jury of its obligation to find defendant not guilty of the charged offenses if the prosecution did not prove every element of each of the charged offenses beyond a reasonable doubt, as (1) the common meaning of "should" conveys an obligatory command and not a permissive request; and (2) the court's primary instruction on reasonable doubt, given before the instructions on each of the offenses, instructed the jury that it "*will* find the defendant not guilty" if the prosecution failed to meet its burden of proof.

People v. Rubio, 222 P.3d 355 (Colo. App. 2009). The pattern instruction on reasonable doubt is constitutional, rejecting claims that the language "arises from" improperly reverses the burden of proof, and that the "hesitate to act" language lowers the burden of proof.

People v. Robb, 215 P.3d 1253 (Colo. App. 2009). The trial court did not erroneously instruct the jury concerning the definition of reasonable doubt where: (1) informing the jury that reasonable doubt "arise[s] from… the evidence, or lack of evidence" does not undermine the presumption of innocence; (2) phrases such as proof of "utmost certainty" or proof excluding every reasonable hypothesis of innocence are not required; and (3) the use of the "hesitate to act" language has been repeatedly approved.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). Because the phrase "serious emotional distress" is understandable to persons of common intelligence, it was within the trial court's discretion to refuse to instruct the jury on the definition of "severe emotional distress" found in the civil jury instructions.

People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006). A trial court did not err in giving supplemental jury instructions on the statutory terms "physical force" and "physical violence" based on definitions in Black's Law Dictionary because Colorado statutory law did not define those terms, the definitions given were not inaccurate, and the definitions could not have been interpreted in improper ways. In defining the term "consent" as used in the offense of unlawful sexual contact, the trial court did not err in giving a supplemental jury instruction based on language from §18-3-401(1.5) and §18-1-505(3)(d).

People v. Montoya, 104 P.3d 303 (Colo. App. 2004). As used in §18-3-203(1)(c), the phrase "knew, or reasonably should have known" sets a standard of objective reasonableness on the part of the defendant. Since objective reasonableness standard applies, trial court not required to instruct jury on the definition of "knowingly."

People v. Frantz, 114 P.3d 34 (Colo. App. 2004). An instruction defining a term that constitutes an element of the offense is sufficient and correct when it omits exceptions for which no evidence was presented. Definition of "controlled substance analog" given to the jury properly omitted exceptions relating to drugs that are themselves controlled substances, investigational drugs used within the terms of a federal exemption, and drugs not intended for human use, because no evidence was presented that would have supported them.

People v. Kyle, 111 P.3d 491 (Colo. App. 2004). Failure to include language in Pattern of Abuse instruction requiring the jury to find that the act of sexual contact establishing the pattern occurred "within ten years prior to" the predicate act did not constitute plain error.

People v. Marquez, 107 P.3d 993 (Colo. App. 2004). Court did not err in instructing jury that there can be more than one cause of the victim's death, and in finding that the defendant failed to make the threshold showing necessary to support the affirmative defense of intervening cause.

People v. Brown, 119 P.3d 486 (Colo. App. 2004). It is not plain error to omit a definition of "drug paraphernalia" where: (1) defendant approved the jury instructions, (2) defense counsel referred to the items in defendant's possession as paraphernalia, and (3) the existence of drug paraphernalia was uncontested.

People v. Lopez, 97 P.3d 277 (Colo. App. 2004). Court did not err in instructing jury that there can be more than one cause of the victim's death, and that defendant's conduct does not have to be the only, nearest, or last cause of death, so long as it is a cause but for which the death would not have occurred.

People v. Jacobs, 91 P.3d 438 (Colo. App. 2003). The word "solicits" as used in the elements of the substantive offense of Soliciting For Child Prostitution (§18-7-402) has a meaning different than the word "solicitation" as it is used in the inchoate offense of Criminal Solicitation (§18-2-301(1)). Therefore, there is no need to give an instruction based on the elements of the offense of Criminal Solicitation when instructing a jury on the elements of the offense of Soliciting For Child Prostitution.

People v. Merklin, 80 P.3d 921 (Colo. App. 2003). Trial court did not err in providing definitional instruction that informed jury about a previously-charged offense involving the victim where instruction was a correct statement of law, and instruction did not provide jury with information about the charges or details of the other offense.

People v. Madden, 87 P.3d 153 (Colo. App. 2003), rev'd other grounds, 111 P.3d 452 (Colo. 2005). No plain error for the trial court's failure to define "substantial step" because defendant did not contest it at trial and did not argue that his conduct was not a substantial step towards commission of the offense.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). No plain error in the failure to define "serious bodily injury" to supplement the instruction defining the term "deadly weapon" because defendant did not contest that the victim suffered serious bodily injury.

Election & Unanimity

Quintano v. People, 105 P.3d 585 (Colo. 2005). The election requirement protects defendant's right to a unanimous verdict by assuring that some jurors do not convict on one offense and others on a separate offense; it also enables adequate defense preparation. Although the five identically worded counts did not identify particular acts as the basis for each charge, and the prosecution did not elect the specific conduct relied upon for each charge, the modified unanimity instruction, which required the jury to agree to the same act or acts as the basis for each count, was sufficient to cure the harm resulting from the prosecution's failure to individualize the counts charged in the information.

People v. Gookins, 111 P.3d 525 (Colo. App. 2004). Under Thomas v. People, 803 P.2d 144 (Colo. 1990), a trial court need only instruct the jury that it must reach a unanimous decision on the same act or acts committed by defendant. There is no requirement that the jury identify the particular act or acts upon which it bases its verdict. Where evidence of many acts is presented, any one of which could constitute the offense charged, and where there is a reasonable likelihood that jurors may disagree on the act the defendant committed, the trial court should instruct the jury that, to convict, it must unanimously agree that the defendant committed the same act or that he committed all the acts included within the period charged. The determination of whether there is a reasonable likelihood that jurors may disagree on the act the defendant committed is within the discretion of the trial court.

People v. Greer, 262 P.3d 920 (Colo. App. 2011). Where the jury indicated on special interrogatories that it did not unanimously find that defendant committed a specific act to support its verdicts, it could not be determined that the jury was unanimous as to any single count. While merger of the counts might solve any double jeopardy issue, it would not solve the unanimity issue, and the convictions must be vacated. Whether a defendant was denied due process by the prosecution's failure to elect a particular act is a question of law reviewed de novo. Where there is evidence of multiple acts, any one of which would constitute the offense charged, the trial court must either: (1) require the prosecution to elect the act upon which it relies for conviction; or (2) instruct the jury that it must unanimously agree on the same act to support the conviction or that all of the acts in evidence occurred (modified unanimity instruction). A trial court has discretion to decide whether there is a reasonable likelihood that jurors may disagree on the act the defendant committed. A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair. *Here:* trial court properly refused to give a modified unanimity instruction or require the prosecution to elect a specific act where: (1) the victim's testimony was unlikely to lead to confusion about the various unlawful acts; (2) defendant's defense was a general denial of all of the acts; and (3) there was no basis for jurors to conclude that one act occurred, but others did not. Where the People adequately elected the specific act for the SAOC count and for the SAOC-PATT, and the jury found the defendant guilty of both, any error in not providing a modified unanimity instruction was harmless.

People v. Hines, 2021 COA 45. A modified unanimity instruction was not required when prosecution presented multiple acts that could have constituted the crime of human trafficking because the prosecution established that defendant had engaged in a continuing course of conduct.

People v. Serna-Lopez, 2023 COA 21. COA concludes the trial court erred by failing to provide the jury with a modified unanimity instruction with respect to two special offender sentence enhancer counts. *Here:* because the trial court combined the two distinct special offender sentence enhancers into a single instruction, it allowed the prosecution to prove the existence of a deadly weapon or firearm by two independent alternatives. The potential for a lack of unanimity created by the single instruction was compounded by asking the jury the single

question of whether the offense involved a deadly weapon or a firearm, and then collapsing the two alternatives' answers into a single "yes" or "no" response. The effect of the jury instruction and verdict form is that they permitted various outcomes lacking unanimity: (1) a reasonable juror could have concluded that the BB gun was a deadly weapon within defendant's reach; or (2) a reasonable juror could have concluded defendant, or his confederate possessed the firearm in the trunk but did not believe the BB gun to be a deadly weapon.

People v. Wester-Gravelle, 2020 CO 64. Defendant's failure to object to the information did not result in waiver of her duplicity claim, but the trial court did not plainly err by failing to give a modified unanimity instruction, or in the alternative, by not requiring the prosecution to select the transaction on which they were relying for a forgery conviction.

People v. Mosely, 2019 COA 143, rev'd other grounds, 2017 CO 20. A jury must unanimously decide which component of self-defense the prosecution disproved beyond a reasonable doubt.

People v. Davis, 2017 COA 40M. A defendant does not waive an election or unanimity claim by failing to raise the issue in the trial court. A single conspiratorial agreement may not be divided into multiple charges. For a conspiracy, the following factors tend to show a single criminal episode: the acts alleged occurred during the same period, the type of overt act alleged is the same, the unlawful objective of the conspiracy is the same, the modus operandi is the same, and the same evidence would be relevant to the charges. Conversely, the following factors suggest multiple criminal episodes: defendant is charged with conspiring with different parties; in different counties; in different agreements; and with allegations of different overt acts. *Here:* there was one criminal episode of conspiracy because the actions occurred in a relatively short time period in the same county, the conspiracy was primarily with one other person, and all the overt acts were done in furtherance of the same unlawful objective. The jury was not required to unanimously agree on the overt act supporting the conviction for conspiracy.

People v. Johnson, 2016 COA 15. The prosecution need not elect specific incidents of sexual contact to convict defendant of the pattern of sexual abuse sentence enhancer; the trial court need only instruct the jurors that they must either unanimously agree that defendant committed the same act or acts or that defendant committed all of the acts described by the victim (modified unanimity instruction). *Here*: trial court properly permitted the jury to identify an incident of sexual contact other than those listed on the special interrogatory.

People v. Vigil, 2015 COA 88. Where the prosecution aggregated the entries into several buildings on the same property into a single transaction and presented a single theory of burglary, the jurors were not required to unanimously agree on which building was burglarized; they needed to agree only that defendant burglarized a building on the charged date at the charged place. The prosecutor did not need to elect among the acts, and the trial court did not need to give a modified unanimity instruction.

People v. Perez-Hernandez, 2013 COA 160. Where defendant was charged with possession of burglary tools on one occasion related to one burglary, and the evidence included items that were in defendant's possession during this single transaction, neither an election nor a unanimity instruction was required.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). When a defendant is charged with crimes occurring in a single transaction, the prosecution does not have to elect among the acts that constitute the crime and a unanimity instruction need not be given. *Here:* an instruction requiring the jurors to agree unanimously as to which communications established harassment by stalking under §18-9-111(4)(b)(II) was not required because the harassment by stalking conviction required the prosecution to show a course of conduct that constituted a single transaction. Thus, the jury had to find beyond a reasonable doubt that such repeated communications took place, but it did not have to agree unanimously on which of them established the harassment by stalking offense.

People v. Montoya, 141 P.3d 916 (Colo. App. 2006). Where prosecution was relying on complicity theory to charge defendant, district court did not err by adding to the unanimity instruction a sentence informing the jury that it "may consider complicity as defined in [the complicity instruction] in deciding [defendant's] guilt." The additional sentence did nothing to undermine the requirement that, in order to convict, every element of complicity had to be proven beyond a reasonable doubt.

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). Although in a burglary case, a jury must agree on the underlying felony defendant intended to commit, failure to specially instruct the jury that it must be unanimous as to the underlying felony was harmless where defendant was convicted on separate counts of the two possible felonies underlying the burglary count.

People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003). Defendant was not entitled to have the jury instructed that they must unanimously agree as to whether the charged offenses occurred on October 30th or October 31st.

Multiple Charges

People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005). If two or more offenses committed against a single victim are based on the same act or series of acts arising from the same criminal episode, and the evidence supporting the counts is identical, defendant may be convicted of more than one offense, but concurrent sentences must be imposed. A court need not vacate one of the convictions.

Meads v. People, 78 P.3d 290 (Colo. 2003). When multiple charges are based on identical evidence, the trial court may require the prosecution to elect on which it will rely for conviction. If multiple convictions are entered, defendant must receive concurrent sentences.

People v. Denton, 91 P.3d 388 (Colo. App. 2003). A defendant cannot be convicted of more than one offense based on identical evidence of the same act in the same criminal episode unless concurrent sentences are imposed against a single victim. *Here:* defendant was convicted of first degree aggravated motor vehicle theft, theft, and theft by receiving based on his stealing a single car. He received concurrent sentences for each conviction. Defendant's convictions for theft and theft by receiving must be vacated because they were supported by evidence identical to that supporting the first degree aggravated motor vehicle theft.

People v. Dotson, 55 P.3d 175 (Colo. App. 2002). If two or more offenses committed against a single victim are based on the same act or series of acts arising from the same criminal episode, and the evidence supporting the counts is identical, then concurrent sentences must be imposed.

People v. Jurado, 30 P.3d 769 (Colo. App. 2001). The mere fact that multiple offenses took place during one continuous criminal episode does not establish that they were supported by identical evidence. Offenses are not necessarily supported by identical evidence even though there are some common elements of proof. §18-1.3-406 addresses sentencing for multiple crimes of violence arising from the same criminal episode. Crimes of violence are "separate" within the meaning of §18-1.3-401(1) (a), and thus require consecutive sentencing, when the evidence supporting the convictions is not "identical" within the meaning of §18-1-408(3).

Multiple Theories

People v. Thurman, 948 P.2d 69 (Colo. App. 1997). When one offense is prosecuted under alternative theories, the jury should be allowed to return a verdict as to each theory.

People v. Dunaway, 88 P.3d 619 (Colo. 2004). Where alternative theories of liability are submitted to the jury under a general verdict form, due process requires only that one alternative be supported by evidence sufficient to satisfy the proof beyond a reasonable doubt requirement. Overruled James v. People, 727 P.2d 850 (Colo. 1986) to the extent that its reasoning conflicted with Griffin v. U.S., 502 U.S. 46 (1991).

Richardson v. U.S., 526 U.S. 813 (1999). Jurors must unanimously agree that each element is present, but they need not agree on the "brute facts" or means by which an element is satisfied. A federal drug statute requires proof that the defendant engaged in a continuing "series of violations." For that statute, the jury must unanimously agree about each individual violation. But, for example, in a robbery case, it would be permissible for half of the jury to conclude that the defendant used a knife, and half to conclude that he used a gun, as long as they unanimously agreed that his actions constituted a "threat of force."

People v. Vigil, 251 P.3d 442 (Colo. App. 2010). The trial court did not err in failing to require the jurors to unanimously agree on the theory supporting theft.

People v. Linares-Guzman, 195 P.3d 1130 (Colo. App. 2008). Jury's guilty verdicts to attempted aggravated robbery and conspiracy to commit aggravated robbery provided a sufficient guaranty of unanimity as to whether aggravated robbery or theft constituted the predicate crime for first degree burglary, even though the defendant was acquitted of the completed aggravated robbery.

People v. Sharp, 104 P.3d 252 (Colo. App. 2004). Element instruction including alternative means of committing theft did not require reversal even if there were insufficient evidence to support one of the theories. Jurors are presumed to follow the instruction to find defendant guilty only if the prosecution proved each of the elements beyond a reasonable doubt.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). The verdict form for second-degree assault was proper where the jury was not required to agree unanimously on a theory of culpability, but rather, as instructed, it was only required to agree unanimously on the guilty verdict.

People v. Palmer, 87 P.3d 137 (Colo. App. 2003). Defendant was charged with felony murder for killing one of the two occupants of an apartment he barged into. The predicate felony was burglary. The first-degree burglary count alleged that defendant had the intent to commit felony menacing on the burgled premises. Neither the menacing count nor the menacing instructions referred to a particular victim, but the menacing verdict form did. The verdict on the menacing count was unanimous because the verdict form referred to a single occupant. Although the jury might not have been unanimous on the person defendant *intended* to menace when he committed burglary, it was not required to be unanimous on that element of burglary. The jury need not agree on the theory or evidence by which an element of an offense is proved.

People v. Hall, 60 P.3d 728 (Colo. App. 2002). Trial court is not required to give an unanimity instruction on alternative theories of liability (principal vs. complicitor). The verdict will be upheld as long as there is sufficient evidence to support both theories.

People v. Pineda, 40 P.3d 60 (Colo. App. 2001). The trial court was not required to give a unanimity instruction where the prosecution suggests alternative theories to satisfy a single element.

People v. Hansen, 972 P.2d 283 (Colo. App. 1998). Unlike alternative methods of committing the offense, alternative definitions need not be supported by sufficient evidence. Trial court erred in granting a postconviction challenge on the ground that there was insufficient evidence to support the part of the "serious bodily injury" definition that was based on a substantial risk of death. It was not necessary to distinguish between different types of serious bodily injury, so this was not a general verdict under *James*.

Multiple Incidents

People v. Allman, 2012 COA 212. No special unanimity instruction was required to convict defendant of failure to register as a sex offender where he could have lived at one of three different addresses; the multiple addresses at which defendant could have resided were incidents of the same transaction (establishment of a residence).

Melina v. People, 161 P.3d 635 (Colo. 2007). Defendant was properly convicted of a single count of solicitation for his multiple requests to various individuals that the victim be killed. The People's theory of the case and the evidence presented at trial established a single transaction, and therefore, defendant was not entitled to a jury instruction on unanimity.

Quintano v. People, 105 P.3d 585 (Colo. 2005). Where there is no reasonable likelihood that the jurors will disagree on which acts defendant committed, the prosecution is not required to designate a particular act. However, if the prosecution is not required to designate a particular act, jurors should be instructed that in order to convict defendant they must either unanimously agree that defendant committed the same act or acts or that defendant committed all the acts described by the victim and included within the time period charged (a modified unanimity instruction).

Woellhaf v. People, 105 P.3d 209 (Colo. 2005). Double Jeopardy protects not only against a second trial for the same offense, but also against multiple punishments for the same offense unless the legislature has specifically authorized multiple punishments for a single offense. Multiplicity is the charging of multiple counts and the imposition of multiple punishments for the same criminal conduct. Although not fatal to an indictment, multiplicity may improperly suggest to the jury that defendant has committed more than one crime and may also lead to multiple sentences for the same offense and thereby implicate double jeopardy protections. There are three kinds of multiplicity issues: (1) involves two or more statutory provisions that proscribe the same criminal conduct. In these situations, courts determine the number of offenses by comparing only the elements of the statutory provisions at issue, without looking to the facts of the case, to discern whether one provision requires proof of an additional fact which the other does not; (2) involves a series of repeated acts that are charged as separate crimes even though they are part of a continuous transaction and therefore actually one crime; and (3) involves statutes providing for alternate ways of committing the same offense. It arises when a prosecutor charges multiple counts of the same offense because defendant has committed the crime using more than one of the prohibited alternative methods. To resolve the third kind of multiplicity, the court must first examine of the scope or "unit" of prosecution authorized by the statutory prescription, and, next, examine the factual components of each prosecution and the evidence in support thereof. *Here:* the unit of prosecution of SAOC and SAOC-POT prohibits "any sexual contact." Where the prosecution established that defendant touched the victim in four different ways, but the record was silent with regard to when, where, or how the four sexual contacts transpired, and appellate court could not ascertain the temporal proximity of the acts, whether the acts occurred in different locations, or whether the acts were the product of new volitional departures, the court could not discern factually distinct offenses, and therefore court regarded each touching as having been inflicted in one single incident.

People v. Gookins, 111 P.3d 525 (Colo. App. 2004). The determination of whether there is a reasonable likelihood that jurors may disagree on the act(s) that defendant committed is within the discretion of the trial

court.

People v. Jacobs, 91 P.3d 438 (Colo. App. 2003). A series of e-mails in which defendant tried arranging a "date" with a 12-year-old girl constituted a single transaction that did not require a unanimity instruction.

People v. Devine, 74 P.3d 440 (Colo. App. 2003). Trial court reversibly erred by failing to sua sponte issue a unanimity instruction where each withdrawal from a probate trust account was a completely separate transaction and the subject of different testimony and evidence. The failure to give a unanimity instruction under these facts raised grave doubts about whether defendant's conviction was based upon a true unanimity or whether different incidents formed the basis for the conclusion of different jurors.

People v. Salyer, 80 P.3d 831 (Colo. App. 2003). Where the parties' arguments focus on one particular act as being the charged offense, there was no reasonable likelihood the jury's verdict could have been based on a different act or acts.

People v. Brown, 70 P.3d 489 (Colo. App. 2002). The jury should not have been given a verdict form for "sexual assault on a child-pattern" because "pattern" is a sentence enhancer, not a separate offense. Instead, the verdict forms should have required the jury to determine whether defendant was guilty of the two predicate offenses of SAOC, with interrogatories then used to determine whether the pattern sexual abuse allegations had been established. The mistake was not plain error because the instructions, the interrogatory, and the testimony described only two incidents. The jury could not have convicted without unanimously finding that defendant committed the two predicate acts of sexual abuse.

People v. Rivera, 56 P.3d 1155 (Colo. App. 2002). It was plain error where there was no unanimity instruction in a securities fraud prosecution charging numerous criminal acts. Unlike in People v. Freda, 817 P.2d 588 (Colo. App. 1991), these were different acts, any one of which could have supported the offense, instead of different evidence supporting the elements of a single crime.

People v. Scialabba, 55 P.3d 207 (Colo. App. 2002). The trial court did not commit plain error in failing sua sponte to require an election of acts or to give a special unanimity instruction. As argued to the jury, the charge of tampering with a witness was supported by the single transaction of writing a letter to the witness. Defendant's subsequent actions were not presented as a separate incident but as other evidence of defendant's intent to keep the witness from testifying.

People v. Lawrence, 55 P.3d 155 (Colo. App. 2001). Defendant was charged with 34 counts of willful destruction of big game wildlife, and evidence established that the defendant participated in the killing of 34 animals. However, the jury was not instructed which animal was to be associated with each charged count. No plain error because defendant did not request either a unanimity instruction or an election by the prosecution, the evidence was sufficient to sustain a conviction as to each charged count, and each discrete criminal act established by the evidence could be associated with a charged count. There was no need to compel an election by the prosecution, and no reason to give a special unanimity instruction.

People v. Gholston, 26 P.3d 1 (Colo. App. 2000). Defendant complained about the trial court's failure to give a "specific transactions" instruction (one that tells the jury which specific instances of sexual assault are being relied upon for conviction). This failure did not constitute plain error because the jury knew, from the evidence and the arguments of counsel, which specific transactions were being relied upon. And the court gave a *Thomas* modified unanimity instruction.

People v. Simmons, 973 P.2d 627 (Colo. App. 1998). Jury returned a general verdict of "guilty" to menacing under these circumstances: (1) the evidence suggested that defendant menaced two people; (2) the prosecutor argued that the verdict could be based on a victim other than the one named in the charging document; and (3) the jury received the pattern COLJI instruction, which refers to placing "another person" in fear. This

constituted plain error because the jury was allowed to convict without unanimously agreeing as to a particular victim.

People v. Thurman, 948 P.2d 69 (Colo. App. 1997). The *Thomas* rule extends beyond the context of sex assaults on children. But it is inapplicable when there was just one transaction involving illegal drug trafficking.

People v. Estorga, 612 P.2d 520 (Colo. 1980). Where there are many acts occurring over a period of time, any one of which would constitute the offense charged, the People may be compelled to select the act on which they rely for a conviction.

Deadlocked Jury:

Fain v. People, 2014 CO 69. The trial court has discretion, which should only be exercised in rare circumstances, to instruct a deadlocked jury about the possibility of mistrial, when, considering the content of the instruction and the context in which it is given, the instruction will not have a coercive effect on the jury. *Here Fain:* trial court did not err, much less plainly err, by failing to give a mistrial advisement when the jury told the court that one juror's viewpoint will not change. Overruled People v. Raglin, 21 P.3d 419 (Colo. App. 2000).

Martin v. People, 2014 CO 68. The court should consider exercising its discretion to instruct a deadlocked jury about the possibility of a mistrial in the event the jury is unable to reach a unanimous verdict after continued deliberations in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations. *Here:* second supplemental instruction for jury to continue deliberating after jury foreperson stated during polling that verdict was not hers, thus demonstrating that jury had not reached unanimous verdict, for jury to notify court when it reached unanimous verdict, for jury to continue deliberations if it could not, and that any juror was free to change his or her mind after returning to jury room, did not impermissibly coerce jury to reach verdict, when, in view all instructions given as whole, jury was instructed to continue to deliberate "for further reconsideration of your verdict," but that jurors should not "surrender your honest conviction solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict." Overruled People v. Raglin, 21 P.3d 419 (Colo. App. 2000).

Gibbons v. People, 2014 CO 67. In giving a modified-*Allen* instruction for the jury to continue to deliberate and attempt to reach a unanimous verdict, upon notification to the court that the jury is deadlocked, the instruction should not include a time-fuse admonition that the court will give the jury a designated amount of time for additional deliberation. In giving modified-*Allen* instruction upon court's receipt of notification of jury deadlock for jury to continue to deliberate and attempt to reach unanimous verdict, trial court was not required to inform jury about possibility of mistrial in event they were unable to reach unanimous verdict. Courts should undertake a case-by-case approach when evaluating the coercive effect of a modified-*Allen* instruction which informs the jury of the potential for mistrial in the event they are unable to reach a unanimous verdict by a specific time. In evaluating how to use its discretion as to whether to inform the jury of the possibility of a mistrial if they are unable to reach a unanimous verdict, the trial court should consider whether the jury has actually indicated that it believes indefinite deliberations are necessary; however, the trial court is never required to exercise that discretion, and in the absence of some affirmative indication from the jury that it harbors this concern, the trial court should not interfere with the jury's deliberative process. *Here:* jury's question during deliberations as to what might happen if jury was unable to reach unanimous verdict did not impose any requirement on trial court to inform jury of possibility of mistrial if they were unable to reach unanimous verdict, rather, trial court's modified-*Allen* instruction and the court's statement that it would talk with jury again in about an hour and check back in a few minutes, was proper exercise of its discretion, and it did not mislead or coerce jury into reaching verdict by specific time. Overruled People v. Raglin, 21 P.3d 419 (Colo. App. 2000).

People v. Richardson, 184 P.3d 755 (Colo. 2008). Contrary to People v. Lewis, 676 P.2d 682 (Colo. 1984), §18-1-408(8) expressly prohibits the trial court from alleviating jury deadlock over the degree of guilt by instructing the jury, without the prosecution's consent, to return a guilty verdict on a lesser-included offense. Rather, if *any juror* remains convinced by the facts and the law that defendant is guilty of a greater offense, the jury cannot be instructed, without the prosecution's consent, to return a verdict on a lesser-included offense.
Because *Lewis* instructions are not constitutionally required, the General Assembly may prohibit or alter them. Therefore, we hold that §18-1-408(8) abrogates the part of *Lewis* that allows the trial court to instruct the jury, without the prosecution's consent, to return a guilty verdict on a lesser-included offense if the jury has reached consensus as to the defendant's guilt but is deadlocked as to the degree of guilt.

People v. Lopez, 2024 COA 26. The jury asked: can we be hung on one or some of the counts and present verdicts of guilty or not guilty for the remaining charges? [Not saying this is the case!]. The trial court, noting that it would not answer "yes" to the jury's question because it "did not want to encourage a hung jury, and the jury [had] explicitly" disclaimed that it was deadlocked simply referred the jury back to the instructions already given. The trial court's decision not to inform the jury that it could hang "fell within the range of reasonable" responses to the jury's question. And because defense counsel argued that the jury was not deadlocked and therefore objected to the court taking the steps defendant now says the court should have taken, that claim of error was waived. *[Cert Accepted (12/23/24) in case #24SC244: (1) Whether a criminal defendant can open the door to expert witness testimony that another witness told the truth on a particular occasion. (SAAG Frank Lawson)]*

People v. Cox, 2023 COA 1. COA considers whether a trial court must, without request, inquire about potential jury deadlock any time a jury asks what happens if it cannot reach a unanimous decision; COA declines to prescribe a categorical rule requiring such an inquiry in all circumstances. A trial court has broad discretion to determine an appropriate response, so long as the response is not coercive under all the circumstances, including whether the circumstances as a whole indicate that the jury is in fact deadlocked. *Here:* where the jury did not indicate it was deadlocked, the question came relatively early in the deliberations, and no one at trial perceived the possibility of deadlock, trial court did not abuse its discretion, much less plainly err, by instructing the jury to continue deliberating without first asking whether further deliberation was likely to result in a unanimous verdict.

People v. Pellegrin, 2021 COA 118. Trial court did not abuse its discretion by declining to declare mistrial after polling revealed that verdicts were not unanimous, at trial for stalking, posting private image for harassment, and harassment; trial court's instruction to continue deliberations, after juror identified herself as dissenting juror, was not coercive, there was no indication that jury was deadlocked, trial court found that, based on juror's response and demeanor, she was not likely to be bullied into agreeing with rest jury to find defendant guilty, and, indeed, after further deliberation, jury returned verdict that was different and more favorable to defendant than it had prior to its further deliberations.

People v. Black, 2020 COA 136. When the jury asked "what happens if we can't come to a unanimous decision on only one charge?," trial court's unqualified instruction to the jury to continue deliberating without first ascertaining the intractability of the jury's impasse was coercive, and thus, not harmless beyond a reasonable doubt, in prosecution for assault, DUI, and resisting arrest; trial court's comments established that it was uncertain as to what the jury meant by the question, however this ambiguity made even more critical the threshold inquiry as to what was the likelihood of progress towards a unanimous verdict if deliberations continued. Disagreed with People v. Munsey, 232 P.3d 113 (Colo. App. 2009).

People v. Dinapoli, 2015 COA 9. Trial courts are not required to supplement a modified-*Allen* instruction with a mistrial advisement. Although the court should have inquired whether there was a reasonable likelihood of progress toward a unanimous verdict upon further deliberations, a mistrial advisement was not necessary to remedy that omission.

People v. Payne, 2014 COA 81. Defendant's right to be present at his trial was violated when the trial court delivered a modified-*Allen* instruction to the jury concerning the jury's possible deadlock in defendant's absence during jury deliberations; defendant's presence when the modified instruction was read in open court could have had a psychological effect on the jurors in a way that benefited the defense.

People v. Walden, 224 P.3d 369 (Colo. App. 2009). The modified-*Allen* instruction given to the deadlocked jury was not defective, despite the fact that it did not inform the jurors that they would be excused and a mistrial declared if they were not able to reach a unanimous verdict; the instruction otherwise advised the jurors that

they should try to arrive at a consensus, but only if they could do so without violence to individual judgment, and that the court was going to ask you to go back and continue your deliberations.

People v. Munsey, 232 P.3d 113 (Colo. App. 2009). When a trial court is informed by a jury that it is deadlocked on one or more counts, the trial court may not instruct the jury in a way that would require any juror to surrender a conscientious conviction in order to arrive at a unanimous verdict. A trial court may instruct such a deadlocked jury: (1) to continue its deliberations; (2) jurors should not be influenced to change their opinions by the opinions of other jurors; and (3) a failure to reach a unanimous verdict will result in a mistrial. *Here:* since the jury did not categorically state that it was deadlocked, the trial court could instruct the jury that it had taken an oath to return a verdict on each matter at issue.

People v. Rogers, 220 P.3d 931 (Colo. App. 2008), overruled other grounds, Garcia v. People, 2022 CO 6. During deliberations, jury indicated that it could not reach consensus on two of the charges, including the sex assault charge which involved a lesser-included offense of unlawful sexual contact. The trial court instructed the jury to complete the other verdicts and turn them in. In reviewing the other verdicts, the trial court noted that the jury completed the special interrogatory for the second-degree kidnapping charge with a finding that it unanimously agreed beyond a reasonable doubt that the victim was subjected to sexual assault or unlawful sexual contact. Over defendant's objection, the trial court gave the jury the suggested instruction in People v. Lewis, 676 P.2d 682 (Colo. 1984), in relation to the sex assault charge, in which it advised them to return a guilty verdict on the lesser-included offense if they were deadlocked as to the degree of guilt and not as to guilt versus non-guilt. The trial court's actions were proper because they fully complied with the procedures outlined in *Lewis*.

People v. Hayward, 55 P.3d 803 (Colo. App. 2002). Trial court properly deferred ruling on defendant's motion for mistrial in order to make the *Lewis* inquiries. Upon learning that the jurors were deadlocked only as to degree of guilt, the court properly gave a *Lewis* instruction.

People v. Watson, 53 P.3d 707 (Colo. App. 2001). Trial court properly gave modified *Allen* instruction even though the court knew the jurors' preliminary vote. The jury was not coerced by (1) receipt of exhibits that had been inadvertently omitted from the packet; or (2) the fact that deliberations occurred 2 days before Christmas.

People v. Hendrickson, 45 P.3d 786 (Colo. App. 2001). The modified-*Allen* instruction applies when jury deliberations have been "somewhat lengthy." *Here*: trial court properly declined to give the modified-*Allen* instruction where defendant claimed that 3 jury notes within 3 hours of beginning deliberations indicated an impasse.

People v. Barnard, 12 P.3d 290 (Colo. App. 2000). The trial court did not abuse its discretion in not issuing a *Lewis* instruction requiring the jury to return a verdict of second-degree murder where it was clear that such an instruction would be coercive to the lone hold-out for first-degree murder.

Theory of the Defense Instructions

People v. Luu, 813 P.2d 826 (Colo. App. 1991). A theory of the case instruction that explains evidence must be general, brief, and instruct the jury on the legal effect of the explanation.

People v. Inman, 950 P.2d 640 (Colo. App. 1997). The trial court may reject a theory of the case instruction that tends to be argumentative or calls attention to specific evidence.

People v. Nunez, 841 P.2d 261 (Colo. 1992). The trial court has an affirmative obligation either to correct tendered theory of the case instructions or to incorporate the substance of the tendered theory of the case instruction into the instructions submitted to the jury.

People v. Trujillo, 83 P.3d 642 (Colo. 2004). An error in denying a defense theory of the case instruction is not prejudicial if, when the instructions are considered in their entirety, defendant's theory could be argued under other instructions given by the court. *Here*: defendant was afforded due process despite the trial court's refusal to instruct the jury on certain lesser non-included offenses. In light of other instructions given, court's refusal to instruct on these lesser offenses made no meaningful difference to his theory of the case.

People v. Joosten, 2018 COA 115. The court's error in denying defendant's theory of defense instruction was harmless under *Novotny*'s outcome-determinative analysis because no reasonable juror would have believed his theory.

People v. Trujillo, 2018 COA 12. Because the trial court instructed the jury on defendant's theory of defense and counsel argued that theory in closing argument, the court did not err in rejecting five additional theory-of-defense instructions.

People v. Roman, 2017 CO 70. Defendant was convicted of first degree assault. The jury was also instructed on the lesser included offense of intentional second degree assault at defendant's request. The trial court denied defendant's request for an instruction on the lesser included offense of reckless second degree assault. Any error in failing to give the instruction on reckless second assault was harmless because: (1) jury did not merely convict defendant of the charged offense because it had no other option-it rejected a comparable lesser included offense in favor of the charged offense; and (2) it was never defendant's theory of the case that he committed reckless second degree assault-he steadfastly asserted that he did not cause victim's injuries.

People v. Castillo, 2014 COA 140, rev'd other grounds, 2018 CO 62. A proper theory of the case instruction should explain defendant's view of what the evidence shows, must be general and brief, and must instruct the jury on the legal effect of the explanation. *Here:* because defendant's proposed instructions did not explain how the legal statements contained therein should be applied in this case, they were not theory of the case instructions.

People v. Walden, 224 P.3d 369 (Colo. App. 2009). A "mistake of fact" instruction was not warranted where the theory of defense merely negated an element of the offense.

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). Court did not err in failing to sua sponte instruct the jury on the relevance of evidence of voluntary intoxication where an intoxication theory of defense would have been inconsistent with and would have undermined defendant's theory of defense that she was not the attacker.

People v. Merklin, 80 P.3d 921 (Colo. App. 2003). Trial court did not err in refusal to give defense theory of the case instruction where first sentence merely denied the charge, second sentence asserting an alibi was not

supported by evidence at trial, and defendant was not precluded from presenting his theory of the case during closing argument.

People v. Baird, 66 P.3d 183 (Colo. App. 2002). Trial court properly excised portions of the tendered theory of the defense instruction that were unduly argumentative.

People v. Meads, 58 P.3d 1137 (Colo. App. 2002). Defendant's theory of the case instruction is improper if the evidence does not support it or it does not correctly state the law.

Curative Instructions

Vigil v. People, 731 P.2d 713 (Colo. 1987). An error in the admission of evidence may be cured by withdrawing the evidence from the jury's consideration and instructing the jury to disregard it.

People v. Saiz, 923 P.2d 197 (Colo. App. 1995). A curative instruction is also appropriate to instruct the jury to disregard a prospective juror's statement, or comments made by counsel in opening statement, or closing argument.

People v. Carrier, 791 P.2d 1204 (Colo. App. 1990). A curative instruction is generally sufficient to overcome an error, and an instruction is inadequate only when a comment is so prejudicial that, but for the comment, the jury might not have found the defendant guilty.

People v. Anderson, 183 P.3d 649 (Colo. App. 2007). Although an expert witness improperly testified that she believed the victim's allegations were true, there was no reversible error. The jurors were instructed: (1) to disregard the improper testimony, and (2) that whether they believed the victim was for them to decide. Those curative instructions were sufficient to remedy any problem. As such, the expert's testimony did not cast serious doubt on the reliability of the conviction.

People v. Renfro, 117 P.3d 43 (Colo. App. 2004). Court properly declined to give an additional instruction concerning credibility of witnesses, which instructed that jurors should not allow judgments made by other witnesses to affect their decision on credibility, because standard credibility instruction given was adequate.

People v. McNeely, 68 P.3d 540 (Colo. App. 2002). Where the prosecutor improperly impeached defendant's credibility with a conviction that had been suppressed, the error was harmless under all the circumstances of the case, including the trial court's curative instruction to the jury to disregard evidence of the conviction because it does not exist.

People v. Kenny, 30 P.3d 734 (Colo. App. 2000). The prejudice which may accrue from a non-responsive answer may be cured by the court's instruction to disregard the objectionable portion.

Limiting Instructions Generally: CRE 105

People v. Thomas, 2014 COA 64. As a general rule, defense counsel is charged with the task of deciding whether a limiting instruction is desirable. Absent a special statutory requirement, a trial court is under no obligation to provide a limiting instruction without a defendant's request that it do so.

Davis v. People, 2013 CO 57. Unless a limiting instruction is either required by statute or requested by a party, a trial court has no duty to provide one sua sponte.

People v. Rios, 2014 COA 90. The trial court's error in instructing the jury regarding the codefendant's plea agreement and its refusal to include any caution that such information could not be used as evidence of defendant's guilt was not harmless beyond a reasonable doubt.

People v. Everett, 250 P.3d 649 (Colo. App. 2010). Trial court violated §16-10-301(4)(d) by failing to inform jury in closing charge of the specific limited purpose for which other-act evidence could be used. However, defendant was not prejudiced because the court had instructed the jury when the evidence was admitted, and before deliberations, the court reminded the jury that the evidence had been admitted for a specific purpose.

Kaufman v. People, 202 P.3d 542 (Colo. 2009). An instruction limiting the jury's use of CRE 404(b) evidence should be neutral in referring to the other act to avoid any prejudicial connotation conveyed by the words crime and offense. *Here*: an instruction identifying the act as "always carrying a knife" and "training that defendant has concerning use of knives" should have been more neutral but was not prejudicial.

People v. Cook, 197 P.3d 269 (Colo. App. 2008). Trial court was not required to give a CRE 404(b) limiting instruction when defendant's other acts (child pornography) were admitted into evidence because the other acts were evidence of the pattern of sexual abuse.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). A court should instruct a jury on the limited purpose served by CRE 404(b) evidence when it is discussed in testimony and again in the closing instructions. However, where the jury received an instruction contemporaneous to one witness's testimony and again in the closing charge, any error in failing to give the instruction during the testimony of another witness was harmless.

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). A trial court's failure to give a limiting instruction sua sponte doesn't constitute plain error.

People v. Torres, 141 P.3d 931 (Colo. App. 2006)**.** Trial court properly admitted defendant's prior act of domestic violence under CRE 404(b) and domestic violence statute, §18-6-801.5. Although the statute requires a cautionary instruction on the limited use of defendant's prior bad acts, defendant did not request it, and trial court's failure to give it sua sponte was not plain error.

People v. Moore, 117 P.3d 1 (Colo. App. 2004). A trial court is generally required to instruct the jury on the limited purpose for which other domestic violence acts may be considered at the time the evidence is admitted. However, the trial court's failure to do is not plain error where: (1) limiting instruction was given shortly after the evidence was admitted; (2) trial court identified the evidence to which the limiting instruction applied; and (3) trial court repeated the instruction in the closing charge to the jury, including an explicit reminder of the evidence to which the instruction applied.

People v. Welsh, 80 P.3d 296 (Colo. 2003). The trial court should have given the jury an instruction concerning the limited purpose of evidence of defendant's failure to respond to questions about the shooting as rebuttal to her claim of insanity.

People v. Strean, 74 P.3d 387 (Colo. App. 2002). Trial court acted properly when it did not give the jury a contemporaneous limiting instruction sua sponte upon admitting child hearsay statements of the victim under §13-25-129(1).

People v. Warren, 55 P.3d 809 (Colo. App. 2002). No plain error where trial court failed to identify the purpose of CRE 404(b) evidence in its limiting instruction on direct examination since it cured any potential prejudice by doing so after cross-examination. Also, when a contemporaneous limiting instruction states the explicit purpose of CRE 404(b) evidence, the closing charge need only remind the jury that certain evidence was admitted during trial for a limited purpose.

Jury Questions

Copeland v. People, 2 P.3d 1283 (Colo. 2000). When a jury asks for information during deliberations, an additional instruction is generally required unless: the jurors can be adequately informed by directing their attention to some portion of the original instructions; the request concerns matters not in evidence or questions which do not pertain to the law of the case; or the request would require the judge to express an opinion on factual matters that the jury should determine. The court must make reasonable efforts to obtain the presence of defense counsel before responding to the jury.

People v. Trujillo, 114 P.3d 27 (Colo. App. 2004). A defendant has a fundamental right to have counsel present when the court responds to questions from the jury. *Here:* although trial court erred in responding to a jury question without making reasonable efforts to obtain the presence of defense counsel, error was harmless beyond a reasonable doubt because the response given by the court was correct.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Where defense actively participates in the preparation of a response to a jury's question during deliberations, or expressly agrees to the response, the defense waives any right to assert error on appeal unless the response was so patently wrong as to constitute a misstatement of the law.

People v. Lopez, 2024 COA 26. The jury asked: can we be hung on one or some of the counts and present verdicts of guilty or not guilty for the remaining charges? [Not saying this is the case!]. The trial court, noting that it would not answer "yes" to the jury's question because it "did not want to encourage a hung jury, and the jury [had] explicitly" disclaimed that it was deadlocked simply referred the jury back to the instructions already given. The trial court's decision not to inform the jury that it could hang "fell within the range of reasonable" responses to the jury's question. And because defense counsel argued that the jury was not deadlocked and therefore objected to the court taking the steps defendant now says the court should have taken, that claim of error was waived. *[Cert Accepted (12/23/24) in case #24SC244: (1) Whether a criminal defendant can open the door to expert witness testimony that another witness told the truth on a particular occasion. (SAAG Frank Lawson)]*

People v. Guzman-Rincon, 2015 COA 166. Trial court's decision to respond to a jury question by instructing a deliberating jury that their lives had been threatened without the presence of counsel violated defendant's right to counsel at a critical stage.

People v. Frye, 2014 COA 141. When a jury asks a question, an additional instruction is often appropriate unless: (1) the jurors can be adequately informed by directing their attention to some portion of the original instructions; (2) the request concerns matters not in evidence or does not pertain to the law of the case; or (3) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

People v. Alvarado, 284 P.3d 99 (Colo. App. 2011). Trial court's response to jury questions regarding complicity, in which the court provided the jury with a supplemental instruction on the mental state necessary for complicitor liability, was not an abuse of discretion where: (1) jury continued to express confusion on the issue even though the court had already referred the jury back to its original instruction, and (2) the court expressed concern over the length of the time the jury had been deliberating.

People v. LePage, 397 P.3d 1074 (Colo. App. 2011), aff'd other ground, 2014 CO 13. The jury's communication with the court during deliberations demonstrated its ability to ask questions it deemed necessary. Thus, the fact that the jury did not submit any questions concerning another matter suggests that the jury was not confused as to that matter and supports the conclusion that the error as to that matter did not prejudice defendant.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). A jury's question whether "it is our job to question the value of [of a stolen vehicle] based on the California price vs. the Colorado price" does not reflect a fundamental misunderstanding of the term "value" that would require definition of this commonly understood term.

People v. Oram, 217 P.3d 883 (Colo. App. 2009). During deliberations, the jury asked whether "the bond agreement legally g[a]ve the bonding company or its agents the right to enter into the residence" at issue. Because this question asked for a conclusion of law, the court's response that it did "not necessarily" give defendant the right to enter, but that the agreement could be considered in deciding whether the elements of the affirmative defense were present, was a proper response.

People v. Manier, 197 P.3d 254 (Colo. App. 2008). Although the "knowingly" mens rea in first-degree aggravated motor vehicle theft, §18-4-409(2), does not necessarily apply to all eight aggravators, it does apply to (2)(h)'s display-of-fictitious-license-plates aggravator because in another statute, the General Assembly declares that the display of unauthorized license plates is not unlawful unless it is done knowingly. *Here*: trial court erred in responding to a jury question that defendant did not have to know that the license plates displayed on the stolen truck did not belong to it.

People v. Zamarripa-Diaz, 187 P.3d 1120 (Colo. App. 2008). The trial court did not abuse its discretion or violate defendant's rights to due process by reviewing juror questions and then posing the questions to witnesses without first consulting with the parties. Although it would have been better practice for the trial court to consult with counsel before asking the jurors' questions, nothing in Crim.P. 24(g) or Medina v. People, 114 P.3d 845 (Colo. 2005) requires such consultation in order to satisfy the requirements of due process.

People v. Bass, 155 P.3d 547 (Colo. App. 2006). Trial court's response to jury questions regarding complicity, in which the court instructed the jury to consider the instructions as a whole, was not error where: (1) the question did not indicate that the jury fundamentally misunderstood the complicity knowledge requirements, and (2) a portion of the question would have required application of the facts of the case to the complicity instruction.

People v. Isom, 140 P.3d 100 (Colo. App. 2005). During deliberations, jury asked to view the videotaped interview, and the court allowed the jurors to do so without securing the presence of defendant and his attorney. Defendant's presence would have been useless, since he was represented, and court had no reason to consult with him before deciding to allow the jury to review the tape; court was not required, as a matter of due process, to secure defendant's presence. While the court erred in failing to consult with defense counsel before allowing the jury to view the tape, the error was harmless, since the court properly responded to the jury's inquiry, there is no indication that the presence of counsel would have altered the court's decision, and there is no indication defendant was prejudiced (the jury did not convict defendant of all the charges).

People v. Wilford, 111 P.3d 512 (Colo. App. 2004). Jury submitted question during deliberations asking whether "carrying a gun" is the same as "using" a gun, in the context of the phrase "by use of force or threat or intimidation." Court responded that merely carrying a gun is not necessarily "use," but "use" does not have to include firing, pointing, or even touching the gun. Court went on to state that the question is whether defendant or a confederate used a gun to force, threaten, or intimidate the victim, and whether the facts rise to that level of "use" is a question for the jury to decide. This response was appropriate because the jury indicated it was confused about the meaning of the phrase "use of force" and court's response reflected an accurate statement of the law. Even if it was error for the court to have answered a jury question during deliberations without obtaining defendant's presence, any error was harmless because defense counsel was present and had opportunity to review and object to the response, and the response given was proper.

People v. Phillips, 91 P.3d 476 (Colo. App. 2004). Where defendant acceded to the court's response, he is precluded from raising this issue on appeal. Where the original instructions adequately informed the jury about the mental state of "knowingly," no additional instruction was required.

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). In securities fraud trial, trial court instructed jury, correctly, that whether a fact was material depended on whether a reasonable investor would consider it important. Jury asked whether the standard was "based on each individual investor and the evidence presented regarding each individual sale." The jury's question did not reflect a fundamental misunderstanding of the trial court's instructions, and therefore, the court did not err in referring the jury back to the original instructions.

People v. Madden, 87 P.3d 153 (Colo. App. 2003), rev'd other grounds, 113 P.3d 452 (Colo. 2005). No plain error in the trial court referring the jury back to the instructions in response to a jury question. Because the defense agreed with the court's response, if there was error, it was invited.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). During deliberations, jury asked multiple questions about the meaning of "intent to promote or facilitate" in the complicity instruction. Trial court properly referred jury back to the instructions because the questions reflected a general lack of understanding of intent.

People v. Gilmore, 97 P.3d 123 (Colo. App. 2003). Where the original instructions adequately inform the jury of a definition, no additional instruction is recommended or required when the jury asks for additional information. *Here*: court did not have to instruct the jury that "mere presence" does not constitute possession or that the defendant could not be found guilty "by association."

People v. Medina, 72 P.3d 405 (Colo. App. 2003). The trial court did not err by responding to a jury question by giving an additional instruction that complicity applied to the charge of attempt to commit aggravated robbery. The response was legally accurate and did not purport to answer any factual question.

People v. Rivers, 70 P.3d 531 (Colo. App. 2002). Under the invited error doctrine, defendant's request to respond to a jury question by referring them back to the original instructions bars him from complaining on appeal that the referral was improper.

People v. Grace, 55 P.3d 165 (Colo. 2001), overruled other grounds, Gibbons v. People, 2014 CO 67. A defendant has a constitutional right to be personally present (in addition to being represented by counsel) when a trial court responds to jury questions. *Here*: defendant's absence was harmless beyond a reasonable doubt because the trial court's responses to two questions were appropriate, and defendant suffered no prejudice from his absence. The trial court appropriately informed the jury that it could not provide the jurors with a PH transcript that had not been admitted into evidence; and appropriately requested that the jurors continue to deliberate after they inquired about their options regarding deadlock.

VERDICTS

Generally

People v. Martinez, 2024 COA 34. The due process clause prohibits the trial court from relying on the jury's answer to the verdict question/interrogatory to enter a conviction on an uncharged lesser nonincluded offense even where defendant was on notice of that fact. Here: trial court erred by relying on the jury's answer to an at-risk-person interrogatory to enter a conviction for the uncharged lesser nonincluded offense of criminal negligence resulting in the death of an at-risk person. This amounted to a constructive amendment and resulted in a violation of the defendant's due process rights. Because the constructive amendment was not harmless under any standard of review, the COA reversed the conviction for criminal negligence resulting in the death of an at-risk person and remanded the case for the trial court to enter a conviction for criminally negligent homicide.

People v. Cordova, 199 P.3d 1 (Colo. App. 2007). A party waives the requirement that jury foreperson sign a verdict form where the jury orally announces a unanimous verdict in the presence of the party and the party fails to object to the form of the verdict.

People v. Tweedy, 126 P.3d 303 (Colo. App. 2005). Trial court has authority before accepting a verdict and before discharging jury to send it back to correct a mistake or to clarify an ambiguity in its verdict.

Implied Acquittal Rule

People v. Aguilar, 2012 COA 181. Implied acquittal rule did not apply because jury expressly deadlocked on the greater charge. *Here:* defendant's jury deadlocked on felony murder and convicted him of the lesser included offense of first-degree burglary; he argued that the "implied acquittal rule" prevented his retrial on felony murder. The implied acquittal rule bars a retrial only where defendant is charged with greater and lesser offenses, the jury finds him guilty of the lesser offense, and the jury is silent as to the greater charge.

INCONSISTENT VERDICTS

People v. Frye, 898 P.2d 559 (Colo. 1995). Inconsistent verdicts of guilt and acquittal are allowed, except under the narrow terms provided in §18-2-206(2).

People v. Gonzales, 926 P.2d 153 (Colo. App. 1996); People v. Lee, 914 P.2d 441 (Colo. App. 1995). *Frye* does not preclude defendant from challenging 2 guilty verdicts as legally or logically inconsistent.

People v. Ramirez, 18 P.3d 822 (Colo. App. 2000). Inconsistent verdicts occur only when the elements of one crime necessarily negate elements of the other crime. *Here:* conviction for first-degree burglary is not inconsistent with conviction for second-degree assault with provocation.

People v. Shockey, 2023 COA 121. Jury findings that defendant was guilty of second-degree murder but did not use a deadly weapon (in a special interrogatory) were inconsistent where the victim was shot and the jury was not instructed on complicity. The majority concluded this required vacation of the conviction, while the dissent argued the remedy should be a new trial. *[Cert Accepted (9/30/24) in case #24SC117: (1) Whether any claim that the jury's findings are inconsistent was waived where the findings were read aloud by the district court and the defendant did not object until after the jury was discharged; (2) Whether a finding on a special interrogatory that the prosecution had not proven beyond a reasonable doubt the defendant used, or possessed and threatened the use of, a deadly weapon is logically and legally inconsistent with a conviction for second degree murder or negates an element of that offense; (3) Whether the appropriate remedy for an inconsistent*

verdict and special interrogatory finding is vacation of the conviction and entry of a judgment of acquittal or reversal of the conviction and remand for a new trial (Brock Swanson, FAAG)].

People v. Struckmeyer, 2020 CO 76: Following *Rigsby*, CSC holds that the guilty verdict for F3 child abuse (knowingly or recklessly) and the guilty verdict for F4 child abuse (criminal negligence), even if logically inconsistent, are not legally inconsistent. By returning a guilty verdict on child abuse (knowingly or recklessly), the jury, as a matter of law, necessarily found that he acted with criminal negligence. Even if there is a logical inconsistency between acting knowingly and acting with criminal negligence, and between acting recklessly and acting with criminal negligence, no legal inconsistency exists in either scenario based on §18-1-503(3).

People v. Delgado, 2019 CO 82. To avoid mutually exclusive guilty verdicts, the trial court should instruct the jury that defendant may not be convicted of multiple crimes when the elements of those crimes are mutually exclusive. *Here:* convictions for robbery and theft from a person were fatally inconsistent because robbery requires a taking by force and theft from a person requires a taking without force; remedy for inconsistent verdicts is reversal and retrial because the inconsistency in this case makes it impossible to determine what the jury found. Trial court's error in accepting legally and logically inconsistent guilty verdicts was plain; error was obvious, and cast serious doubt on reliability of convictions, given that it was impossible to know whether jury believed that defendant did or did not use force.

People v. Rigsby, 2018 CO 74. Even if convictions are arguably logically inconsistent, they are fine if they are legally consistent. *Here:* jury found defendant guilty of 2 counts of second degree assault and 1 count of third degree assault based on same criminal conduct. §18-1-503(3) sets up a hierarchical system of culpable mental states in which: (1) "intentionally" or "with intent" is the most culpable, "knowingly" is the next most culpable, "recklessly" is the next most culpable, and "criminal negligence" is the least culpable; and (2) proving a culpable mental state necessarily establishes any lesser culpable mental state(s). Pursuant to §18-1-503(3), then, by returning a guilty verdict on count 1 and finding that defendant acted with intent, the jury, as a matter of law, necessarily found that he acted with criminal negligence, and by returning a guilty verdict on count 2 and finding that defendant acted recklessly, the jury, as a matter of law, necessarily found that he acted with criminal negligence. Even if each of the guilty verdicts for second degree assault is logically inconsistent with the guilty verdict for third degree assault, no legal inconsistency exists. And guilty verdicts that are legally consistent are not mutually exclusive.

People v. Zweygardt, 2012 COA 119. Inconsistency between a conviction and an acquittal is not grounds for reversal. Two convictions are fatally inconsistent only when an element of one negates an element of the other. Appellate courts review *de novo* whether two convictions are fatally inconsistent. *Here:* convictions for vehicular assault, negligent homicide, and careless driving (resulting in death), all against a single victim, are not fatally inconsistent, because under §18-1-503(3), all of the requisite mental states are equal to or included within recklessness.

People v. Randell, 2012 COA 108. Under §18-2-206(2), defendant cannot be convicted of conspiracy to commit a crime if he is acquitted of the substantive crime and the evidence supporting the conspiracy is the same as that supporting the substantive crime. In determining whether separate and distinct evidence supports conspiracy and the substantive crime, an appellate court may consider any evidence other than that concerning the substantive crime. If the verdicts are consistent in any view of the evidence, the presumption is that the jury took that view. *Here:* conviction for conspiracy to commit a computer crime was not fatally inconsistent with acquittal on the substantive offense of computer crime, because the evidence supporting the existence of a conspiracy was different from evidence supporting commission of the substantive offense.

People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010). Defendant's convictions for attempted murder after deliberation and assault under heat of passion were not legally inconsistent because provocation is not a

necessary element of assault. Although attempted murder and assault require different specific intents, jury's verdict for attempted murder and assault against same victim were not inconsistent because a defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). Defendant's conviction for conspiring to murder the victim was proper despite the fact that he was acquitted of attempting to murder that same victim. Evidence of the attempted murder was not the "sole evidence" of the conspiracy count within the meaning of §18-2-206(2).

Candelaria v. People, 148 P.3d 178 (Colo. 2006). With regard to first degree murder, a jury's findings of extreme indifference and specific intent with regard to a particular individual are neither logically nor legally inconsistent.

People v. Simpson, 93 P.3d 551 (Colo. App. 2003). Guilty verdicts for attempted second degree murder and first degree burglary were not inconsistent where a reasonable jury could have found that defendant both entered or remained in his ex-wife's home with the intent to menace and, while there, took a substantial step toward causing her death.

People v. Jones, 990 P.2d 1098 (Colo. App. 1999). During a robbery, defendant shot and killed the victim. He was convicted of felony murder, reckless manslaughter, robbery, and conspiracy to commit robbery. There is no legal or logical inconsistency between felony murder and reckless manslaughter, but defendant can only sustain one homicide conviction for one death.

People v. Espinoza, 989 P.2d 178 (Colo. App. 1999). For purposes of applying the inconsistent-verdicts doctrine, neither a mistrial (following a deadlock) nor a prosecutor's subsequent decision to dismiss constitutes an acquittal. A conviction for conspiracy to commit arson is not inconsistent with a deadlock on charge of arson. If the defendant were retried for arson on the same evidence and acquitted, he would have a basis for collateral attack.

MERGER & LESSER-INCLUDED OFFENSES GENERALLY: §18-1-408(5), (6)[11]

Whiteaker v. People, 2024 CO 25. First degree criminal trespass of a dwelling is a lesser-included offense of second-degree burglary. The CSC confirmed that when a defendant is convicted of both a greater offense and a lesser-included offense in violation of double jeopardy, the remedy on appeal is automatic reversal of the judgment of conviction as to the lesser-included offense and merger of the two offenses, such that only the greater remains. The CSC acknowledged its opinion is in tension with *Scott* and traditional obviousness analysis but decided not to follow it. CSC also stated it was not adding to structural error but creating a new category of reversal for double jeopardy sentencing errors specifically (confined to these types of errors). Explicitly overruled People v. Garcia, 940 P.2d 357 (Colo. 1997).

Pellegrin v. People, 2023 CO 37. CSC holds that §18-1-408(5)(c) does not create a "single distinction test." An offense is included in another offense under §18-1-408(5)(c) if it differs from the offense charged only in the respect that: (1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist. *Here:* CSC concludes that because the offenses of harassment and stalking differ in more ways than the two distinctions identified in §18-1-408(5)(c), harassment is not an included offense of stalking under that statutory provision and defendant's convictions for harassment and stalking do not merge.

[11] For merger and lesser-included issues on specific crimes, please see the Lookit Crime Section. The cases here address just the general law on the issues.

People v. Larsen, 2023 COA 28. COA clarifies that, when multiple convictions are entered on multiple jury verdicts and some counts merge, the previously merged counts can be reinstated if defendant is successful on a post-conviction claim.

People v. Robinson, 2022 COA 124. Defendant appeals four convictions for insurance fraud and contends that, because those convictions are based on a single insurance claim, they are multiplicitous in violation of double jeopardy; she also contends the trial court reversibly erred by allowing a detective to testify that he did not think she was telling the truth when he spoke to her during his investigation. COA concluded the trial court did not plainly err by allowing the detective's testimony. But COA concludes that the insurance fraud statute, the complaint and information filed by the prosecution, and the evidence and argument presented at trial all support the conclusion that her three convictions for making false statements under §18-5-211(1)(e), must merge into one conviction for insurance fraud under §18-5-211(1)(b).

People v. Dominguez, 2019 COA 78. Trial court does not commit plain error by failing to merge convictions for greater and lesser-included offenses where the evidence shows two separate and temporally distinct instances of prohibited conduct.

People v. Jamison, 2018 COA 121. Unless a statute expressly authorizes multiple punishments for the same criminal offense, Double jeopardy prohibits "the imposition of multiple punishments for the same criminal conduct." In Colorado, the legislature has determined that a defendant may not be convicted of 2 offenses for the same conduct if "[o]ne offense is included in the other." Defendant was not entitled to lesser nonincluded offense instructions for second degree possession and introduction of contraband because there was no rational evidentiary basis for the jury to conclude that the contraband item – a toothbrush shank – could cut fence or wire, as required by the lesser nonincluded offenses.

People v. Thompson, 2018 COA 83. Two convictions for securities fraud were multiplicitous because the prosecution did not argue two factually distinct sets of facts on each count; no plain error because no Colorado case or well-settled legal principle had addressed the unit of prosecution under Colorado securities law.

People v. Rock, 2017 CO 84; Page v. People, 2017 CO 88. Unless the prosecution or defense requests a lesser-included-offense instruction, the court is not obligated to give one. Corollary to, and consistent with, our primary observation in *Reyna-Abarca*—that one offense must be considered included in another offense of which its elements are logically a subset—is the proposition that an offense, the commission of which is necessarily established by establishing the elements of a greater offense, must also be included in that greater offense. To the extent that a lesser offense is statutorily defined in disjunctive terms, effectively providing alternative ways of being committed, any set of elements sufficient for commission of that lesser offense that is necessarily established by establishing the statutory elements of a greater offense constitutes an included offense. Our use of the term "contains" in *Reyna-Abarca* was intended, and should be understood, in the sense of "necessarily contains," or "requires." In order to be included, every alternative way of committing a lesser offense, only one of which is "required," therefore need not be "contained" in the statutory definition of the greater offense. To be an included offense, it is enough that any particular set of elements sufficient for conviction of that offense be so contained. Multiple convictions for two separate offenses the elements of one of which constitute a subset of the elements of the other can clearly stand if the offenses were committed by distinctly different conduct. Separate convictions for even the same offense are permissible if it was committed more than once.

People v. Welborne, 2017 COA 105. Criminal mischief is not a lesser included offense of first-degree arson because criminal mischief contains an element that is not required for first-degree arson, that the charged acts occur "in the course of a single criminal episode."

People v. Hoggard, 2017 COA 88. Second degree forgery is a lesser-included offense of felony forgery under the applicable single-distinction test for lesser offenses described by §18-1-408(5)(c). COA rejected the previous decision People v. Riley, 2015 COA 152, which incorrectly relied exclusively upon the strict elements test for lesser offenses described by §18-1-408(5)(a).

People v. Roman, 2017 CO 70. Defendant was convicted of first degree assault. The jury was also instructed on the lesser included offense of intentional second degree assault at defendant's request. The trial court denied defendant's request for an instruction on the lesser included offense of reckless second degree assault. Any error in failing to give the instruction on reckless second assault was harmless for two reasons: (1) the jury did not merely convict defendant of the charged offense because it had no other option. Rather, it rejected a comparable lesser included offense in favor of the charged offense; and (2) it was never defendant's theory of the case that he committed reckless second degree assault. Rather, he steadfastly asserted that he did not cause the victim's injuries.

Reyna-Abarca v. People, 2017 CO 15. Unpreserved double jeopardy claims can be raised for the first time on appeal and be reviewed for plain error. In a double jeopardy analysis, an offense is a lesser included offense of another offense if the elements of the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense. Abrogated Meads v. People, 78 P.3d 290 (Colo. 2003).

People v. Geisick, 2016 COA 113. A defendant waives any claim that the evidence was insufficient to support a conviction for a lesser nonincluded offense when he asks for the instruction to be given to the jury because the request for a lesser nonincluded instruction affirmatively represents to the trial court that the evidence is sufficient to find him guilty of the offense beyond a reasonable doubt.

People v. Davis, 2015 CO 36M. Plain error standard applies where defendant did not object to trial court's failure to merge defendant's possession and distribution of a controlled substance counts. Plain error is obvious and substantial and must have so undermined the fundamental fairness of the proceeding so as to cast serious doubt on the reliability of the judgment to merit reversal. The double jeopardy clauses prohibit multiple punishments for the same offense. Although the legislature may define multiple offenses and authorize multiple punishments based on the same behavior, a defendant may not be punished multiple times for the same conduct if one offense is included in the other. An offense is included in another if proof of the same or less than all the facts required to establish the commission of the greater offense establishes the lesser offense.

People v. Montante, 2015 COA 40. A doctor who provided a false physician's certification recommending medical marijuana to an undercover police officer was not entitled to an instruction on the lesser nonincluded offense of medical marijuana registry fraud. He could not be convicted of this offense while being acquitted of attempt to influence a public servant.

People v. Duran, 272 P.3d 1084 (Colo. App. 2011). Attempted first-degree murder - extreme indifference is a lesser-included offense of first-degree murder - extreme indifference. For that reason, where defendant is charged with the greater offense, instruction on the lesser attempt cannot constitute a constructive amendment of the charge.

Brown v. People, 239 P.3d 764 (Colo. 2010). A defendant who maintains his innocence throughout trial may seek an inconsistent jury instruction on both a lesser included offense and voluntary intoxication provided there is a rational basis for the instruction in the evidence. *Here:* there was no rational basis in the evidence for the giving of a lesser included attempted second degree murder instruction on defendant's theory that his firing one shot past the victim's ear before striking her body with subsequent shots suggested a lack of intent to cause death.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). A defendant has the right to a lesser nonincluded offense instruction if the record provides a rational basis to support a verdict acquitting him of a greater offense and convicting him of the lesser offense. However, the mere chance that a jury may reject uncontroverted testimony and convict on the lesser charge does not require the trial court to instruct the jury on the lesser charge. There is also no right to a jury instruction on a lesser offense if the element that distinguishes the greater from the lesser offense is uncontested. *Here:* because there was no rational basis on which the jury could have acquitted defendant of harassment by stalking but convicted him of telephone harassment, the court properly refused to instruct the jury on the lesser nonincluded offense.

People v. Zamarripa-Diaz, 187 P.3d 1120 (Colo. App. 2008). Although the trial court erred under People v. Bachica, 940 P.2d 965 (Colo. App. 1996), in instructing the jury that it could not consider the lesser-included offense of second degree burglary until it first unanimously acquitted defendant of first degree burglary, the error did not rise to plain error.

People v. Graybeal, 155 P.3d 614 (Colo. App. 2007). To determine whether an offense is truly a lesser-included offense, §18-1-408 requires a statutory comparison of the elements of both the greater and lesser offenses (the "strict elements test"). Under this test, if proof of the elements of the greater offense necessarily proves the lesser offense, then the lesser offense is lesser-included. If however, each of the statutory offenses requires proof of at least one more fact than the other, the strict elements test is not satisfied, and it is presumed that the defendant could be convicted of both offenses.

People v. Ortiz, 155 P.3d 532 (Colo. App. 2006). False imprisonment is a lesser non-included offense of second degree kidnapping: (1) the offense of false imprisonment contains an element that is not contained in the definition of second degree kidnapping of a child, namely, the absence of consent; (2) defendant argued that parental non-consent is an implied element of second degree kidnapping of a child; however, an implied element can only be recognized by reliance on the doctrine of logical necessity if it is impossible to conceive of a scenario in which proof of the enumerated elements would not also necessarily prove the implied element; and (3) the dispositive question is whether, in every case, the offense of second degree kidnapping of a child in violation of §18-3-302(2) impliedly requires proof that the perpetrator took the child without the consent of the parent. COA concluded that it does not and determined that the trial court correctly instructed the jury that false imprisonment is a lesser nonincluded offense of second degree kidnapping committed in violation of §18-3-302(2).

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). There was no evidentiary basis for an instruction on theft as a lesser included offense of robbery, since the evidence established that the defendant shot the victim as a means of retaining possession of the victim's money.

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). Under *Apprendi*, sentence enhancers need not be treated as "elements" for purposes of merger and double jeopardy.

People v. Wilford, 111 P.3d 512 (Colo. App. 2004). Trial court did not abuse its discretion in rejecting defendant's tendered jury instruction defining "confederate," as found in §18-4-302(1) (c). The term is commonly understood and within the comprehension of the jury, and defendant's tendered instruction (which was similar to the definition of conspiracy) imposed an additional element not required by the offense.

People v. Beatty, 80 P.3d 847 (Colo. App. 2003). Court did not err in failing to instruct the jury that attempted first-degree assault and illegal discharge of a firearm are lesser-included offenses of attempted first-degree murder after deliberation, since the lesser offenses include elements that are not required to prove attempted first-degree murder.

People v. J.A.M., 43 P.3d 673 (Colo. App. 2001). In a bench trial, it was reversible error for the trial court to consider a lesser-included offense sua sponte, where neither party had requested it.

Prosecution Requests

People v. Garcia, 940 P.2d 357 (Colo. 1997). When the prosecution requests an instruction on a lesser uncharged offense, the decision turns on whether defendant was notified that he could be called upon to defend against that charge. As a matter of law, defendant is given proper notice of an uncharged offense that meets the definition of a lesser-included offense. If the uncharged offense is a lesser non-included, the court must look to the charging document, consider the greater offense as charged, and determine whether the defendant was provided with sufficient notice of the lesser offense.

People v. Buell, 2017 COA 148. A trial court is only required to give a lesser included offense instruction when there is a rational basis in the evidence to support a verdict acquitting him of the greater offence and convicted him of the lesser offense. The mere chance that a jury may reject uncontroverted testimony and convict on the lesser charge does not require the trial court to instruct the jury on the lesser charge. A reviewing court must determine whether a jury could have rationally acquitted of the greater and convicted of the lesser.

People v. Scott, 10 P.3d 686 (Colo. App. 2000). The trial court did not err in giving a lesser-included offense instruction on third-degree assault, even though it found insufficient evidence on the charged offense of second-degree assault, because the instruction was requested by the prosecution, the lesser offense was ascertainable from the charging instrument, and (even though clearly an attempt to salvage a weak case) the lesser offense was not remote in degree from the charged offense.

People v. Tow, 992 P.2d 665 (Colo. App. 1999). Defendant ran a stop sign, killing people in another car. He was tried before the court on a charge of vehicular homicide. After discussing whether criminally negligent homicide was a lesser-included offense, the court considered and convicted defendant of that crime. Because defense counsel heard the discussion between the prosecution and court, he had notice that criminally negligent homicide might be considered. He could have addressed that offense during closing arguments.

People v. Satre, 950 P.2d 667 (Colo. App. 1997). In first-degree burglary case, the prosecution requested a lesser-offense instruction on first-degree criminal trespass. The trial court gave this instruction over the defendant's objection. The court of appeals reversed because, unlike *Garcia*, the charging document gave the defendant no notice that "dwelling" would be an issue.

Defense Requests

People v. Robinson, 2017 COA 128M. Colorado's approach to lesser non-included offenses remains entirely judicially created. Although an ordinary theory-of-the-case instruction must be given if the record contains any evidence to support the theory, a defendant seeking an instruction on a lesser non-included offense faces a higher burden: just as with lesser included offenses, the jury should be instructed on a lesser non-included offense only where there exists a rational evidentiary basis for the jury to simultaneously acquit the defendant of the greater charged offense and convict the defendant of the lesser offense. Here, there was no rational basis for the jury to simultaneously acquit the defendant of felony menacing and convict him of disorderly conduct. Therefore, the trial court did not err in refusing to instruct the jury on the lesser non-included offense of disorderly conduct with a deadly weapon. A defendant is not entitled to an instruction on a lesser non-included offense that contradicts the defendant's sworn testimony at trial. Contrary to the COA's opinion, Brown v. People, 239 P.3d 764 (Colo. 2010), only applies in the context of lesser included instructions, and a defendant may not receive an instruction on a lesser non-included offense if it contradicts his or her trial testimony.

People v. Jompp, 2018 COA 128. Trial court properly denied defendant's request for a resisting arrest instruction as a lesser non-included to escape because defendant's arrest had already been effectuated when he ran away. The undisputed record evidence was that defendant was in custody. He had already submitted to the police officer's instructions, was handcuffed, searched, and led by the arm to a patrol car for transport to jail. By the time he ran from the officer, he was already under the officer's sufficient physical control by physical restraint *and* by his submission to control such that there was a reasonable assurance that he would not leave.

People v. Naranjo, 2017 CO 87. Colorado's approach to lesser non-included offenses remains entirely judicially created. Although an ordinary theory-of-the-case instruction must be given if the record contains any evidence to support the theory, a defendant seeking an instruction on a lesser non-included offense faces a higher burden: just as with lesser included offenses, the jury should be instructed on a lesser non-included offense only where there exists a rational evidentiary basis for the jury to simultaneously acquit the defendant of the greater charged offense and convict the defendant of the lesser offense. A defendant is not entitled to an instruction on a lesser non-included offense that contradicts the defendant's sworn testimony at trial. Contrary to the COA's opinion, Brown v. People, 239 P.3d 764 (Colo. 2010), only applies in the context of lesser included instructions, and defendant may not receive an instruction on a lesser non-included offense if it contradicts his trial testimony. *Here:* there was no rational basis for the jury to simultaneously acquit defendant of felony menacing and convict him of disorderly conduct. Therefore, the trial court did not err in refusing to instruct the jury on the lesser non-included offense of disorderly conduct with a deadly weapon.

People v. Nozolino, 2014 COA 95. A lesser non-included offense instruction is tantamount to a theory of the case instruction. Because defendant is entitled to a theory of the case instruction, a lesser non-included instruction is warranted if it is supported by the evidence, defendant requests it, and there is a rational basis for the jury to acquit the defendant of the offense charged and simultaneously find him guilty of the lesser offense."

People v. Wartena, 2012 COA 12. Whether there is sufficient evidence to support instructing the jury on a lesser offense is a factual inquiry reviewed for an abuse of discretion. However, there must also be a rational basis in the evidence to support a verdict acquitting defendant of a greater offense and convicting him of the lesser offense. To the extent that inquiry involves a comparison of statutory elements, it is a question of law subject to de novo review. A defendant does not have an absolute due process right to be tried on each, and every, lesser charge he requests. Rather, the lesser nonincluded offense doctrine reflects the public policy

rationale that juries should not face an all-or-nothing decision between convicting a defendant as charged and acquitting him entirely, particularly when it is clear that some crime has been committed and defendant is not completely blameless. Thus, due process is satisfied where the court gives lesser offense (included or non-included) instructions that embody a defendant's theory of the case. *Here:* as the lesser offense instructions given could have allowed the jury to acquit defendant of the purportedly overcharged offenses while convicting him of a lesser charge consistent with his theory of defense, he was not entitled to receive instructions on the lesser nonincluded offenses of his choosing.

People v. Brown, 218 P.3d 733 (Colo. App. 2009). A lesser included offense instruction is not precluded by a defendant's testimony denying involvement in the offense; however, a defendant is entitled to such an instruction only where there is evidence to support a rational verdict acquitting him of the greater offense and convicting him of the lesser.

People v. Rubio, 222 P.3d 355 (Colo. App. 2009). A defendant is entitled to a lesser non-included offense instruction if there is a rational basis in the evidence to support a verdict acquitting him of a greater offense and convicting him of the lesser offense. *Here*: in a case charging attempted extreme indifference murder, the court erred in not also instructing the jury on the lesser non-included offense of illegally discharging a firearm. The principal difference between the two crimes involves the degree of wantonness or recklessness: attempted extreme indifference murder requires proof of "universal malice manifesting extreme indifference to the value of human life generally," while the firearms offense requires only that defendant "knowingly or recklessly discharged" a gun into a dwelling. The distinguishing element-whether defendant acted with "universal malice" or lesser recklessness-was in dispute and was the principal issue for the jury to decide. The error was not prejudicial as to the charges relating to two victims who were shot, because the jury was instructed on other comparable lesser non-included offenses (i.e., reckless second degree assault); it was prejudicial as to the charges relating to victims where lesser offense instructions were not given.

People v. Gallegos, 226 P.3d 1112 (Colo. App. 2009). An instruction telling the jury that it may acquit of the charged offense and convict only of the lesser, non-included offense is not required when: (1) jury was instructed to consider each charge independently; and (2) defendant's counsel explained in closing argument that the defendant was seeking a not guilty verdict on the charged offense but conceded guilt on the lesser non-included.

Arko v. People, 183 P.3d 555 (Colo. 2008). The decision whether to request a lesser non-included offense instruction is a tactical decision that rests with defense counsel after consultation with the defendant. *Here:* where defendant and his attorney disagreed about whether a lesser non-included offense instruction should be submitted to the jury, trial court erred in deferring to defendant's decision on the matter. Reversed People v. Arko, 159 P.3d 713 (Colo. App. 2006).

People v. Chavez, 190 P.3d 760 (Colo. App. 2007). There was no rational basis for a lesser included instruction (alleging possession of a smaller quantity of drugs) where such an instruction would have been inconsistent with defendant's theory of defense (that he did not possess any of the drugs found in his apartment).

People v. Lowry, 160 P.3d 696 (Colo. App. 2007). A lesser non-included offense need not arise from the same facts as the charged offense.

People v. Graybeal, 155 P.3d 614 (Colo. App. 2007). Under the "strict elements test," possession of marijuana (§18-18-406(1)) is not a lesser-included offense of transferring marijuana to a person under the age of fifteen (§18-18-406(7)(b)). Under the "strict elements test," possession of marijuana (§18-18-406(1)) is not a lesser-included offense of contributing to the delinquency of a minor (§18-6-701).

Grissom v. People, 115 P.3d 1280 (Colo. 2005). A defendant is entitled to an instruction on the lesser included offense of reckless manslaughter under a complicity theory where there is some evidence that the principal and the complicitor entered into a common enterprise to commit a crime. *Here:* the following evidence was sufficient: the principal/shooter and defendant engaged in a common enterprise to at least assault the victim to collect an alleged debt; defendant believed he was helping the principal collect his debt by a means short of murder; and the principal and defendant acted recklessly in their attempts during the days leading up to the murder to collect the debt.

People v. Larkins, 109 P.3d 1003 (Colo. App. 2004). Trial court properly rejected defendant's tendered lesser-included offense instruction on second degree criminal trespass. Where defendant broke into victim's home and committed theft, there was no rational basis to acquit him of burglary but convict him only of trespass because the intent to form the theft could have been formed either before the unlawful entry or while the defendant unlawfully remained, either of which was supported by the evidence.

People v. Trujillo, 83 P.3d 642 (Colo. 2004). Defendants have a due process right to have the jury instructed on lesser non-included offenses in conjunction with a theory of defense, if there is a rational basis in the evidence to support a verdict acquitting them of a greater offense and convicting them of the lesser offense. The rationale for allowing such an instruction is to prevent the jury from convicting defendant of a greater crime than he or she has committed because the jury had no other option.

People v. Simpson, 93 P.3d 551 (Colo. App. 2003). Trial court did not err in failing to give instruction on lesser offense of illegal discharge of a firearm as that offense contemplates shootings directed at occupied structures or vehicles from outside such premises or vehicles, and there was no evidence here that the shots were fired from outside the house.

Mata-Medina v. People, 71 P.3d 973 (Colo. 2003). In a trial for second-degree murder, it was error to reject defendant's jury instruction on criminally negligent homicide. However, this error was harmless as a matter of law where defendant was convicted of second-degree murder and the jury was instructed on the intermediate offense of reckless manslaughter. The jury's rejection of an intermediate offense constitutes an implicit rejection of the omitted lesser offense.

People v. Hall, 59 P.3d 298 (Colo. App. 2002). Defendant was charged with reckless manslaughter, and requested an instruction on reckless endangerment. Defendant is entitled to a lesser offense instruction if there is a rational basis in the evidence to support a verdict acquitting him of the greater offense and convicting him of the lesser. There is no right to a jury instruction on a lesser offense if the element that distinguishes the greater offense from the lesser offense is uncontested. *Here*: trial court properly refused the requested instruction, since there was no rational basis in the evidence upon which the jury could have acquitted him of reckless manslaughter and convicted him of reckless endangerment. Because it was conceded that defendant caused the victim's death, the facts could not support a conviction of reckless endangerment even if defendant were acquitted of reckless manslaughter.

People v. Dotson, 55 P.3d 175 (Colo. App. 2002). Trial court properly refused to instruct on the lesser offense of aggravated robbery with a simulated weapon where the only evidence about the guns was a description, and the victim testified that he heard the magazines "click" when they were loaded. There was no evidence to suggest that the guns were not real.

People v. Medina, 51 P.3d 1006 (Colo. App. 2001), aff'd other grounds, 71 P.3d 973 (Colo. 2003). Where defendant was convicted of second-degree murder, the trial court's failure to instruct the jury on the lesser-included offense of criminally negligent homicide was harmless error where the jury rejected the next lower included offense of reckless manslaughter, on which there was an instruction.

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). The trial court properly refused to instruct the jury on the lesser non-included offense of reckless endangerment. Since it was undisputed that the defendant's actions caused the death of his child, there was no rational basis upon which a jury could have acquitted on the charged offense of reckless child abuse resulting in death and convicted on reckless endangerment.

People v. Gordon, 32 P.3d 575 (Colo. App. 2001). Defendant admitted firing 3 shots at his girlfriend but claimed that he did so only to put her out of her misery after she fired a shot into her head. She died as a result of 4 gunshots to the head; the coroner could not testify that any one shot was the cause of death. *Here:* trial court properly rejected defendant's tendered instruction on the lesser offense of "aided suicide." The term "aid," as used in the aided suicide statute, must be limited to passive aid, i.e., providing the means by which the victim then goes forward and kills himself. It cannot include acts that actually cause death. Because defendant fired three shots at the victim, any one of which could have been a cause of death, there was no evidence that defendant merely provided the means by which the victim shot herself, and defendant's tendered instruction was properly refused.

People v. Williams, 23 P.3d 1229 (Colo. App. 2000). Where defendant is charged with first-degree murder and he requests a lesser non-included instruction on second-degree assault (which includes a deadly weapon element), he effectively waives an objection that he did not have sufficient notice of the deadly weapon element in the first-degree assault lesser non-included offense instruction submitted by the prosecution.

People v. Garcia, 17 P.3d 820 (Colo. App. 2000). Where defendant successfully excluded evidence of other crimes on the basis that it would be unfairly prejudicial under CRE 403, and thus deprived the prosecution of the evidentiary basis for a particular lesser non-included offense, the trial court properly refused defendant's request for a less serious, lesser non-included offense instruction.

People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000). No error in refusing to submit lessers of reckless manslaughter and criminally negligent homicide because record did not support them. All evidence indicated that the defendant acted knowingly.

People v. Ramirez, 18 P.3d 822 (Colo. App. 2000). The mere chance that a jury may reject uncontroverted testimony and convict on a lesser-included offense does not require the trial court to instruct the jury on the lesser charge. *Here:* victim's uncontroverted testimony that defendant placed knife to her throat, cut her finger, and threatened to kill her did not support an instruction on third-degree assault because the record did not support a finding that the assault was accompanied by mere criminal negligence.

People v. Castro, 10 P.3d 700 (Colo. App. 2000). The trial court erroneously refused to instruct on the lesser offense of criminally negligent homicide on the ground that this offense was incompatible with defendant's assertion that he acted in self-defense. The jury could have found that the circumstances under which defendant voluntarily fired his gun amounted to criminal negligence where: (1) defendant was intoxicated at the time of the shooting; (2) he was much older than victim; (3) he remembered feeling a hard hit to his face, falling, and seeing the flash from the gun barrel but did not remember shooting the gun; and (4) there was evidence of swelling on the defendant's jaw and an abrasion on victim's finger.

MAXIMIZING JURY VERDICTS

People v. Glover, 893 P.2d 1311 (Colo. 1995). When a defendant has been convicted on two different counts of first-degree murder for a single homicide, the convictions should be vacated, and the trial court should be directed to enter as many convictions and impose as many sentences as are legally possible to fully effectuate the jury's verdict.

People v. Randell, 2012 COA 108. Although multiplicitous theft by receiving convictions must merge, the appellate court must conduct the mergers in a way that maximizes the jury's verdict. *Here*: defendant committed 26 acts of theft by receiving over 2 years and claimed that the 6-month period for aggregation of those crimes began with his first theft by receiving, thereby placing all offenses within one of four six-month blocks and permitting entry of only four convictions. The first act of theft by receiving occurred at the end of a 6-month aggregation period (the months prior to the first act); the last act of theft by receiving occurred at the beginning of a another 6-month aggregation period, and the remaining acts occurred in one of three6-month periods between the first and last act, thereby permitting entry of 5 theft by receiving convictions, rather than the 4 the defendant urged.

People v. Vigil, 251 P.3d 442 (Colo. App. 2010). Where the timing of discrete thefts allows for alternate groupings in multiple 6-month time periods, DA may choose which units of prosecution to charge. COA has no such discretion and in order to maximize duplicitous theft verdicts, it must select the grouping maintaining the most convictions and resulting in the longest sentence.

People v. Delci, 109 P.3d 1035 (Colo. App. 2004). Where defendant is convicted of greater and lesser offenses and receives a longer sentence on the lesser offense, and where the convictions merge, the greater offense must be vacated to fully effectuate the jury's verdict. *Here:* defendant's conviction for first-degree burglary was vacated because the trial court imposed a longer sentence on the defendant's conviction of the lesser-included offense of second degree assault.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). Defendant was convicted of felony murder, kidnapping, and robbery. Kidnapping conviction was vacated since it was the predicate felony for the felony murder - it was the felony that most directly contributed to the death of the victim. Affirming the felony murder conviction maximized the jury's verdict.

People v. White, 64 P.3d 864 (Colo. App. 2002). Court should enter as many convictions and impose as many sentences as are legally possible so as to effectuate fully the jury's verdict, but only one conviction of murder is permitted for the killing of one victim. *Here*: second-degree murder conviction must be vacated because the felony murder conviction produces the longest sentence and results in a conviction of the higher-class felony.

Verdict Forms

Rail v. People, 2019 CO 99. A conflict between a jury's general verdict and its response to a special interrogatory does not necessarily require reversal of the general verdict. Lingering ambiguity regarding inconsistencies in the jury's verdicts can be resolved by juror polling. *Here:* jury found defendant guilty of SAOC, and in a related PATT interrogatory, found that all the alleged incidents of sexual contact were proved. But on a unanimity interrogatory attached to the SAOC-PATT, the jury found all those same incidents "not proved." The jury's general verdict and the juror's assent during polling that they found defendant guilty of each of the listed incidents of sexual contact has been proven sufficiently established that jury found defendant guilty beyond a reasonable doubt of SAOC-PATT.

Sanchez v. People, 2014 CO 29. Because the verdict form by which the jury found defendant "guilty" of "sexual assault on a child – pattern of abuse" never offered the jury an opportunity to find that he committed the elements of sexual assault on a child, and instead reflected at most the jury's factual finding of two different incidents of sexual contact, trial court erred in entering judgment of conviction for a F3 sexual assault on a child.

People v. LePage, 397 P.3d 1074 (Colo. App. 2011). Errors in verdict forms are analyzed differently from errors in jury instructions. *Here:* trial court gave the jury verdict forms reading Second Degree Assault and *Third Degree Assault*, despite the fact that the jury was *instructed* on Second Degree Assault and *Obstruction of a Peace Officer*. Defendant was convicted of Second Degree Assault. *Held*: no plain error.

People v. Ramirez, 56 P.3d 89 (Colo. 2002). No plain error in jury's failure to sign the second-degree murder — heat of passion jury verdict form because there was no evidence that entitled defendant to an instruction on heat of passion, let alone a verdict to that effect.

SENTENCING

GENERAL SENTENCING PROCEDURES

People v. Cross, 2023 COA 24. When the probation department fails to provide defendant with the PSI by the deadline specified in §16-11-102(1)(a)(IV), defendant is entitled to a continuance of the sentencing hearing. Unless the prosecution proves the error was harmless, the appropriate remedy when a trial court denies defendant's request for a continuance under these circumstances is reversal of the sentence and a remand for resentencing.

People v. Silvanic, 2023 COA 16. Defendant, a convicted sex offender, appeals court's denial of his objection to the probation department's request to continuously monitor all aspects of his electronic devices and internet usage. As a matter of first impression, COA concludes that before imposing a condition that subjects a probationer to ongoing, unfettered monitoring of their electronic devices and internet usage, the court must: (1) make sufficient factual findings concerning the extent of the electronic monitoring necessary to accomplish the legitimate purposes of the probationary sentence; and (2) evaluate whether less restrictive means are available to achieve those ends. Because the court failed to make such findings and conclusions, COA reversed the order and did not reach defendant's First and Fourth Amendment challenges. The dissent concludes that there is no material difference between the subject monitoring condition and other previously approved sex offender intensive supervised probation conditions that defendant does not challenge on appeal. To the extent there are material differences, the dissent concludes that the additional restrictions are warranted given the nature of defendant's convictions. The dissent also addresses defendant's remaining constitutional challenges, concluding that any impingement the monitoring condition imposes on defendant's First or Fourteenth Amendment rights is substantially outweighed by the government's interest in ensuring he complies with the terms and conditions of his probation.

People v. Smalley, 2015 COA 140. COA reviewed whether defendant was offered an opportunity to speak at sentencing de novo. *Here*: because defendant was not given a chance to speak, it was reversible plain error.

People v. Sandoval-Candelaria, 2014 CO 21. 6-month and 7-day delay in sentencing was not unreasonable under Crim.P. 32(b) because delay was imposed to allow for resolution of a pending felony case for which defendant was on bond at the time he committed instant offense; delay was to further legislature's intent in enacting §18-1.3-401(9)(a), which was to require trial courts to sentence recidivist offenders within an aggravated range; delay was for a "legally justifiable reason." Delay was not presumptively prejudicial;

defendant's constitutional speedy sentencing claim was denied without further inquiry into the remaining *Barker* factors.

People v. Wolfe, 213 P.3d 1035 (Colo. App. 2009). Defendant must be sentenced under the sentencing scheme in effect at the time of commission of the offense, not the scheme in effect at the time of sentencing. This includes the question whether the sentencing court may suspend a sentence to DOC. Follows People v. Munoz, 857 P.2d 546 (Colo. App. 1993); declines to follow People v. Hummel, 131 P.3d 1204 (Colo. App. 2006).

People v. Linares-Guzman, 195 P.3d 1130 (Colo. App. 2008). Trial court could rely on information contained in PSI and state judicial computer database to determine defendant's probationary status because a court can take judicial notice of its own records.

People v. Baker, 178 P.3d 1225 (Colo. App. 2007). If defendant maintains his innocence and invokes his right against self-incrimination both at trial and at sentencing, trial court cannot constitutionally consider his lack of an expression of remorse as an aggravating circumstance; if defendant does not testify at trial but elects to address court at sentencing hearing, court can consider the lack of remorse/acceptance of responsibility in his statements.

Vensor v. People, 151 P.3d 1274 (Colo. 2007). Trial court properly allowed testimony at sentencing hearing in sexual assault on a child case by parents of victims named in counts dismissed as part of plea agreement.

People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006). Crim.P. 25, which requires that, absent good cause), defendants must be sentenced by the judge who presided over their trials, does not apply to resentencing proceedings under Crim.P. 35(b).

People v. Lassek, 122 P.3d 1029 (Colo. App. 2005). Consideration of letters about deceased victim does not violate defendant's confrontation clause rights, and consideration of victim character evidence does not violate due process.

People v. Valencia-Alvarez, 101 P.3d 1112 (Colo. App. 2004). Because sentencing is individualized, there is no requirement that codefendants receive similar sentences.

People v. Shepard, 98 P.3d 905 (Colo. App. 2004). *Apprendi* does not apply retroactively to convictions that were final before it was decided.

People v. Martinez, 83 P.3d 1174 (Colo. App. 2003). Denial of right to allocution harmless error where court gave minimum sentence allowed under the law.

People v. Perea, 74 P.3d 326 (Colo. App. 2002). Under §16-11-102(5), trial court must afford defendant an opportunity to make a statement in his own behalf before he is sentenced. *Here*: remanded for resentencing, since the court's inquiry, "any response from the defendant ?," was answered only by defense counsel, and left a doubt as to whether defendant was personally invited to speak.

People v. Reed, 43 P.3d 644 (Colo. App. 2001). Court may increase a sentence after recessing, but before remanding defendant into custody, without violating double jeopardy.

People v. Koehler, 30 P.3d 694 (Colo. App. 2000). Defense requested a continuance so that judge who accepted the guilty plea, and who expressed concerns about the credibility of important witnesses, could preside over sentencing. *Here*: no error to deny this request.

People v. Patton, 7 P.3d 1057 (Colo. App. 1999), rev'd other grounds, 35 P.3d 124 (Colo. 2001). Court properly continued sentencing hearing to permit defense counsel to further investigate contested presentence report allegations.

People v. Gretz, 973 P.2d 110 (Colo. App. 1998). Absent parties' consent, the court may not dispense with presentence report.

People v. Borrego, 774 P.2d 854 (Colo. 1989). Defendant has right to allocution before imposition of sentence; denial of the right to allocution requires resentencing under §16-11-102(5); Crim.P. 32(b).

Habitual Criminal: §18-1.3-801

People v. Hampton, 876 P.2d 1236 (Colo. 1994). Habitual criminal proceedings have three phases: (1) Charging: prosecutor must list substantive offenses with which defendant is currently charged, and also must bring an additional count for each prior conviction that will later be used to adjudicate defendant a habitual criminal; (2) Guilt: jury determines whether defendant is guilty of the current substantive charges; (3) Sentencing: prosecution seeks to prove that defendant has been previously convicted of the prior charged offenses; if prosecutor meets his burden, defendant is adjudicated a habitual criminal and trial court imposes an enhanced sentence.

People v. Jacobs, 2018 COA 159. It was harmless error where defendant only challenged one of his prior felony convictions for habitual criminal because even if one of the five prior convictions was vacated, his sentence would remain unchanged.

People v. Jompp, 2018 COA 128. 2013 version of §18-1.3-801(5) precludes a non-custodial escape conviction from being used as a current conviction for habitual criminal purposes.

People v. Loris, 2018 COA 101. Habitual criminal statute found in §18-1.3-801(2)(a)(I) unambiguously applies to drug felonies, except as specifically provided for in the statute.

People v. Kadell, 2017 COA 124. For a prior drug felony conviction to qualify as a predicate offense under habitual criminal statute, prosecution must prove that prior offense remained a felony under Colorado law at the time defendant committed the new offense, even when the prior conviction was from Colorado.

Dean v. People, 2016 CO 14. For equal protection purposes, the determination whether one sentence is more harsh than another turns on the length of the sentence, not the date of parole eligibility. *Here:* habitual criminal statute does not violate equal protection as applied to defendant, even though his sentence under subsection (2) places parole eligibility further away than if he had committed more serious prior offenses and consequently been sentenced to "life" under subsection (1).

People v. Poindexter, 2013 COA 93. Pen packs are *prima facie* evidence of identity. *Here:* the defendant's pen pack bore a triple-certified cover sheet listing the contents as including a photograph, fingerprint record, and commitment; pack included three photographs, two fingerprint cards, and two mittimuses, each of which carried information linking it to defendant through some combination of his name, date of birth, and DOC number. Neither CRE 902 (authentication) nor §18-1.3-802 requires that a triple-certified cover sheet list the precise and exact contents of pen-pack. Trial court did not abuse its discretion by admitting the pen pack. In habitual criminal proceedings, a variance between the date alleged and the date proved for a prior conviction is not fatal, absent a showing that it prejudiced defendant's ability to plead the judgment as a bar to a subsequent proceeding. *Here:* where information alleged that a prior conviction entered on 1/15/99, and the evidence showed that a guilty plea was entered 1/26/99, and judgment entered 1/27/99 *nunc pro tunc* 1/15/99, any variance was not prejudicial. *Blakely* does not require that habitual criminal counts be submitted to the jury.

People v. Lahr, 2013 COA 57). When imposing sentence for aggravated robbery under §18-4-302(3) following a habitual criminal adjudication, court is required to first modify maximum of the presumptive range because

the offense is an extraordinary risk crime, and then apply the habitual criminal enhancement to the modified maximum in the presumptive range.

People v. Green, 2012 COA 68M). Habitual criminal charges are not subject to §18-1-405(1)'s speedy trial deadline because habitual criminal charges are merely sentence enhancers affecting the degree of punishment imposed, rather than substantive offenses for which the punishment is imposed; they are not offenses, and are not issues raised by the complaint, information, or indictment within the meaning of §18-1-405(1).

People v. Gregg, 298 P.3d 983 (Colo. 2011). There was sufficient evidence to prove California conviction where the uncertified California probation order identified defendant by name, date of birth and social security number.

People v. Moore, 321 P.3d 510 (Colo. App. 2010). Admission of pen packs in a habitual criminal trial does not implicate defendant's right of confrontation because pen packs are not testimonial; pen packs are not comparable to laboratory reports identifying the nature of a tested substance, which were held testimonial in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), because the documents contained in pen packs were created not in anticipation of the habitual criminal trial, but for routine administrative purposes.

People v. Loyas, 259 P.3d 505 (Colo. App. 2010). Expert testimony linking fingerprint evidence from prior felony convictions to defendant validly proves identity in habitual criminal proceeding; variation in defendant's name or aliases does not implicate identity issues where other evidence (fingerprints/photographs) links him to the prior convictions; for habitual criminal purposes, prior convictions are effective on date the judgment of conviction is entered by trial court; trial court's failure to sign mittimus until days after judgment of conviction is entered is immaterial; defendant must show prejudice in any discrepancy between the dates of conviction alleged in the habitual criminal charges and dates of the judgment of conviction for his prior felonies; habitual criminal convictions need not be tried to a jury.

People v. Strock, 252 P.3d 1148 (Colo. App. 2010). When reviewing sufficiency of the evidence of habitual criminal counts, court must determine "whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilt." People have burden to prove beyond a reasonable doubt that the accused is the person named in prior conviction; despite the lack of fingerprints directly linked to the case number, evidence of defendant's identity was sufficient where: mittimus contained defendant's DOC inmate number; certified trial court records stated that a person with defendant's name and birth date was convicted of the offense; DOC official testified that the photograph of the person convicted in that case bore a "striking resemblance" to defendant; fingerprint card associated with another case contained defendant's DOC inmate number, name, and birth date.

People v. Barnum, 217 P.3d 908 (Colo. App. 2009). Jeopardy attaches in a habitual criminal proceeding when the first prosecution witness is sworn or when evidence is admitted, not when the jury is sworn for the trial on the substantive charges.

People v. Moore, 226 P.3d 1076 (Colo. App. 2009). Evidence established a chain of identity proving beyond a reasonable doubt that defendant was same person convicted in the prior convictions, where witnesses established that defendant's fingerprints matched the fingerprints in the pen pack and the DOC number used to identify defendant were the same numbers listed on mittimus for other counts; defendant was not entitled to a jury trial on habitual counts.

People v. Cooper, 205 P.3d 475 (Colo. App. 2008). By its plain language, habitual criminal statute does not apply to F6 convictions.

People v. Cordova, 199 P.3d 1 (Colo. App. 2007). Because defendant had a prior drug conviction, his drug charges were increased to a higher felony classification; habitual criminal statute then applied to this higher classification, mandating a sentence of 4xs the presumptive maximum for that class felony.

People v. Canody, 166 P.3d 218 (Colo. App. 2007). As a matter of law, counsel cannot be considered ineffective for failing to inform defendant of his right to have a jury determine habitual criminal charges because defendant does not have such a right.

People v. Valencia, 169 P.3d 212 (Colo. App. 2007). Trial court has the discretion to grant or deny a continuance of a habitual criminal proceeding. Where defendant objected to a continuance of habitual criminal proceeding on grounds that it violated double jeopardy/fair trial/speedy trial, court would not address his appellate claim that the hearing was not held "as soon as practicable" as required by §18-1.3-803(1). *Here*: defendant's objection was not specific enough to alert trial court to the specific claim of error; no plain error; granting of continuance during a habitual criminal proceeding does not violate double jeopardy, even where purpose of continuance was to allow prosecution to rectify a problem with its evidence; mid-trial continuance or recess does not "end" or "terminate" the proceeding (as a mistrial or acquittal would) and resumption of the proceeding is not equivalent to a second trial or double jeopardy; extent of the delay caused by the continuance does not independently implicate double jeopardy.

People v. Nunn, 148 P.3d 222 (Colo. App. 2006)**.** Findings required under the habitual criminal statute – that defendant is the same person who was the subject of the prior convictions, and that those convictions were based "upon charges separately brought and tried" and "arising out of separate and distinct criminal episodes" – are facts that are inherent within the fact of the prior conviction, and fall within the prior conviction exception rule of *Apprendi/Blakely*, at least where those facts are conclusively established by the prior judicial record introduced at habitual criminal trial; prior conviction exception to *Apprend/Blakely* is still valid. Follows Lopez v. People, 113 P.3d 713 (Colo. 2005).

People v. Skufca, 141 P.3d 876 (Colo. App. 2005), rev'd other grounds, 176 P.3d 83 (Colo. 2008). Defendant's identity as person who had the prior convictions alleged in two habitual criminal counts was sufficiently demonstrated where DA office manager identified copies of the judgments of convictions in defendant's two cases and testified that: she was employed at the time the convictions were obtained; she was personally acquainted with defendant; and defendant was the same individual seen in a booking photo from the 1997 case. Evidence was also presented by defendant's former probation officer, who identified defendant as the individual she supervised in connection with the federal offense. Date of the defendant's prior conviction for purposes of the habitual criminal statute is date judgment of conviction is entered by trial court. Where the judgment and sentence are initially deferred, date of the conviction is when revocation of the DJ&S occurs, and defendant is sentenced. During a habitual criminal trial, court need only make oral findings that are sufficiently explicit as to grounds that court used to reach its conclusion so as to permit review by COA. Defendant was not denied his Sixth Amendment right to a jury trial where his habitual criminal status was determined by a judge and not a jury.

People v. Rieger, 128 P.3d 295 (Colo. App. 2005). Habitual criminal statute is in derogation of the common law and must be strictly construed; a prosecutor may not file habitual criminal counts after a guilty plea has been accepted or a defendant is sentenced. *Here:* since the prosecutor knew of defendant's prior convictions before defendant pled guilty but did not file the habitual criminal counts until after the plea, trial court's judgment that defendant was habitual criminal was reversed.

People v. Felder, 129 P.3d 1072 (Colo. App. 2005). No right to a jury trial in habitual criminal proceedings. Follows Lopez v. People, 113 P.3d 713 (Colo. 2005).

People v. Flowers, 128 P.3d 285 (Colo. App. 2005). *Apprendi* does not require a jury determination that prior convictions were separately brought and tried as required under the habitual criminal statute.

People v. Patnode, 126 P.3d 249 (Colo. App. 2005). Two felony traffic offenses could be used as prior convictions notwithstanding that those offenses had since been reduced to misdemeanors.

People v. Kyle, 111 P.3d 491 (Colo. App. 2004). Evidence of fingerprint cards and expert testimony linking those prints to defendant was sufficient to allow a reasonable fact finder to determine, beyond a reasonable doubt, that defendant had been convicted of two prior felonies.

People v. Carrasco, 85 P.3d 580 (Colo. App. 2003). Offering evidence of fingerprint cards and expert testimony linking those prints to defendant is a valid method for proving the identity element, but it is not the only way to show identity; where unique Denver Police Department fingerprint number linked defendant to two previous felony convictions, and fingerprints linked to that number matched those of defendant, evidence was sufficient to allow jury to determine that defendant was the same person who had been convicted of two previous felonies.

Martinez v. People, 69 P.3d 1029 (Colo. 2003). Because the permissible range for a F2, at the time applicable to defendant's offense, was actually greater (by one day) than the 24-year sentence required by the habitual criminal statute, the length of defendant's permissible sentence was not further limited by his habitual criminal status. However, because defendant's habitual criminal status requires a sentence to incarceration, while the special drug offender statute merely increases the length of defendant's sentence for possession of less than an ounce of cocaine, defendant's adjudication as an habitual criminal may very well limit, in other ways, the court's sentencing options.

People v. Johnson, 74 P.3d 349 (Colo. App. 2002). Absent death, resignation, incapacitation, or disqualification, same judge who presides at trial must conduct the habitual criminal hearing. If defendant's prior conviction was a felony in the state in which he was convicted, the information need not allege that the crime is a felony in Colorado, and prosecution need not prove the crime would have been a felony in Colorado. *Here*: petty theft with a prior conviction was treated as a felony in California, so it could be used as a predicate felony under our habitual criminal statute.

People v. Ziglar, 45 P.3d 1266 (Colo. 2002). When defendant testifies at trial, his prior convictions may be used only to impeach his credibility; but when defendant testifies in a habitual criminal proceeding and admits prior convictions, his admissions may be considered as substantive evidence; trial court may, but is not required to, give an amended *Curtis* advisement in the habitual phase.

People v. Valdez, 56 P.3d 1148 (Colo. App. 2002). When a sentence is invalidated for constitutional disproportionality, trial court in resentencing should consider all options otherwise authorized by statute. *Here:* after invalidating a sentence imposed under the big habitual statute, court may not resentence defendant under little habitual statute because the prior convictions are older than 10 years; court may impose sentence under §18-1-105.

People v. Shepherd, 43 P.3d 693 (Colo. App. 2001). California prison records were properly authenticated. The documents were certified by a person purportedly authorized to make the certification, and that person's authority was certified by original documents submitted under seal by California's Deputy Secretary of State.

People v. Cook, 22 P.3d 947 (Colo. App. 2000). Defendant's habitual criminal adjudication was based on his robbery conviction, not his conviction for felony murder; when COA vacated defendant's robbery conviction, it had to vacate his habitual criminal sentence.

People v. Deroulet, 22 P.3d 939 (Colo. App. 2000), rev'd other grounds, 48 P.3d 520 (Colo. 2002). Where defendant admitted prior convictions through counsel and through his own statement under oath, failure by

court to obtain defendant's personal waiver of constitutional rights before accepting admission of habitual counts from counsel was harmless beyond a reasonable doubt.

People v. Holloway, 973 P.2d 721 (Colo. App. 1998). If the finding of habitual criminality is triggered by a conviction for first-degree murder, courts impose a single life sentence, not three terms of life imprisonment.

People v. Bernabei, 979 P.2d 26 (Colo. App. 1998). There is more than one way (besides fingerprint cards/expert testimony linking those prints to defendant) to prove identity. *Here:* sufficient evidence to prove defendant's identity on three convictions where documents contained a physical description, photos, and identifying marks, and all documents contained the identical prison number assigned to defendant. A habitual criminal cannot be sentenced to incarceration in community corrections.

People v. Daniels, 973 P.2d 641 (Colo. App. 1998). Use the adjusted maximum presumptive range for extraordinary risk crimes, then multiply to determine habitual sentence.

DV/ DV Habitual Criminal: §18-6-801

Pellegrin v. People, 2023 CO 37. CSC holds that a domestic violence finding under §18-6-801(1)(a) does not impose a "penalty" as contemplated by *Apprendi* and its progeny. Defendant has no Sixth Amendment right to have a jury, instead of the trial judge, determine whether the crimes for which he was convicted included an act of domestic violence.

People v. Ryan, 2022 COA 136. By statute, defendant has a right to have habitual DV offender counts submitted to the jury unless defendant previously admitted the DV finding as part of a plea agreement, or a jury previously made the DV finding. COA agrees defendant would only need to be retried on the habitual DV offender counts, not the underlying charges, but the case is not a model of clarity on that point.

People v. Trujillo, 2019 COA 74. Statute requiring courts to order defendants convicted of domestic-violence-related crimes to attend treatment "in addition to any sentence imposed" characterized a domestic violence treatment order as something other than a sentence and indicated that it was "not a form of punishment." Mandate in domestic violence sentencing statute requiring all persons convicted of crimes of domestic violence, other than persons sentenced to prison, to complete domestic violence treatment program applied to defendant convicted of third degree assault and sentenced to two years in jail; plain meaning of "prison" in statute was not synonymous with "jail," but rather, referred to place of incarceration for more serious offenses, statute's single, explicit exception for prison sentences indicated legislature intended that there be no other exceptions to the treatment mandate, and interpreting statute to prohibit treatment orders alongside jail sentences would create an exception to the statute that the plain meaning did not suggest or demand. Statute governing duty of domestic violence offender management board to adopt treatment programs for "offenders who are placed on probation, placed on parole, or placed in community corrections or who receive a deferred judgment and sentence" did not modify domestic violence sentencing statute to exclude defendants sentenced to jail from treatment mandate otherwise applicable to all convicted defendants except those sentenced to prison.

People v. Jaso, 2014 COA 131. Where trial court's DV finding increases defendant's punishment under the habitual DV offender statute that finding must be reflected in the jury verdict or be otherwise *Blakely*-compliant or *Blakely*-exempt. If not, it violates defendant's Sixth Amendment right to a jury trial under *Apprendi/Blakely*.

People v. Vigil, 2013 COA 102. Habitual DV statute provides that defendant who is convicted of an offense that would otherwise be a misdemeanor shall be convicted of a F5 where the underlying offense includes an act of DV and defendant has 3 prior DV convictions. *Here:* plain language of the HDVO statute demonstrates legislature's intent to create a F5 offense, punishable as such. Because statute elevates a misdemeanor to a felony, defendant charged with HDVO must be provided with felony procedural protections, including trial by a jury of 12 in district court.

People v. Simpson, 2012 COA 156. As a rule, defendant may demand a PH whenever he is accused of a class 1, 2, or 3 felony by direct information or felony complaint. But a PH does not encompass every disputed issue as it is merely a screening device to determine whether probable cause exists to believe that the offense charged was committed by defendant. Because the PH concerns the offense charged, it cannot be used to determine the presence or absence of sentence enhancers. If an offense qualifies as a class 1, 2, or 3 felony, not by its elements, but through the operation of a statutory sentence enhancer, it does not trigger the right to a PH.

Habitual Sex Offenders: §18-1.3-1004(1)(c), §18-3-412

Isom v. People, 2017 CO 110. Defendant was found to be a habitual sex offender against children and was sentenced to a term of 40-years-to-life; he then filed a Crim. P. 35(a) motion alleging that his sentence was illegal. CSC construed §18-3-412(2) and §18-1.3-1004(1)(c) as requiring court to sentence a habitual sex offender against children to an indeterminate prison sentence with a lower term of 3xs the maximum of the presumptive range, unless court finds extraordinary aggravating circumstances under §18-1.3-401(6), in which case the lower term can be up to 6xs the maximum of the presumptive range. *Here:* the statutory minimum for the bottom end of defendant's indeterminate sentence for this F4 was 18 years; therefore his 40 year sentence was illegal. Court remanded for resentencing noting that if extraordinary circumstances existed, court could impose a bottom end sentence of no more than 36 years.

People v. Apodaca, 58 P.3d 1126 (Colo. App. 2002). SOLSA specifically explains that when defendant is also convicted as a habitual sex offender against children, the trial court shall sentence the sex offender to DOC for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life. If a defendant is sentenced under SOLSA and the general habitual criminal statute, the trial court must impose a sentence to DOC for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life. This interpretation harmonizes the two sections, and, to the extent that it resolves a conflict between them, it is consistent with the maxim that the specific statute limited to sexual offenders prevails over the general habitual criminal statute.

Sex Offenses Generally

Vensor v. People, 151 P.3d 1274 (Colo. 2007). Under SOLSA, the minimum term (lower end) of the range is limited to 2xs the maximum presumptive range for the class of felony; maximum of the sentence must be life. Sentencing defendant under SOLSA to a minimum term in the aggravated range does not present a *Blakely* problem because it affects only the minimum term of the indeterminate sentence, which has life as its maximum. Sentencing court properly considered testimony of other, uncharged sexual assaults when imposing sentence for two class four felony sex offenses. In imposing a sentence within the sentencing range, a court may consider not only the conduct with which the offender was expressly charged, but also unrelated criminal conduct and even aspects of his life that go beyond antisocial conduct.

Salah v. People, 2024 CO 54. CSC rejects defendant's argument that a biological connection alone is dispositive of whether a probationer has a constitutional right to familial association in this context. Like most other courts that have addressed the parameters of sex offender probation conditions when a probationer asserts a right to familial association, the CSC holds that whether a probation condition implicates a probationer's constitutional right to familial association with an extended relative depends, as a threshold matter, on whether the probationer demonstrates the nature of their relationship with the family member. This threshold showing is necessary so that a trial court reviewing a claim of familial association can determine where on the spectrum of protection the relationship falls. *Here:* defendant didn't present any evidence at his sentencing or his revocation

hearing demonstrating the nature of his relationship with his nephew. Consequently, the trial court didn't err by prohibiting defendant from contacting or living with his nephew or by failing to make specific findings identifying the compelling circumstances that justified the imposition of these restrictions.

Godinez v. Williams, 2024 CO 14. The CSC considers the following certified question of law from the 10th Circuit Court of Appeals: Whether Colorado's Sex Offender Lifetime Supervision Act ("SOLSA"), §§18-1.3-1001 to -1012, requires, permits, or prohibits parole boards from considering maturity and rehabilitation. SOLSA "permits" consideration of maturity and "requires" consideration of rehabilitation.

People v. Silvanic, 2023 COA 16. Defendant, a convicted sex offender, appeals court's denial of his objection to the probation department's request to continuously monitor all aspects of his electronic devices and internet usage. As a matter of first impression, COA concludes that before imposing a condition that subjects a probationer to ongoing, unfettered monitoring of their electronic devices and internet usage, the court must: (1) make sufficient factual findings concerning the extent of the electronic monitoring necessary to accomplish the legitimate purposes of the probationary sentence; and (2) evaluate whether less restrictive means are available to achieve those ends. Because the court failed to make such findings and conclusions, COA reversed the order and did not reach defendant's First and Fourth Amendment challenges. The dissent concludes that there is no material difference between the subject monitoring condition and other previously approved sex offender intensive supervised probation conditions that defendant does not challenge on appeal. To the extent there are material differences, the dissent concludes that the additional restrictions are warranted given the nature of defendant's convictions. The dissent also addresses defendant's remaining constitutional challenges, concluding that any impingement the monitoring condition imposes on defendant's First or Fourteenth Amendment rights is substantially outweighed by the government's interest in ensuring he complies with the terms and conditions of his probation.

People v. Ehlebracht, 2020 COA 132. As a matter of first impression, prohibition against imposition of both prison and probation sentences in a single case, *Allman*, did not apply to sentences imposed under Sex Offender Lifetime Supervision Act (SOLSA).

People v. Short, 2018 COA 47. Where the pattern of abuse count operates as only a sentence enhancer, only one conviction is permissible with an enhanced sentence. But if the pattern of abuse count operates as both a substantive offense and sentence enhancer, then two convictions and sentences could be entered.

People v. Relaford, 2016 COA 99. COA can decline to consider a constitutional challenge to SOLSA that was not raised below; defendant was not entitled to relief because SOLSA has been found constitutional by several COA divisions and defendant provided no compelling reason to reconsider prior decisions.

Chavez v. People, 2015 CO 62. Conviction for a sex offense subject to SOLSA that is also a "per se" crime of violence requires sentencing to an indeterminate term of incarceration with a minimum term in the enhanced, crime-of-violence range (midpoint of the presumptive range up to twice the maximum presumptive range).

People In The Interest of J.O., 2015 COA 119. Because juvenile was simultaneously adjudicated delinquent for 4 unlawful sexual contact offenses including unlawful sexual contact and indecent exposure, he was ineligible for the first-offense exception to the sex offender registration requirement. First-offense exception to the sex offender registration requirement is written in the disjunctive; juvenile's adjudications for both offenses meant he did not satisfy the requirements for the registration exception.

People v. Lancaster, 2015 COA 93. Sexual assault is a F2 when offender is armed with a deadly weapon or represents that he is armed with a deadly weapon. Sentencing range for F2 is 16-24 years to life unless the court makes *Blakely*-compliant findings for aggravation, or jury makes separate COV findings.

Defendant who commits a per se crime of violence sex offense is subject to §18-1.3-406(1)(b) and is not eligible for a probationary sentence.

Hunsaker v. People, 2015 CO 46. When a conviction is for a sex offense that requires sentencing in accordance with mandatory sentencing statute, prosecution is not required to prove aggravating circumstances to support a bottom-end sentence in the aggravated range.

People v. Anderson, 2015 COA 12. Defendant moved to terminate his probation pursuant to §18-1.3-1008(2), which permits court to discharge indeterminate probation sentence of a sex offender convicted of F4 after the offender has served 10-years' probation, arguing that the time he served on DJ&S before he was revoked counted toward his total time on probation. *Here:* the period of an unsuccessful DJ&S does not qualify as time served on probation.

People v. Montgomery, 2014 COA 166. SOLSA does not violate Colo. Const. art. V, section 21, which requires that a legislative bill contain only a single subject, which must be expressed in the bill's title. SOLSA's single purpose is the lifetime treatment and supervision of persons who commit sex offenses, and this purpose includes sentencing, parole, and probation.

People v. Whitlock, 2014 COA 162. Person who is applying for probation is in a different situation from person who has been sentenced to probation. In the latter instance, person has attained a "liberty interest" which may not be taken away without due process. Sentencing court does not impermissibly infringe upon defendant's Fifth Amendment rights when it denies him the privilege of probation based, in part, on the prospect that he would not, during the pendency of his appeal and in the course of sex offender treatment, admit responsibility for his crime.

People v. Pifer, 2014 COA 93; People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003); People v. Strean, 74 P.3d 387 (Colo. App. 2002). SOLSA is constitutional.

People v. Fair, 2013 COA 41. Interpretation of a SOMB regulation is reviewed *de novo*. Review begins with regulation's plain language and applies the usual canons of statutory construction. *Here:* SOMB regulation provides that offender who denies committing any criminal offense (a risk level 3) but receives a community-based sentence such as probation/community corrections, shall be placed in a "Denier Intervention" program as a precursor to Sex Offense Specific Treatment (SOST). Defendant pled guilty to sexual assault and was sentenced to probation, at which time he was determined to be at a lower risk level 2; after beginning probation and SOST, he was reclassified as risk level 3. He was subsequently discharged unsuccessfully from SOST, triggering the revocation of probation. Revocation upheld. SOMB regulation requiring Denier Intervention applies only to offenders who are at risk level 3 *at the time they receive a community-based sentence*. Regulation does *not* apply to offenders who are reclassified at risk level 3 after being placed in the community.

People v. Dinkel, 2013 COA 19. Trial court does not have discretion to reduce a sex offender's term of probation below the statutorily mandated minimum term pursuant to §§18-1.3-1008, 18-1.3-104(1). Sex offender's successful discharge from treatment does not allow for early release; it is only a factor to consider after the minimum probation term has passed.

People v. Lientz, 2012 COA 118. Under SOLSA, court must impose an indeterminate term of at least the minimum of the presumptive range and a maximum of life. In setting the minimum term of indeterminate sentence, court may not exceed the maximum in the presumptive range unless (1) extraordinary aggravating circumstances are present, and (2) court makes specific findings on record detailing the specific extraordinary circumstances that constitute the reasons for varying from the presumptive sentence. *Here*: Because trial court failed to make the appropriate findings, case must be remanded for resentencing.

People v. Simon, 266 P.3d 1099 (Colo. 2011); Tillery v. People, 266 P.3d 1099 (Colo. 2011). Plain language of

§18-3-405(2)(d) and §18-3-405.3(2)(b) clearly permits each separately charged incident of SAOC, or SAOC-POT, to be elevated from an F4 to a F3 where each incident is committed as part of an overall pattern of sexual abuse between defendant and victim; this does not violate double jeopardy (multiple punishments) under either the U.S. or Colorado Constitution.

People v. Walker, 321 P.3d 258 (Colo. App. 2011), aff'd in part, vacated in part 318 P.3d 479 (Colo. 2014). Under §18-1.3-1004(4), court may sentence defendant to an indeterminate term only if (1) he is convicted of/pleads guilty/pleads nolo contendere to, an economic sex crime specified in statute, and (2) defendant's assessment under §16-11.7-104, determines that he is likely to commit a SVP offense against a stranger or against a person with whom a relationship is established or promoted primarily for the purpose of sexual victimization. An indeterminate sentencing assessment does not require SVP assessment specifically; rather, it requires determination that defendant is likely to commit an SVP offense. Per *Blakely/Isaacks*, to impose discretionary indeterminate sentencing, either jury must find the additional, aggravating facts (effectively requiring re-calling the jury once an assessment has been made or empanelling a new jury) or defendant must waive his right to have a jury determine these facts.

People v. Collins, 250 P.3d 668 (Colo. App. 2010). Constitutional challenge to SOLSA need not be considered if it was not raised below.

People v. Jones, 222 P.3d 377 (Colo. App. 2009); People v. McMurrey, 39 P.3d 1221 (Colo. App. 2001). Trial court does not have jurisdiction to address DOC classification of sex offenders; DOC has statutory authority and discretion to classify inmate as a sex offender for treatment purposes; sex offender classification hearings are quasi-judicial proceedings subject to review under C.R.C.P. 106(a)(4); defendant's challenge to his classification as a sex offender must be brought as a civil action against the DOC and not under Crim.P. 35(c).

Hernandez v. People, 176 P.3d 746 (Colo. 2008). Under §16-11.7-106, sex offender treatment is not mandated in every case where a sex offender subsequently commits an offense of any kind; where recommendations of sex offender evaluation and facts of the subsequent case do not support treatment, a sentencing court is not required to order treatment; when the sex offender evaluation and facts of the case support it, trial court must impose treatment as a condition of probation; trial court's discretion not to order treatment is tightly constrained.

People v. Harrison, 165 P.3d 859 (Colo. App. 2007). SOLSA sentencing is mandatory for defendants convicted of a completed or inchoate form of one of the fourteen "sex offenses" listed in §18-1.3-1003(5); and permissible for defendants convicted of one of the nine "economic" sex crimes listed in §18-1.3-1004(4)(b) if assessment determines that defendant meets definition of SVP.

People v. King, 151 P.3d 594 (Colo. App. 2006). Person convicted of attempted sexual assault is subject to indeterminate sentencing if the attempted assault constitutes a F2, F3, or F4; the "application of physical force or physical violence" aggravator found in §18-3-402(4)(1) applies to attempted sexual assaults in addition to completed sexual assaults; indeterminate sentencing for attempted sexual assaults does not violate due process.

People v. Rockwell, 125 P.3d 410 (Colo. 2005). A factual basis for unlawful sexual behavior can be established by (1) statements made by defendant, (2) facts or fact-finding stipulated to by defendant, or (3) facts found by jury. A "factual basis" consists of those facts which establish that offense has been committed. To establish a satisfactory factual basis as required by discretionary parole provisions, trial judge must be able to fairly conclude that defendant would be convicted of an unlawful sexual behavior offense if he chose to stand trial; imposition of offense specific treatment does not establish a factual basis for unlawful sexual behavior that would require discretionary parole; where defendant admitted only to the elements of offense in pleading guilty,

and those elements did not include unlawful sexual behavior, factual basis for the guilty plea did not include unlawful sexual behavior; factual basis is limited to the elements of the offense.

People v. Renfro, 117 P.3d 43 (Colo. App. 2004). All sexual assault offenses committed after July 1, 2000, and charged under §18-3-402, that are committed against an at-risk individual pursuant to §18-6.5-103(7) (a), are class 2 felony offenses.

People v. Dash, 104 P.3d 286 (Colo. App. 2004). SOLSA does not function as a civil commitment statute because its indeterminate sentence is based "upon conviction of a sex offense pursuant to criminal proceedings." following *Strean* and *Oglethorpe*, SOLSA satisfies procedural/substantive due process/equal protection and does not constitute cruel and unusual punishment or violate the separation of powers doctrine.

People v. Jacobs, 91 P.3d 438 (Colo. App. 2003). Before an indeterminate sentence may be imposed on defendant convicted of Soliciting For Child Prostitution, an assessment must be made that it is likely that defendant will commit an enumerated SVP crime under certain specific circumstances set forth in §18-1.3-1004.

People v. Manzanares, 85 P.3d 604 (Colo. App. 2003). Although, by their terms, §16-11.7-104(1) and §16-11.7-105(1) apply only when a PSI is required for use in sentencing sex offenders, these statutes are construed to apply also to DJ&S. *Here*: because trial court failed to order such an evaluation, the treatment condition was unenforceable.

People v. Bobrik, 87 P.3d 865 (Colo. App. 2003). Defendant has no right to be sentenced under the Colorado Sex Offender Act of 1968; sentencing under the act is discretionary with trial court, and there was no abuse of discretion in declining to sentence defendant under the act in this case.

Martin v. People, 27 P.3d 846 (Colo. 2001). Sex offenders who committed offenses between 7/1/93 and 6/30/96 are subject to discretionary parole; those who serve the entire prison term will have no post-incarceration parole; those released before the end of the prison term will serve parole no longer than the remainder of the prison term; the mandatory parole provisions are without effect. People v. Cooper, 27 P.3d 348 (Colo. 2001)(same for sex offenders who committed offenses between 7/1/96 and 11/1/98).

Sex Offender Registration: §16-22-108, et. seq.

People v. Warren, 2024 COA 60. The Sex Offender Registration Act dictates that certain individuals are subject to lifetime registration and may not petition to discontinue such registration under §16-22-113(3). In 2018, §16-22-113(2.5)(a) was amended to state that "notwithstanding any provision of this section to the contrary, a registrant . . . may file a petition to discontinue registration if the registrant suffers from a severe physical or intellectual disability to the extent that he or she is permanently incapacitated and does not present an unreasonable risk to public safety." The legislature's use of such a plain, broad "notwithstanding" clause clearly signals their intention that the provisions of subsection (2.5)(a) "override conflicting provisions of any other section" and that includes subsection (3) which otherwise limits who may petition for deregistration. *Here:* defendant was convicted of first-degree sexual assault which normally would prevent a request to deregister. Because defendant made his request under (2,5)(a) and attached his mental health records outlining his intellectual disabilities, and the People objected to his petition, the trial court erred by not conducting a hearing under §16-22-113(2.5)(g).

People v. Dulac, 2024 COA 14. A defendant who successfully completes a DJ&S for a sex offense is ineligible to petition for removal from the sex offender registry under §16-22-113(1)(d), if they have other outstanding convictions in the same case. §16-22-113(1)(d) requires dismissal of the case—not merely the charge that is the subject of the DJ&S—before a petition may be filed under that subsection.

People In Int. of J.M.M., 2021 COA 88. A juvenile offender is eligible to seek to deregister as a sex offender even if the offender failed to satisfy the terms and conditions of earlier sentences or dispositions, so long as the offender successfully completed his or her subsequently imposed sentence or disposition. Here: because J.M.M. successfully completed a juvenile sentence or disposition and satisfied the other requirements of §16-22-113(1)(e), the trial court did not err by granting J.M.M.'s petition to discontinue his sex offender registration even though he failed to successfully complete his original DJ&S and multiple probationary sentences except for the last one.

People ex rel. T.B., 2021 CO 59. Statute mandating lifetime sex offender registration for offenders with multiple juvenile adjudications was not intentionally punitive but was punitive in effect as to juveniles. Mandatory lifetime sex offender registration for juveniles with multiple adjudications constitutes cruel and unusual punishment in violation of Eighth Amendment to U.S. Constitution. Mandatory punishments that are constitutional when applied to adult offenders can violate Eighth Amendment when applied to juveniles, as such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Overruled People in the Interest of C.M.D., 2018 COA 172; People In The Interest of J.O., 2015 COA 119; People in Interest of J.T., 13 P.3d 321 (Colo. App. 2000).

McCulley v. People, 2020 CO 40. During pendency of a DJ&S period, defendant may be treated for some purposes as "convicted," even though no judgment of conviction has been entered. §16-22-113(3)(c) of the Sex Offender Registration Act precludes those with "more than one conviction . . . for unlawful sexual behavior" from petitioning for removal from the sex offender registry. For purposes of this section, "conviction" includes a successfully completed DJ&S. *Here:* defendant who successfully completed DJ&S imposed when he pled guilty plea to second-degree sexual assault, and who, more than ten years earlier, was released from the 60-day term of incarceration and two years of probation imposed on his guilty plea to misdemeanor sex offense, was no longer "[a]ny adult who has more than one conviction for unlawful sexual behavior," and was not statutorily disqualified from petitioning to discontinue requirement that he register as sex offender; court had to give effect to fact that the statutory phrase "[a]ny adult who has more than one conviction for unlawful sexual behavior" was written in the present tense, and that defendant's successful completion of the DJ&S meant that his guilty plea to the sexual assault charge was withdrawn and that charge was dismissed

People In the Interest of I.S., 2017 COA 155. For purposes of determining whether a court can excuse a juvenile from registering as a sex offender, the phrase "as charged in the first petition filed with the court" in §16-22-103(5)(a)(III) plainly means the original petition as it appeared when it was first filed with the court and not any amendments or subsequent petitions.

People v. Jones, 2017 COA 116. A violation of the duty to register in §16-22-108(3)(i) must be charged under the catchall provision in §18-3-412.5(1). But here, the prosecution elected to charge defendant only under §18-3-412.5(1)(g), and it is bound by that choice. *Here:* on August 20, 2012, defendant moved out of a hotel; his whereabouts during the months after he left the motel are not clear; defendant did not report a change of address with the Aurora P.D., and he did not register as a sex offender with any other local law enforcement agency in Colorado until 2013; the People charged him in this case with failure to register as a sex offender between August 26, 2012, and November 28, 2012, covering a three-month period soon after he moved out of the motel; there was no evidence that defendant had a fixed residence during any portion of the relevant time period; defendant could not be convicted under §18-3-412.5(1)(g).

Stanley v. Dist. Att'y for 18th Jud. Dist., 2017 COA 33. Sex offender was precluded from discontinuing his requirement to register as a sex offender under statutory provision precluding removal of sex offender

registration requirement and imposing lifetime sex offender registration for persons convicted outside Colorado of offenses comparable to sexual assault.

Curtiss v. People, 2014 COA 107. Defendant who is convicted of an out-of-state offense which, if committed in Colorado, would prohibit removal from the sex offender registry is not eligible to be removed from the registry. §16-22-113, the statute governing removal from the registry, applies equally to all convictions regardless of where the crime occurred.

People v. Halbert, 2013 COA 95. §18-3-412.5(1)(a)(failure to register as a sex offender), is not a "catchall" provision that incorporates all of the registration duties imposed by article 22 of title 16. Each subsection, (a)-(k), is a separate crime and must be charged separately. *Here:* evidence was insufficient to support a conviction because defendant was only charged with (1)(a)(failure to initially register), whereas he was only *guilty* of (1)(g)(failure to register when changing addresses) and (1)(i) (failure to complete new registration form).

People v. Sheth, 2013 COA 33. Sex offender's obligation to register continues even after his probation has terminated. Under §16-22-113 he must wait at least 10 years after final release before he can seek to be relieved of registration requirement.

People v. Carbajal, 2012 COA 107. Sex offender registration is not an element of defendant's sentence; purpose of registration is not to punish defendant, but to protect community and aid law enforcement in investigating future sex crimes; defendant required to register on a DJ&S may petition to discontinue registration after successful completion of the DJ&S; but successful completion of DJ&S does not automatically relieve defendant from duty to register - merely provides a right to petition the court to discontinue registration; determination of whether to grant a petition to discontinue registration is within the discretion of trial court. *Here*: trial court relied on sex offender's failure to complete certain conditions of his DJ&S in denying a petition to discontinue registration; court abused its discretion since, once DJ&S was dismissed, offender no longer had an obligation to complete those conditions; trial court could not properly deny a petition to discontinue registration following successful completion of DJ&S based solely on a conviction for criminal trespass which did not have an underlying factual basis involving unlawful sexual behavior.

People v. Perry, 252 P.3d 45 (Colo. App. 2010). Under sex offender registration statutes §16-22-112(3)(b)(II), offender who successfully completes DJ&S for SAOC and obtains a dismissal of the charge may petition for removal from the registry; offender who is serving a DJ&S has a "conviction" that would prelude removal from registry; but once DJ&S is completed and the case dismissed, offender would no longer has such a "conviction."

People v. Mayo, 181 P.3d 1207 (Colo. App. 2008). Petitioner was properly required to register as sex offender where he was subject to civil commitment in Illinois after being indicted for SAOC; Illinois's civil commitment is equivalent of a DJ&S under Colorado's sex offender registration laws given: (1) the structure of the Illinois civil commitment proceedings; (2) the attendant burden of proof of beyond a reasonable doubt; (3) the retention of the criminal charge during service of the commitment; (4) the supervisory requirements attaching to such a commitment; and (5) Illinois's registration requirement for such committed persons. *Here*: Illinois civil commitment is the functional equivalent of "conviction" or "convicted" as those terms are defined in §16-22-102(3).

People ex rel. C.B.B., 75 P.3d 1148 (Colo. App. 2003). Procedural due process does not require a hearing to determine current dangerousness before a sex offender can be required to register and have his information released by law enforcement; due process does not require a hearing to establish a fact that is not relevant under the statutory scheme; statutory scheme requires registration following a conviction or an adjudication for a sex offense; current dangerousness is not relevant.

People ex rel C.C.V., 56 P.3d 1216 (Colo. App. 2002). Under §18-3-412.5(7)(a)(I), a 16-year-old juvenile adjudicated for first-degree sexual assault must register as a sex offender for 20 years before petitioning to discontinue his registration; §18-3-412.5(8) does not entitle him to petition at any time.

People v. Montaine, 7 P.3d 1065 (Colo. App. 1999). Duty to register as a sex offender is a collateral consequence of a guilty plea.

Sexually Violent Predator ("SVP"): §18-3-414.5

People v. Hunter, 2013 CO 48. In §18-3-414.5(1)(a)(III), a stranger "means either the victim is not known by the offender or the offender is not known by the victim at the time of the offense." Trial court should consider the context of the parties' relationship at the time of the offense. *Here:* where defendant was a neighbor but wore a mask during the offense so victim would not recognize him, he fit definition of a "stranger."

Candelaria v. People, 2013 CO 47. CSC finds that defendant "need not specifically intend to establish or promote a relationship with victim primarily for the purposes of sexual victimization to satisfy the relationship criterion of SVP statute; all that is required is evidence that defendant established or promoted the relationship "primarily for the purpose of sexual victimization." Overrules People v. Stead, 66 P.3d 117 (Colo. App. 2002).

Uribe-Sanchez v. People, 2013 CO 46. Case remanded for SVP findings in line with the "promoted" definition outlined in *Gallegos.* Trial court must consider the relationship criterion without reference to the facts of the crime itself to see whether defendant meets the definition.

People v. Gallegos, 2013 CO 45. Defendant "establishes a relationship" with his victim primarily for the purpose of sexual victimization where he creates, starts, or begins a relationship primarily for that purpose. Defendant "promotes relationship" if, "excluding defendant's behavior during the commission of the sexual assault that led to his conviction, he otherwise encourages a person with whom he had a limited relationship to enter into a broader relationship primarily for the purpose of sexual victimization."

Allen v. People, 2013 CO 44. Trial court makes the ultimate SVP designation, but it should give substantial deference to SOMB's scored risk assessment screening instrument (SORS). Where trial court deviates from the results of the scored instrument, it must make specific findings on the record to demonstrate the necessity of the deviation. Trial court may disagree with the scored assessment but should refrain from re-scoring the instrument. *Here:* trial court's findings that defendant was likely to reoffend based on: (1) his lack of a stable personal life; (2) his threats to kill the victim after the sexual assault; (3) his vacillation between denial and blaming the victim; and (4) two prior restraining order requests made by other women supported trial court's deviation from the recommendation in the screening instrument.

People v. Beagle, 22CA594. In this UNPUBLISHED opinion, the COA held that because an SVP designation is not considered punishment, as found in Allen v. People, 2013 CO 44, it cannot, by definition, be cruel and unusual punishment. The COA acknowledged there was arguable tension between the rationales of People in Interest of T.B., 2021 CO 59 and *Allen*, but recognized that whether the *Allen* decision needs to be revisited in light of *T.B.* was not a decision for the COA to make–it is the CSC's sole prerogative to overrule its prior holdings. Accordingly, defendant's claim that the SVP designation violated his rights under the Eighth Amendment was rejected. *Here:* defendant was 49 years old *[Cert Accepted (11/18/24) in case #24SC154: (1) Whether the sexually violent predator designation, under §18-3-414.5(1)(a), C.R.S. (2024), is a criminal*

punishment under the Eighth Amendment to the United States Constitution; (2) Whether the sexually violent predator designation is cruel and unusual punishment as applied to Petitioner (AAG Jaycey DeHoyas)].

People v. Neustel, 2023 COA 56. COA concludes that a fictional child persona created by law enforcement for a sting operation can be a "victim [who] was . . . a person with whom the offender established a relationship" for the purposes of an SVP designation. §18-3-414.5(1)(a)(III).

People v. Williamson, 2021 COA 77. Sexually violent predator assessment screening instrument (SVPASI), which was used in determining defendant's risk of recidivism, met statutory requirements for Sex Offender Management Board (SOMB) to consider research in creating evidence-based standards for assessing individuals; trial court's reliance on defendant's sex offense history in SVPASI did not violate due process; and constitutional provisions prohibiting cruel and unusual punishment did not apply to SVP designation.

People v. Ehlebracht, 2020 COA 132. As a matter of first impression, prohibition against imposition of both prison and probation sentences in a single case, *Allman,* did not apply to sentences imposed under Sex Offender Lifetime Supervision Act (SOLSA); facts in record supported trial court's conclusion that defendant established a relationship with his victim primarily for the purpose of sexual victimization; trial court's erroneous characterization of defendant's prior convictions did not undermine court's conclusion that defendant be designated a SVP; trial court's use of the word "inference" served only to convey its finding that defendant created a relationship with victim for the purpose of sexual victimization. The use of the word "primarily" under the relationship criterion of the SVP statute indicates that the legislature did not intend for a trial court's SVP designation to hinge on a finding that defendant specifically intended to establish or promote the relationship for the purposes of sexual victimization. *Here:* even though court's findings did not detail events giving rise to the offense, where the arrest warrant affidavit and the presentence investigation report stated that defendant was 29-years-old when he met the 14-year-old victim on a social media application, during their online conversation, defendant expressed no concern with the victim stating she was 15-years-old, and defendant convinced victim to go to his apartment late at night to drink and get high but told her to try to look as old as possible.

People v. Lopez, 2020 COA 41. When deciding whether to impose SVP designation, the trial court should start with the findings and conclusions of the sex offense specific evaluation (SOSE) and SVPASI. A trial court may, in certain circumstances, adopt the findings of the risk assessment evaluator, without going through the evaluation line by line, when making a SVP determination. In SVP proceedings, even when defendant challenges the facts in the risk assessment evaluator's report, the People are not required to prove those facts with the quality of evidence required at a trial on the criminal charges themselves. Principles of due process, as well as the language of the statute, require that a SVP designation be based on reliable evidence, not speculation or unfounded allegations. Where a finding in a professional examination assessment is unexplained, unsourced, disputed, and unsupported by ample evidence, due process and the SVP statute require the trial court to make further factual findings before adopting the assessment. *Here:* evaluator's answers in SVPASI were internally inconsistent as to whether defendant promoted relationship with victim, and thus trial court was required to make findings on record with respect to relationship prong of SVP designation; although evaluator checked box reflecting conclusion that defendant did promote a relationship as contemplated by the SVP statute; evaluator also checked another box indicating his overall conclusion that defendant "does not meet any of the above relationship criteria," and conflicting answers on other portions of the SVPASI form created ambiguity as to whether evaluator concluded defendant satisfied "promoted a relationship" criterion. Trial court was required to make factual findings on whether defendant had a developmental disability before determining whether he qualified as a SVP, where evaluator's assessment did not definitively establish whether defendant had an impairment of general intellectual functioning, but reported that defendant scored a full-scale IQ of 76 plus or minus seven on the Weschler Abbreviated Standard of Intelligence, and the low end of defendant's tested full-scale IQ margin of error was within the applicable range for impairment of general intellectual functioning

People v. Salas, 2017 COA 63. Unpreserved challenges to SVP designation may be raised on appeal and reviewed for plain error; trial court must made findings to support an SVP designation based on the definitions established in *Gallegos*, 2013 CO 45.

People v. Tunis, 2013 COA 161. Defendant's actions demonstrating that he planned the sex assault does not meet standards for "promoting the relationship" under the revised SVP criteria. Where defendant had a limited relationship with victim through victim's mother, and where he did not seek to expand that relationship to a different place or to different activities, the evidence does not support SVP designation.

People v. Torrez, 2013 COA 37. When finding defendant is SVP, trial court may adopt the findings of risk assessment evaluator without going through his or her evaluation line by line; trial court's failure to make a finding on a disputed issue in the risk assessment may be harmless. *Here*: trial court's failure to address whether defendant was employed full time was harmless where any four factors would support the evaluator's finding that defendant was likely to reoffend and there were four other, unchallenged factors supporting that finding.

People v. Bryant, 2013 COA 28. Use of a different evaluation scale for an offender who chooses not to participate in SVP assessment interview does not violate right to remain silent because the Fifth Amendment applies only to criminal proceedings, and SVP proceedings are not designed to punish the offender, but to protect the community.

People v. Brosh, 2012 COA 216M. SVP designation is an issue of law - unlike the determination of a sentence within the sentencing range, not discretionary; discretionary reconsideration of SVP designation under Crim.P. 35(b) is not available. Sex Offender Risk Scale (which is part of the SVP Risk Assessment Screening Instrument) meets the statutory requirements under §18-3-415.5. SOMB Handbook demonstrates appropriateness of using failure to succeed in treatment/supervision as a predictor of reoffending and satisfies objectives/criteria set forth for developing assessment screening instrument in determining whether an offender is likely to reoffend. *Here*: trial court properly recognized discretion of the evaluator in scoring but deferred to evaluator's expertise.

People v. Mendoza, 313 P.3d 637 (Colo. App. 2011). SVP Assessment Screening Instrument ("ASI") satisfies statutory requirement of predicting the likelihood of the future commission of SVP offense; ASI did not violate equal protection because SVP statute does not treat similarly situated persons differently; ASI did not violate procedural due process because sex offender risk scales in the ASI have safeguards and standards; defendant is not entitled to be reevaluated under the revised or current ASI; §16-11.7-103(4) directs the SOMB revise the evaluation but does not allow previously designated offenders to be reassessed under any revised versions. *Here:* record supported finding that defendant engaged in conduct designed to expand his existing relationship with his stepdaughter into one primarily for the purpose of sexual victimization when he got the victim alone, inappropriately kissed and caressed her, and had sex with her.

People v. Valencia, 257 P.3d 1203 (Colo. App. 2011). To "promote a relationship primarily for the purpose of sexual victimization" under the SVP statute, an offender must engage in some conduct, beyond the sexual assault itself, which is designed to establish an initial relationship or to expand an existing relationship into one primarily for the purpose of sexual victimization. *Here*: while the evidence established that defendant committed a violent sexual assault, there is no evidence that he had previously promoted a relationship with the victim to facilitate that assault.

People v. Buerge, 240 P.3d 363 (Colo. App. 2009). If defendant intends to sexually assault a person, it does not matter that intended victim was fictional/did not actually exist. *Here*: even though there was no actual victim because the purported victim was a fictional person created by undercover police officers, defendant may still be designated a SVP. *Here*: Trial court resolved, by making findings of fact, the issues defendant raised

concerning the validity of the risk assessment for SVP designation. Though the evaluator and probation officer did not identify the data sources, trial court properly determined that defendant satisfied the SVP criteria based on the risk assessment and the record.

People v. Tuffo, 209 P.3d 1226 (Colo. App. 2009). Defendant may seek reconsideration of SVP designation if sought within the normal time for taking an appeal (45 days). *Here*: Although defendant's oral motion for reconsideration was not argued until 7 months after trial court's ruling, it was timely because defendant initially sought reconsideration before 45-day deadline. Defendants convicted of misdemeanor sexual assault may be designated SVP. Because SVP statute requires trial courts to make specific findings of fact as to whether defendant is an SVP, due process requires that facts relied on by trial court be proven by a preponderance of the evidence. *Here*: Trial court's SVP determination did not satisfy the statutory and due process requirements because court failed to make specific findings as to whether defendant: (1) established or promoted the relationship primarily for the purpose of sexual victimization; and (2) met four of the ten items on the "Sex Offender Risk Scale" developed by the SOMB.

People v. Rowland, 207 P.3d 890 (Colo. App. 2009). Community notification requirements of SVP classification are not punishment and not subject to *Apprendi/Blakely*; §18-3-414.5 does not provide defendant with an evidentiary hearing on whether he meets SVP criteria.

People v. Cook, 197 P.3d 269 (Colo. App. 2008). Trial court's finding that defendant was SVP was supported by the record; risk assessment and evidence at trial sufficiently established that defendant took steps to change the focus of his relationship with the two children to facilitate his commission of the sexual assaults.

Sentencing after Remand

People v. Hernandez-Escajeda, 2024 COA 111. A trial court generally has the inherent authority to resentence on a defendant's remaining convictions on remand following the vacatur of a conviction that resulted in a reduced aggregate sentence. The trial court also has the authority to take actions on remand that are not specifically directed by the appellate mandate but do not contravene the mandate.

GENERAL SENTENCING FACTORS

People v. Fuller, 791 P.2d 702 (Colo. 1990). Sentencing court abuses its discretion if it fails to consider the nature of the offense, the character and rehabilitative potential of defendant, development of respect for the law, deterrence of crime, and protection of the public. Decision of the sentencing court must be accorded deference because of the trial judge's familiarity with the circumstances of the case.

People v. Tresco, 2019 COA 61. Although Dawson v. Delaware, 503 U.S. 159 (1992) held that district court abused its discretion in considering defendant's gang-affiliation during sentencing for an unrelated crime violated his First Amendment right to association, USSCt did not erect a per se barrier against the admission of gang-affiliation evidence in sentencing; consideration of defendant's gang-affiliation is admissible during sentencing to extent it is related to nature of offense and defendant's character, not merely his abstract beliefs.

People v. Ruibal, 2015 COA 55. Trial court did not abuse its discretion because it considered all relevant factors before imposing a sentence, including defendant's positive character attributes; to extent court's comments at sentencing may have been confusing, defendant had an obligation to ask for clarification at the time.

People v. Fritts, 2014 COA 103. Due process does not prohibit a harsher sentence when the original sentence was declared to be illegal unless defendant can show that it was the product of actual vindictiveness.

People v. Lientz, 2012 COA 118. Under SOLSA, court must impose an indeterminate term of at least the minimum of the presumptive range and a maximum of life. In setting the minimum term of indeterminate sentence, court may not exceed the maximum in the presumptive range unless (1) extraordinary aggravating circumstances are present, and (2) court makes specific findings on record detailing the specific extraordinary circumstances that constitute the reasons for varying from the presumptive sentence. *Here*: because trial court failed to make the appropriate findings, case remanded for resentencing.

People v. Walker, 321 P.3d 528 (Colo. App. 2011), aff'd in part, vacated in part, 2014 CO 6. Under §18-1.3-1004(4), court may sentence defendant to an indeterminate term only if: (1) he is convicted of/pleads guilty/pleads nolo contendere to, an economic sex crime specified in statute; and (2) defendant's assessment under §16-11.7-104, determines that he is likely to commit a SVP offense against a stranger or against a person with whom a relationship is established or promoted primarily for the purpose of sexual victimization. An indeterminate sentencing assessment does not require SVP assessment specifically; rather, it requires determination that defendant is likely to commit an SVP offense. Per *Blakely/Isaacks*, to impose discretionary indeterminate sentencing, either jury must find the additional, aggravating facts (effectively requiring re-calling the jury once an assessment has been made or empaneling a new jury) or defendant must waive his right to have a jury determine these facts.

People v. Maestas, 224 P.3d 405 (Colo. App. 2009). Court did not abuse its discretion because it explained the sentences, considered both aggravating and mitigating circumstances, and its findings concerning defendant's intent at the time she committed offenses and potential harm she posed to community were not unduly speculative.

People v. Smith, 183 P.3d 726 (Colo. App. 2008). Court is not bound by prosecutor's sentencing recommendation and may impose harsher sentence than requested.

People v. Woellhaf, 199 P.3d 27 (Colo. App. 2007). Resentencing to a lengthier sentence following appeal, defendant's right to due process is violated where there is a realistic likelihood that the harsher sentence was motivated by vindictiveness against defendant for successfully appealing/collaterally attacking the prior conviction. Whenever a judge imposes a more severe sentence, reasons for doing so must be clear or the presumption arises that there is a vindictive purpose. If this presumption arises, prosecution must proffer evidence to overcome it; otherwise, vindictiveness is deemed established and sentence must be vacated. *Here:* no presumption of vindictiveness because aggregate sentence imposed upon remand was no greater than aggregate number of years originally imposed; there was no evidence of actual vindictiveness against defendant for successfully appealing part of his conviction, particularly where judge at resentencing considered intent of original sentencing court and other appropriate factors.

People v. Lopez, 148 P.3d 121 (Colo. 2006). Trial court faced with a *Blakely* resentencing agreed to empanel a jury to make findings regarding the commission of the crimes at issue. CSC found action improper – "...the law of this jurisdiction does not permit the statutory maximum sentence to which a defendant has subjected himself by pleading guilty to be increased by a subsequent jury finding." There is no "*Blakely* error" if there are *Blakely*-compliant or *Blakely*-exempt facts in record.

People v. Hoover, 165 P.3d 784 (Colo. App. 2006). Sentencing discretion is abused only where no reasonable person would take the view adopted by trial court; so long as sentence is within the range required by law, is based on appropriate considerations as reflected in record, and is factually supported by circumstances of case, COA must uphold it. *Here*: aggregate 100-year sentence imposed upon defendant's 44 felony convictions for theft, securities fraud, and COCCA violation was proper.

People v. Mazzoni, 165 P.3d 719 (Colo. App. 2006). Sentencing is by its very nature discretionary, and a judge has wide latitude in arriving at a synthesis that is reflective of the interests of society and defendant; trial court does not abuse its discretion simply because other judges might have imposed a different sentence; only in truly exceptional cases will COA substitute its judgment for that of sentencing court.

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). When imposing sentence, court properly considered defendant's failure to take responsibility for her conduct, where she chose to address court at sentencing and made comments denying any responsibility for offense.

People v. Lopez, 129 P.3d 1061 (Colo. App. 2005). Unlike defendant in *Young*, defendant here elected to take the stand and testify at trial and to make a statement for inclusion in PSI; in so doing, he waived his privilege against self-incrimination, and subjected his credibility to evaluation like that of any other witness; trial court's ruling was properly based on defendant's refusal to admit to guilt; and on an assessment of defendant's credibility and permissible inferences drawn therefrom.

People v. Adams, 128 P.3d 260 (Colo. App. 2005). Punishment for a criminal offense can be increased without violating double jeopardy when defendant has no legitimate expectation of finality in the sentence.

People v. Misenhelter, 121 P.3d 230 (Colo. App. 2004). Plea agreement where the "range" agreed upon includes a maximum that is within aggravated range would require that defendant agree that aggravating circumstances exist that would justify a maximum sentence. Absent such agreement, it cannot be said that defendant has agreed to be sentenced within a range that would authorize the imposition of aggravated sentence.

People v. Newman, 91 P.3d 369 (Colo. 2004). Within penalty ranges established by legislature, court has broad discretion to consider not only the conduct for which defendant was expressly charged, but the actual conduct in committing charged offense, defendant's unrelated criminal conduct, and aspects of defendant's life that go beyond antisocial conduct. A limitations period on prosecution of particular conduct does not prohibit consideration of that conduct for other purposes, including determination of appropriate sentences for other criminal convictions. *Here:* in light of the impact on public health and extensive property damage resulting from defendant's practices, trial court's determination that the need for deterrence of similar profit-maximizing choices by others in the future outweighed the harshness of a prison sentence was not an abuse of discretion.

People v. Trujillo, 75 P.3d 1133 (Colo. App. 2003). Trial court properly sentenced defendant to 20 years at DOC for second-degree burglary because impact on the victim, a 72-year-old man in "marginal health," was extraordinary, and he was confronted in his home, in the middle of the night.

Discretionary Aggravation: §18-1.3-401(6)

People v. Leske, 957 P.2d 1030 (Colo. 1998). Factors that trial court may weigh and consider as extraordinary aggravating circumstances include: unusual aspects of the defendant's character, past conduct, habits, health, age, events surrounding the crime, pattern of conduct which indicates whether defendant is a serious danger to society, past convictions, and possibility of rehabilitation.

People v. Kirby, 2024 COA 20. It is a well-established rule that a trial court may rely on the fact of a defendant's prior conviction to find aggravation and impose a sentence outside the presumptive statutory range. But where defendant admitted to driving at high speeds and leaving the scene of the crash, the court erred by using his factual admissions to increase his sentence because defendant didn't first effectuate a knowing, voluntary, and intelligent waiver of his Blakely rights. But, the trial court's reliance on the Blakely-exempt factor was sufficient to support the finding of aggravation.

People v. Villela, 2019 COA 95. Defendant's *Blakely* wavier is not invalidated because he violated his probation terms and was resentenced.

Mountjoy v. People, 2018 CO 92M. Presence of one *Blakely*-compliant/*Blakely*-exempt fact renders an aggravated sentence constitutionally sound even if the sentencing judge also considered facts that were not *Blakely*-compliant /*Blakely*-exempt. Trial court did not deny defendant his rights to due process and trial by jury when it relied on facts found by the jury beyond a reasonable doubt on charges related to the offenses for which the aggravated sentences were imposed. §18-1.3-401(6) is constitutional under *Blakely* so long as aggravated sentence is based on a fact additional to the elements of crime that is one of four kinds of facts: (1) facts found by jury beyond a reasonable doubt, (2) facts admitted by defendant, (3) facts found by judge after defendant stipulates to judicial fact-finding for sentencing purposes, or (4) the fact of a prior conviction. Facts fitting into the first three categories are considered *Blakely*-compliant, and facts fitting into the fourth category are considered *Blakely*-exempt. Trial court determines as a matter of law whether *Blakely*-compliant/*Blakely*-exempt facts constitute aggravating circumstances pursuant to §18-1.3-401(6).

People v. Mountjoy, 2016 COA 86. *Apprendi/Blakely* error is harmless if the record shows beyond a reasonable doubt that jury would have found the fact/facts relied on to aggravate, had jury been asked to do so.

People v. Lientz, 2012 COA 118. Under SOLSA, court must impose an indeterminate term of at least the minimum of the presumptive range and a maximum of life. In setting the minimum term of indeterminate sentence, court may not exceed the maximum in the presumptive range unless (1) extraordinary aggravating circumstances are present, and (2) court makes specific findings on record detailing the specific extraordinary circumstances that constitute the reasons for varying from the presumptive sentence. *Here*: because trial court failed to make the appropriate findings, case must be remanded for resentencing.

People v. Misenhelter, 214 P.3d 497 (Colo. App. 2009). Where defendant (1) was fully advised and acknowledged his understanding of the elements of one charge, as well as his right to have a jury determine his guilt or innocence beyond a reasonable doubt as to that offense, and (2) waived that right knowingly, voluntarily and intelligently, he admitted the facts to establish the elements of that charge pursuant to the constitutional safeguards of *Apprendi, Blakely, Lopez*, and *Isaacks*. *Here*: trial court properly relied on those facts in imposing an aggravated sentence on the other charge to which defendant pled guilty.

Villanueva v. People, 199 P.3d 1228 (Colo. 2008). Defendant's admissions made at a probation revocation hearing may be used to impose an aggravated sentence *only* if defendant first knowingly, voluntarily, and intelligently waives his constitutional right to have the admitted facts found by a jury beyond a reasonable doubt. The General Assembly's decision not to provide a jury trial in probation revocation proceedings does not abrogate the constitutional right to have a jury determine aggravating facts. Defendant's mere acceptance of probation, without an attendant knowing, voluntary, and intelligent waiver of the constitutional right to have jury determine aggravating facts, does not constitute an implicit stipulation to judicial factfinding. *Apprendi / Blakely* error can be cured if defendant subsequently waives his constitutional rights and admits the aggravating facts in dispute. Prior conviction" exception includes any convictions—not just those entered before the offense for which a defendant is being sentenced. *Here*: defendant pleaded guilty to sexual assault and was granted probation, he admitted violating terms and conditions of his supervision, and trial court erroneously used these admissions to impose aggravated sentence. Later, defendant pleaded guilty to attempted stalking in another case. On remand for resentencing in sexual assault case, trial court can rely on the subsequent attempted stalking conviction to impose an aggravated range sentence.

People v. Fiske, 194 P.3d 495 (Colo. App. 2008). Where a *Blakely*-exempt factor exists, trial court must also find that that specific factor is extraordinarily aggravated before it can sentence defendant in the discretionarily aggravated range. *Here:* defendant had a prior *Blakely*-exempt misdemeanor conviction, but court did not make

a finding that the conviction was an extraordinary aggravating circumstance (instead, the court used other factors to justify the aggravated range sentence). Case remanded for resentencing.

People v. Smith, 183 P.3d 726 (Colo. App. 2008). §16-11-206(5), which allows a court revoking probation to impose any sentence or grant any probation which might originally have been imposed or granted, allows court to resentence defendant to an aggravated-range sentence, even if court did not originally find extraordinary aggravating circumstances. Violating the terms of probation may itself constitute an extraordinary aggravating circumstance. As long as one of the justifications for imposing an aggravated-range sentence is *Blakely*-compliant/*Blakely*-exempt, there is no *Blakely* violation.

People v. Vensor, 151 P.3d 1274 (Colo. 2007). Sentencing defendant under SOLSA to a minimum term in the aggravated range does not present a *Blakely* problem because it affects only the minimum term of the indeterminate sentence, which has life as its maximum. Sentencing court properly considered testimony of other, uncharged sexual assaults when imposing sentence for two class four felony sex offenses. In imposing a sentence within the sentencing range, a court may consider not only the conduct with which the offender was expressly charged, but also unrelated criminal conduct and even aspects of his life that go beyond antisocial conduct.

People v. McAfee, 160 P.3d 277 (Colo. App. 2007). Court illegally aggravated the sentence "because of the nature of this offense, the injuries to the victim, and the planning and the mechanism for predatory behavior involved by this defendant." Although defendant admitted to sentencing court/probation officer preparing the PSI that he caused victim's injuries, his admission was not sufficient under *Isaacks* to waive his right to a jury trial on that issue.

People v. Banark, 155 P.3d 609 (Colo. App. 2007). Defendant pled guilty to attempted second degree kidnapping (F5) and was sentenced to probation for 3 years. Probation was subsequently revoked, and he pled guilty to indecent exposure in another case. Trial court resentenced him to DOC for an aggravated term of 5 years. *Here*: trial court erroneously relied on defendant's admissions to violations of his probation in aggravating his sentence because he would not have been advised of his right to a jury trial on those aggravating facts at the probation revocation hearing; any error was harmless beyond a reasonable doubt because defendant pled guilty to indecent exposure, conduct to which he had admitted at the probation revocation hearing and on which trial court relied in sentencing (a *Blakely*-exempt factor under *Lopez*).

People v. Mazzoni, 165 P.3d 719 (Colo. App. 2006). Defendant's prior adjudication may be used to impose aggravated range sentence because it falls within prior conviction exception under *Apprendi*. Although adjudicatory process does not include jury trial right, reliability is assured by constitutional rights afforded to juveniles, i.e. the rights to notice, to counsel, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to adjudication on proof beyond a reasonable doubt. Where defendant was not apprised of or shown to be aware of his rights under *Apprendi/Blakely*, defense counsel's admission at sentencing would not qualify as an admitted fact that could support an aggravated sentence.

People v. Johnson, 142 P.3d 722 (Colo. 2006). *Blakely* announced a new constitutional rule of procedure that only applies to cases that were pending on direct review at the time *Blakely* was decided.

People v. Kendrick, 143 P.3d 1175 (Colo. App. 2006). In determining whether a sentence is within presumptive range for that offense and whether *Apprendi/Blakely* apply, only the incarceration portion of the sentence is considered. *Here*: sentence of 15 years plus 5 years of mandatory parole is within presumptive range for a F3 extraordinary risk offense, which carries a presumptive range of 4-16 years.

People v. King, 151 P.3d 594 (Colo. App. 2006). Prior misdemeanor conviction from another state constitutes a *Blakely*-exempt aggravated sentencing factor under *Lopez*.

People v. Watts, 165 P.3d 707 (Colo. App. 2006). Trial court imposed an aggravated sentence for vehicular assault in part because defendant's conduct caused SBI to two people. *Here*: because the count defendant pled guilty to named two victims, the existence of two victims was an essential element of the offense; court could properly use the fact of multiple victims to aggravate defendant's sentence without securing the special jury trial waiver regarding that fact that might otherwise have been required under *Isaacks*.

People v. Huber, 139 P.3d 628 (Colo. 2006). Defendant's aggravated range sentence was properly based on *Blakely*-exempt, prior conviction fact (defendant committed instant offense while on sex offender supervision as a result of prior conviction). Prior conviction exception does not violate the Colorado Constitution; there is no language in the Colorado Constitution or case law suggesting that Colorado's jury trial requirements provide greater protections than the federal constitution. Prior conviction exception extends to misdemeanors; as long as the prior conviction arose from procedures that satisfy 6th/14th amendments, judge may consider the prior conviction at sentencing. Prior conviction exception extends beyond fact of conviction to "facts regarding prior convictions" that are contained in conclusive judicial records; because defendant's probation sentence can be found in judicial record, trial court properly considered that fact in aggravating sentence. One *Blakely*-compliant/*Blakely*- exempt factor is sufficient to support aggravated sentence.

People v. Blessett, 155 P.3d 388 (Colo. App. 2006). Failing to challenge facts in a PSI was not sufficient to admit those facts or to waive defendant's *Blakely* rights. Upon finding *Blakely* error, case is remanded for resentencing within the presumptive range; People are not entitled to withdraw from plea.

People v. DeHerrera, 122 P.3d 992 (Colo. 2005). Defendant's discretionary aggravated sentence for robbery was permissible because it rested on two *Blakely*-exempt facts: (1) defendant's 4 prior felony convictions; and (2) fact that defendant committed the instant offense just 10 months after release from prison on a prior conviction.

People v. Martinez, 128 P.3d 291 (Colo. App. 2005). When imposing a discretionarily aggravated sentence under §18-1.3-401(6), consistent with the rules announced in *Apprendi/Blakely*, court may properly consider defendant's prior misdemeanor and felony convictions for offenses that occurred subsequent to conduct at issue in sentencing proceeding.

Lopez v. People, 113 P.3d 713 (Colo. 2005). Once trial court properly relies on a *Blakely*-compliant/*Blakely*-exempt fact as an extraordinary circumstance, a discretionary aggravated sentence is permissible, and COA will not consider constitutional challenges to any other extraordinary aggravating circumstance relied on by trial court. The prior conviction exception to the rule of *Apprendi/Blakely* still applies. *Blakely* is not retroactive to convictions that were final before *Blakely* was decided. *Here*: Discretionary aggravated sentence for possession of controlled substance was permissible, because it rested in part on "prior convictions" for drunk driving, reckless driving and vehicular homicide — even though these "prior convictions" entered, and stemmed from an incident that occurred, between defendant's guilty plea and sentencing on possession charge.

People v. Misenhelter, 121 P.3d 230 (Colo. App. 2004). Where parties' plea agreement provided for sentencing cap in the aggravated range, and defendant received a sentence in that aggravated range without any agreement that aggravating factors existed or any express waiver by defendant of the right to have a jury pass upon the existence of such factors, the agreement that the sentence may not exceed a specific number of years did not constitute a sentencing "range agreed upon by the parties" within the meaning of §18-1-409(1). A plea agreement where the "range" agreed upon includes a maximum that is within aggravated range would require that defendant agree that aggravating circumstances exist that would justify a maximum sentence. Absent such agreement, it cannot be said that a defendant has agreed to be sentenced within a range that would authorize the imposition of an aggravated sentence.

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). Where court finds aggravating factors that are elements, it must relate those facts to the particular defendant and circumstances of the crime. *Here*: sentencing defendant to the maximum in aggravated range for accessory to criminally negligent homicide was proper; trial court found defendant knew or could describe the killer, but concealed that information and prevented police from apprehending the killer.

Mandatory Aggravation: §18-1.3-401 (8), (9)

People v. Scott, 2019 COA 174. Offense of escape is not subject to aggravated range sentencing under §18-1.3-401(8)(a)(IV) because at that time defendant committed offense, he was under confinement or in any correctional institution as a convicted felon, or an escapee at the time of the commission of a felony.

People v. Adams, 2016 CO 74. Under §18-1.3-401(8)(a)(IV), fact that defendant was in prison when he committed a felony is a sentence aggravator requiring a sentence between the midpoint and2xs the presumptive maximum; sentence aggravator applies to convictions for second-degree assault on a peace officer while in custody or confinement, notwithstanding fact that offense carries a consecutive sentencing provision.

People v. Reed, 2013 COA 113. Federal supervised release is the equivalent of "parole" for purposes of §18-1.3-401(8)(a)(II). *Here*: where defendant committed this felony while he was on federal supervised release, trial court was required to sentence him in aggravated range.

People v. Ortega, 266 P.3d 424 (Colo. App. 2011). When a crime implicates extraordinary risk statute, §18-1.3-401(10) and the mandatory aggravated range under §18-1.3-401(8)(d)(I), sentencing court should first increase presumptive range for extraordinary risk, and then sentence defendant between midpoint and 2xs maximum of the increased presumptive range.

People v. Wylie, 260 P.3d 57 (Colo. App. 2010). No error for trial court to apply mandatory aggravator in §18-1.3-401(8)(a)(IV)(incarcerated as a convicted felon) to second degree assault/bodily fluids/in custody, §18-3-203(1)(f.5), because the "in custody" aggravator does not effectively raise the class of felony, and because subsection (f.5) lacks a mandatory consecutive sentencing provision that would supersede general sentencing scheme.

People v. Linares-Guzman, 195 P.3d 1130 (Colo. App. 2008). Aggravated range sentence could be based on defendant's probationary status because it falls within the "prior conviction exception" and because defense counsel consented to judicial fact-finding by stating that court "can make judicial findings from the record."

People v. Robinson, 187 P.3d 1166 (Colo. App. 2008). Trial court did not err in construing applicable sentencing statutes as requiring a minimum sentence of 16 years on his controlled substance convictions. Relevant statutory provisions *reclassified* defendant's drug offenses as F2 based on his prior drug convictions; they did not *enhance* his sentence beyond the presumptive range. Trial court properly applied sentence enhancer in §18-1.3-401(8)(a)(II) mandating an enhanced sentence if the defendant was on parole at the time of crime.

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008). Defendant was entitled to be resentenced where sentences were mandatorily aggravated under §18-1.3-401(9)(a); since the charges for which he was on bond were later dismissed, this retroactively undermined trial court's reliance on the "on bond" enhancer. Because it is uncertain whether court would have imposed same sentence in exercise of discretion, defendant must be resentenced without application of the "on bond" enhancer.

People v. French, 165 P.3d 836 (Colo. App. 2007). Defendant has been "convicted" of an offense for purposes of §18-1.3-401(9)(a) if he has pled guilty to an offense, even if he has not been sentenced. Sentencing court in a subsequent case can rely on that "prior conviction" to aggravate the sentence in that case because that is a *Blakely*-exempt fact.

People v. Blinderman, 148 P.3d 232 (Colo. App. 2006). Where defendant did not dispute defense counsel's admission that defendant was on parole at the time of the offense, defendant made a binding admission of his parole status for purposes of imposing a *Blakely*-compliant aggravated range sentence.

People v. Montoya, 141 P.3d 916 (Colo. App. 2006). Defendant's parole/probation status is "inextricably linked" to his prior convictions; trial court's finding that defendant was on probation/parole at time that he committed current offense is a *Blakely*-exempt factor.

People v. Hummel, 131 P.3d 1204 (Colo. App. 2006). Where defendant is subject to mandatory sentencing under §18-1-105, and the court suspends his sentence to incarceration, sentence is illegal, and defendant is permitted to withdraw guilty plea.

People v. Ramirez, 140 P.3d 169 (Colo. App. 2005). The "on bond" aggravator falls within *Apprendi* prior conviction exception because enhanced sentencing is triggered, not just by being on bond for a prior felony, but for being *convicted* of prior felony.

People v. O'Connell, 134 P.3d 460 (Colo. App. 2005). Where the defendant was alleged to have been on probation at the time of the offense and was therefore subject to aggravated range sentencing under §18-1.3-401(8)(a)(III) *Blakely* was not implicated because sentence actually imposed was within the statutorily prescribed presumptive range.

People v. Nitz, 104 P.3d 240 (Colo. App. 2004). Sentence aggravator under §18-1.3-401(8)(a)(IV) does not apply to every person convicted of possession or use in a detention facility because not every person confined in a detention facility is a convicted felon.

People v. Hall, 87 P.3d 210 (Colo. App. 2003). Defendant is always exposed to aggravated range sentence by original charging document. *Here*: Because he was on bond at time he committed a second crime, §18-1.3-401(9)(a) required defendant be sentenced to at least the midpoint of the presumptive range. Court rejected defendant's argument that he actually had to be convicted of the second crime before it could aggravate his sentence on first.

People v. Gardner, 55 P.3d 231 (Colo. App. 2002). No *Apprendi* violation when sentence imposed is within the original presumptive range, regardless of whether the minimum sentence was increased due to mandatory aggravating factors.

People v. Blackmon, 20 P.3d 1215 (Colo. App. 2000). Trial court erred in failing to make specific findings justifying a sentence in excess of presumptive range; legislature has not dispensed with requirement of specific findings; such findings are necessary even when §18-1-105(9.5) mandatory-sentence-enhancing factor applies.

People v. Leske, 957 P.2d 1030 (Colo. 1998). Although trial court may not impose aggravated range sentence based solely on fact that the elements of offense were proven, court is not precluded from considering, as extraordinary aggravating circumstances, facts which tend to establish an element of an offense. This is true even if those elements must always exist for a conviction, provided court relates those facts to particular defendant and the circumstances of the crime. *Here:* psychological and emotional impact of crimes committed by defendant upon his daughter were aggravating circumstances.

Extraordinary Risk Crimes: §18-1.3-401(10)

People v. Lahr, 2013 COA 57. When imposing sentence for aggravated robbery under §18-4-302(3) following a habitual criminal adjudication, court is required to first modify maximum of presumptive range because the offense is an extraordinary risk crime, and then apply the habitual criminal enhancement to the modified maximum in presumptive range.

People v. Valenzuela, 216 P.3d 588 (Colo. 2009). Conspiracy to distribute a controlled substance under §18-18-405(1) is not an extraordinary risk crime under §18-1.3-401(10)(b).

People v. Trujillo, 169 P.3d 235 (Colo. App. 2007). First degree assault is a per se COV and extraordinary risk crime with penalty range of 10-32 years.

People v. Canody, 166 P.3d 218 (Colo. App. 2007). Defendant's 18-year sentence for first degree assault does not violate *Apprendi/Blakely* as offense is both a per se COV and extraordinary risk offense.

People v. Blinderman, 148 P.3d 232 (Colo. App. 2006). Attempted offense is not an extraordinary risk offense unless it is specifically defined as such in a sentence enhancement provision.

People v. Kyle, 111 P.3d 491 (Colo. App. 2004). Where SOLSA, which eliminated extraordinary risk sentence enhancement for sex offenses after November 1, 1998, was enacted during the period of time charged as the pattern of abuse, and it cannot be determined from the verdict whether the offenses selected by jury to justify the pattern occurred before/after the effective date of SOLSA, defendant cannot be sentenced under SOLSA or the extraordinary risk provision.

People v. Ferguson, 43 P.3d 705 (Colo. App. 2001). First degree assault - heat of passion is a COV and an extraordinary risk crime where jury found that defendant used and had deadly weapon.

People v. Martinez, 32 P.3d 582 (Colo. App. 2001). Second-degree murder - heat of passion is a per se COV; because this F3 is both a *per se* COV and an extraordinary risk crime, presumptive sentencing range is 10 to 32 years.

People v. Zamora, 13 P.3d 813 (Colo. App. 2000). Because conspiracy to commit aggravated robbery is a per se COV and an extraordinary-risk crime, trial court correctly concluded that minimum F4 sentence was 5 years.

Sentence Enhancers: §18-1.3-401(13)

Dorsey v. People, 2023 CO 51. The CSC holds that the legislature intended to designate the recidivist provision of the statute describing the crime of failure to register as a sex offender, §18-3-412.5(2)(a), a sentence enhancer, which may be proved to a judge by a preponderance of the evidence, not an element of the offense, which must be proved to a jury beyond a reasonable doubt. The court further holds that allowing a judge to elevate a conviction for failure to register from a F6 to a F5, based on a prior conviction for failure to register, doesn't violate a defendant's right to a jury trial under either the Sixth Amendment or article II, sections 23 and 25 of the Colorado Constitution.

Caswell v. People, 2023 CO 50. CSC holds that the legislature intended to designate the recidivist provision of the cruelty-to-animals statute, §18-9-202(2)(b)(I), a sentence enhancer, which may be proved to a judge by a preponderance of the evidence, not an element of the offense, which must be proved to a jury beyond a reasonable doubt. The court further holds that where, as here, a cruelty-to-animals (second or subsequent offense) case (1) includes notice in the charging document of the prior conviction for cruelty to animals and (2) is treated as a felony throughout the proceedings - including in terms of its prosecution in district court (not county court), the right to a preliminary hearing (if eligible), the number of peremptory challenges, and the number of jurors - the Sixth Amendment doesn't require that the misdemeanor felony transforming fact in subsection (2)(b)(I) be proved to a jury beyond a reasonable doubt. Lastly, the court holds that, even assuming defendant's state constitutional challenge was forfeited and not waived, no plain error occurred.

People v. Rodriguez, 2021 COA 38. The pregnant victim sentence enhancer that is applicable to certain crimes under §18-1.3-401(13) must, consistent with *Blakely*, and notwithstanding that the statute requires the court to make findings, be found by a jury beyond a reasonable doubt because it increases the penalty for the crime at issue beyond the statutory maximum.

Crimes of Violence: §18-1.3-406

People v. Espinoza, 2020 CO 43. Offenses defined in terms of victimization of another and committed against different victims are not capable of being proved by identical evidence within §18-1-408(3); defendant's convictions for 10 counts of attempted murder required consecutive sentences.

Chavez v. People, 2015 CO 62. Conviction for SOLSA offense that is also a per se COV requires indeterminate prison sentence with minimum term in the enhanced, COV range (midpoint of presumptive range up to 2xs maximum presumptive range); per se COV sex offense is subject to §18-1.3-406(1)(b) and is not probation eligible.

People v. Baca, 2015 COA 153, overruled other grounds, Gonzales v. People, 2020 CO 71. Attempted second degree murder is per se COV but is not a COV "as defined by" §18-1.3-406 or an extraordinary risk crime; it must be sentenced in aggravated range of 8-24 years. *Here:* there was no plain error because People v. Laurson, 70 P.3d 564 (Colo. App. 2002) was current law at time of sentencing - attempted second degree murder was an extraordinary risk crime.

People v. Lancaster, 2015 COA 93. Sexual assault is F2 when defendant is armed with deadly weapon/represents armed with deadly weapon. Sentencing range for F2 is 16-24 years to life unless court makes *Blakely*-compliant findings for aggravation, or unless jury makes separate COV findings.

People v. Lahr, 2013 COA 57. When imposing sentence for aggravated robbery §18-4-302(3) following a habitual criminal adjudication, court is required to first modify maximum of presumptive range because offense is an extraordinary risk crime, and then apply habitual criminal enhancement to the modified maximum in presumptive range.

Lucero v. People, 2012 CO 7. Current definition of deadly weapon, §18-1-901(3)(e), states: "deadly weapon" means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: a firearm, whether loaded or unloaded; a knife; a bludgeon; and any other weapon, device, instrument, material, or substance, whether animate or inanimate. Under this definition, there are no "per se" deadly weapons; an object, including a firearm, is not a deadly weapon absent evidence that the defendant used or intended to use it in a manner capable of producing death or serious bodily injury.

Lehnert v. People, 244 P.3d 1180 (Colo. 2010). Increased COV range may not be imposed if jury does not make required, specific finding that defendant possessed and threatened to use deadly weapon.

People v. Moore, 251 P.3d 451 (Colo. App. 2010). Under §18-1.3-401(1)(a), which authorizes trial court to reduce COV sentence where it finds unusual and extenuating circumstances, fact that victim was not injured cannot, as a matter of law, be considered such a mitigating circumstance where injury was not an element of crime.

People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010), aff'd on other grounds, 2012 CO 9. §18-1.3-406(1)(a) mandates consecutive sentences for 2 or more COV arising out of the same incident only if the COVs are separate - not based on identical evidence. *Here*: attempted first-degree murder, attempted aggravated robbery, and second-degree assault were all based on identical evidence involving defendant stabbing victim 6 times and demanding money from her while she was seated in her parked car; COVs were not separate so not mandatory consecutive.

People v. Trujillo, 169 P.3d 235 (Colo. App. 2007); People v. Canody, 166 P.3d 218 (Colo. App. 2007). First degree assault is a per se COV and extraordinary risk crime with penalty range of 10-32 years.

People v. Trujillo, 114 P.3d 27 (Colo. App. 2004). Under §18-1.3-406(7)(a), where defendant is charged with COV and information/indictment specifies the use of a semiautomatic assault weapon, court may impose an additional 5 years for each COV and may order that the 5 year sentences be served consecutively.

People v. Simpson, 93 P.3d 551 (Colo. App. 2003). Defendant's sentence is not invalid because jury was not given specific interrogatories regarding COV counts because defendant specifically stipulated that interrogatories not be given, and refused court's offer of a separate COV instruction.

People v. Bobrik, 87 P.3d 865 (Colo. App. 2003). COV statute, §18-1.3-406(1)(a), requires consecutive sentences for multiple COVs arising out of the same incident. *Here:* defendant pled guilty to several sex offenses, and to a COV count associated with those offenses; "same incident" requirement of COV statute refers to events that are not "separated by time or an intervening event;" the record permitted an inference that the sexual act underlying each particular count was separate and distinct from the sexual acts underlying other counts; therefore, the acts together did not arise out of the same incident. although sentence for each separate offense was properly enhanced as COV, court erred in determining that enhanced sentences had to run consecutively. Defendant's guilty pleas to the substantive offenses and associated COVs waived "ex post facto" claim that the underlying offenses occurred before 7/1/94, the effective date of the COV enhancer applicable to these crimes. This is so despite the fact that factual basis for the pleas suggested that some of the offenses were committed prior to 7/1/94. The crime of violence statute, §18-1.3-406(1) (a), requires consecutive sentences for multiple crimes of violence arising out of the same incident. Here, defendant pled guilty to several sex offenses, and to a crime of violence count associated with those offenses. *Held*: The "same incident" requirement of the crime of violence statute refers to events that are not "separated by time or an intervening event." Here, the record permitted an inference that the sexual act underlying each particular count was separate and distinct from the sexual acts underlying other counts; therefore, the acts together did not arise out of the same incident. Thus, although the sentence for each separate offense was properly enhanced according to the crime of violence statute, the trial court erred in determining that the enhanced sentences had to run consecutively.

People v. Borghesi, 66 P.3d 93 (Colo. 2003). Pursuant to COV statute, courts have discretion to modify sentences for violent crimes in unusual and extenuating circumstances. Although convicted defendants must still serve modified sentences consecutively if the crimes arose out of the same incident, courts may modify sentences below the statutory range, even to include probationary sentences, if defendant is eligible.

People v. Munkus, 60 P.3d 767 (Colo. App. 2002). *Apprendi* does not prohibit defendant from admitting to facts necessary to support/waive a factual basis for a COV count.

People v. Darbe, 62 P.3d 1006 (Colo. App. 2002). Second-degree murder, even when mitigated by heat of passion, is a per se COV. Heat of passion is a sentence mitigator, not an element of second-degree murder.

People v. Belgard, 58 P.3d 1077 (Colo. App. 2002). Under §16-11-309, defendant is afforded a single opportunity to have his sentence reduced below statutory minimum upon submission of a report from DOC to sentencing court. Where sentence has been reduced below statutory minimum, defendant cannot obtain an additional reduction in sentence under Crim.P. 35(b) because resulting sentence would be beyond statutory limits.

People v. Mata, 56 P.3d 1169 (Colo. App. 2002). Because COV statute defines sentencing standards and does not create separate substantive offenses, the mittimus cannot reflect separate sentences for the COV counts.

People v. Ferguson, 43 P.3d 705 (Colo. App. 2001). First degree assault - heat of passion is a COV and an extraordinary risk crime where jury found that defendant used and had deadly weapon.

People v. Martinez, 32 P.3d 582 (Colo. App. 2001). Second-degree murder - heat of passion is a per se COV; because this F3 is both a *per se* COV and an extraordinary risk crime, presumptive sentencing range is 10 to 32 years.

People v. Banks, 9 P.3d 1125 (Colo. 2000). Criminal provision that incorporates COV sentencing does not allow for additional sentence enhancement under the "extraordinary risk" provision unless the conviction entails proof of either serious bodily injury or use of a deadly weapon.

People v. Zamora, 13 P.3d 813 (Colo. App. 2000). Because conspiracy to commit aggravated robbery is a per se COV and an extraordinary-risk crime, trial court correctly concluded that minimum F4 sentence was 5 years.

People v. Lee, 989 P.2d 777 (Colo. App. 1999). Conviction for second-degree assault, §18-3-203(1) (g), was a per se COV.

Terry v. People, 977 P.2d 145 (Colo. 1999). Conspiracy to commit a per se COV is itself a COV, requiring mandatory sentencing.

People v. Smith, 992 P.2d 635 (Colo. App. 1999). Court may not impose a sentence below mandatory minimum for child abuse resulting in death, even where defendant has successfully completed a regimented inmate-training program and might otherwise be entitled to a sentence modification; fact that mandatory sentences for COV may not be reduced, under§16-11-309, does not constitute an equal protection violation.

People v. Farbes, 973 P.2d 704 (Colo. App. 1998). First-degree assault (§18-3-202) is a per se COV, even if jury finds mitigating factor-provoked passion; mandatory aggravated sentence is based on presumptive range for F5 not F3.

Consecutive & Concurrent Sentences: §18-1-408

Qureshi v. District Court, 727 P.2d 45 (Colo. 1986). When defendant is convicted of several offenses, court has discretion to impose sentences concurrently or consecutively. Court must impose concurrent sentences when counts are based on the same act (or series of acts) arising from same criminal episode, and the evidence supporting the counts is identical. Whether evidence is identical turns on whether the charges result from the same discrete act or from two or more separate acts §18-1-408(3).

People v. Muckle, 107 P.3d 380 (Colo. 2005). Mere possibility jury may have relied on identical evidence in returning more than one conviction is not sufficient to trigger mandatory concurrent sentencing in §18-1-408(3); it is only when evidence will support no other reasonable inference than that the convictions were based on identical evidence that sentencing court must find that defendant is entitled to concurrent sentences.

Chirinos-Raudales v. People, 2023 CO 33. CSC considers whether the trial court abused its discretion by entering consecutive sentences for two of defendant's convictions notwithstanding §18-1-408(3), which requires a trial court to impose concurrent sentences when multiple convictions involving a single victim are supported by identical evidence. CSC holds that because the two counts at issue here were not supported by identical evidence, §18-1-408(3) did not mandate that the trial court enter concurrent sentences for the two counts. CSC declined to resolve whether consecutive sentences were required under §18-1.3-1004(5)(a), even if the convictions were based on identical evidence.

People v. Snedeker, 2023 COA 46. COA holds that: (1) after a prison-plus-probation sentence is found to be illegal under Allman v. People, 2019 CO 78, the court may resentence defendant to probation even if defendant has served the prison portion of the original, illegal sentence; and (2) a court may sentence defendant to prison

on a charge in one case and to probation on a charge in another case as part of a global disposition of charges without running afoul of *Allman*. *[Cert Accepted (2/26/24) in case #23SC511: (1) Whether in cases where a prison-plus-probation sentence violates Allman v. People, 2019 CO 78, 451 P.3d 826, re-imposition of the original probation sentence after the defendant has served the prison sentence (thereby resulting in the same sentence) remains violative of Allman; (2) Whether, in cases where a defendant is resentenced in a global sentencing hearing, it violates Allman for the court to impose prison in one case concurrent to probation in another (SAAG Trina Kissel)].*

Allman v. People, 2019 CO 78. Probation statute does not grant courts authority to impose consecutive terms of prison and probation in a single multi-count case.

People v. Thompson, 2018 COA 83. Sentencing court generally has discretion to impose concurrent or consecutive sentences for multiple convictions, but consecutive sentences are statutorily prohibited if identical evidence supported each count. *Here:* court sentenced defendant to consecutive terms where the evidence showed that the securities fraud convictions were predicated on misstatements and material omissions and the theft conviction was predicated on the defendant's retention and use of funds. *Held*: Not plain error.

People v. Thompson, 2017 COA 56. Trial court properly exercised its discretion under §18-1.3-501(1)(c), in ordering defendant's 6 counts of misdemeanor child abuse to run consecutively; there were 6 separate victims and trial court made adequate findings to support its decision.

People v. Diaz, 2015 CO 28. Under §18-3-203(1)(f), second-degree assault on a detention center employee, consecutive sentences are mandatory if, at the time of sentencing, defendant is serving any other sentence. *Here*: defendant committed a first assault and then discharged the sentence he was serving. Meanwhile, he committed/convicted/sentenced for a second assault. He was then convicted of the first assault. Sentence for first assault must be consecutive to sentence for the second assault.

People v. Fritts, 2014 COA 103. Due process does not prohibit harsher sentence when original sentence was declared to be illegal unless defendant can show that it was the product of actual vindictiveness.

People v. Stroud, 2014 COA 58. When a court's comments during sentencing implicitly demonstrate that court considered sentencing factors, there is no plain error in imposing consecutive sentences.

Marquez v. People, 2013 CO 58. The phrase "same incident," as used in §18-1.3-406(1)(a), has the same meaning as "same criminal episode," as used in Crim.P. 8(a)(1) (requiring mandatory joinder).

People v. Herrera, 2012 COA 13. While it is preferable for court to express clearly why it imposed consecutive sentences, consecutive sentences were properly imposed where there were two child sexual assault victims and aggravated circumstances.

People v. Glasser, 293 P.3d 68 (Colo. App. 2011). Where separate acts and evidence support each of 2 convictions, court does not abuse its discretion in imposing consecutive sentences.

People v. Maestas, 224 P.3d 405 (Colo. App. 2009). Defendant who pleads guilty to multiple offenses and waives establishment of a factual basis for at least one of the offenses waives the right to demand concurrent sentencing pursuant to §18-1-408(3) unless he negotiated a guilty plea including a stipulation for concurrent sentences. *Here*: defendant waived a factual basis for the second-degree assault charge and did not negotiate a concurrent sentencing stipulation as part of her guilty pleas; court had authority to impose consecutive sentences on 3 three convictions.

Juhl v. People, 172 P.3d 896 (Colo. 2007). Mandatory concurrent sentencing provision in §18-1-408(3) applies where defendant has entered a guilty plea pursuant to plea agreement. *Here:* evidence was identical because

defendant's act of colliding head-on with victim's vehicle while engaged in high-speed chase from police was basis for both vehicular assault and first degree assault.

People v. McAfee, 160 P.3d 277 (Colo. App. 2007). Trial court had discretion to run sentences consecutively for attempted sexual assault and second-degree kidnapping; statement in support of arrest (which was adopted as the factual basis for defendant's guilty plea) established that defendant hit victim and threatened to "have her" after throwing her to ground, which supports the attempted sexual assault conviction, but not necessarily the kidnapping conviction; therefore, evidence supporting the 2 convictions did not lead to the inevitable conclusion that they were based on identical evidence; consecutive sentences were appropriate.

People v. O'Connell, 134 P.3d 460 (Colo. App. 2005). Although prosecutor mistakenly argued that consecutive sentencing was required under §18-1.3-1004(5) for defendant's convictions for attempted SAOC and second degree burglary, court simply indicated that it had considered the law concerning concurrent versus consecutive sentencing; this did not demonstrate that court believed consecutive sentencing was required, and court otherwise properly exercised its discretion in imposing consecutive terms.

People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004). Imposition of consecutive sentences based on findings of fact made by court does not violate defendant's right to a jury to determine all facts that increase penalty for defendant's conviction under *Apprendi/Blakely*.

People v. Starcher, 107 P.3d 1127 (Colo. App. 2004). If defendant is sentenced to consecutive prison terms in separate cases at separate times, prison terms are treated as one continuous sentence, to be followed by mandatory parole period for highest class felony offense; defendant will not be eligible for parole until he completes all of his incarceration time.

People v. Mackey, 101 P.3d 1143 (Colo. App. 2004). There is no requirement that a sentence run concurrently with a sentence imposed by a foreign jurisdiction, and §16-11-308(1) and §17-22.5-102 do not require such concurrent sentencing; these sections simply clarify defendant's custodial status for the period when defendant remains in county jail awaiting transfer to DOC.

People v. Moore, 117 P.3d 1 (Colo. App. 2004). Under §18-1-408(3), whether concurrent sentences must be imposed turns upon whether the convictions are supported by identical evidence; question is not whether convictions could possibly be supported by identical evidence; because statute imposes a purely evidentiary test, court's traditional authority to impose consecutive sentences is not limited by prosecution's closing argument or by jury instructions. *Here*: because separate/discrete evidence supported different charges, court possessed discretion to impose consecutive sentences.

People v. Trujillo, 114 P.3d 27 (Colo. App. 2004). Court did not err in imposing consecutive sentence for 4 COVs where crimes were committed against separate victims

People v. Lopez, 97 P.3d 223 (Colo. App. 2004). Where trial court discretionarily imposes a previously DJ&S sentence consecutive to one imposed for a subsequent offense, its decision will be upheld if it explains its reasons for doing so.

People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003). Where 2 or more convictions are supported by identical evidence, sentences imposed shall run concurrently, except that where multiple victims are involved, court may in its discretion impose consecutive sentences. *Here*: because there was separate evidence of aggravated robbery and conspiracy to commit that offense, and because prosecution emphasized this separate conspiracy evidence during closing argument, conspiracy conviction was not based on the same evidence as aggravated robbery conviction; court acted within its discretion in imposing consecutive sentences for these offenses.

People v. Johnson, 74 P.3d 349 (Colo. App. 2002). Since both attempted first-degree murder charge and first-degree assault charge were based upon the same discrete act-slashing with a utility knife-concurrent sentences were required under *Page*.

People v. Clifton, 69 P.3d 81 (Colo. App. 2001). No *Apprendi* violation where defendant receives mandatory consecutive sentences based upon a finding by court (rather than jury) that his multiple COVs were committed as part of a single incident.

People v. Sandoval, 974 P.2d 1012 (Colo. App. 1998). When trial court knows defendant has a pre-existing Colorado sentence but does not specify whether new sentence is to be concurrent or consecutive, new sentence will be presumed to run concurrently; once defendant begins serving new sentence, presumption in effect becomes conclusive, since any subsequent increase (even to clarify court's original intent) would be impermissible under double jeopardy.

Proportionality Review

Wells-Yates v. People, 2019 CO 90M. When conducting extended proportionality review of sentence, court should compare the sentence at issue to sentences for other crimes in same jurisdiction and sentences for same crime in other jurisdictions. In conducting an abbreviated proportionality review of sentences for multiple crimes that triggered habitual criminal law, issue was whether triggering offenses and predicate offenses, combined, gave rise to inference that sentence imposed on any one triggering offense was grossly disproportionate. Abrogating Close v. People, 48 P.3d 528 (Colo. 2002); People v. Deroulet, 48 P.3d 520 (Colo. 2002); People v. Hargrove, 2013 COA 165. Trial court should consider legislative amendments to predicate triggering offenses in determining gravity or seriousness of triggering offenses, as part of abbreviated proportionality review. Possession of narcotics, and possession with intent to sell, distribute, dispense, or manufacture narcotics were not per se grave or serious offenses, for purposes of proportionality review. Abrogating People v. Gaskins, 825 P.2d 30 (Colo. 1992); People v. Cisneros, 855 P.2d 822 (Colo. 1993). Whether possession with intent to sell or distribute methamphetamine was grave or serious offense had to be determined on case-by-case basis, with consideration of surrounding facts and circumstances of crime.

Ward v. People, 2024 CO 76. *Wells-Yates* did not announce new substantive rules of constitutional law. Although some of Wells-Yates' s holdings announced new rules, those rules are procedural. Accordingly, none of Wells-Yates's holdings apply retroactively to cases on collateral review. And because defendant failed to establish justifiable excuse or excusable neglect for his untimely collateral attack, the CSC concludes that his motion is statutorily time-barred.

McDonald v. People, 2024 CO 75. *Wells-Yates* did not announce new substantive rules of constitutional law. Although some of *Wells-Yates'*s holdings announced new rules, those rules are procedural. Accordingly, none of *Wells-Yates'*s holdings apply retroactively to cases on collateral review.

Sellers v. People, 2024 CO 64. In this petition, the CSC considers whether a life without the possibility of parole ("LWOP") sentence for felony murder is categorically unconstitutional or, alternatively, grossly disproportionate to the offense of felony murder following the General Assembly's 2021 reclassification of that offense. Based on objective indicia of societal standards and evolving standards of decency as expressed in legislative action and state practice, as well as the exercise of its independent judgment, the CSC concludes that an LWOP sentence for felony murder for an adult offender (19-years-old) is not categorically unconstitutional. The CSC also concludes that, even assuming without deciding that felony murder is not per se grave or serious,

defendant's offense here was, in fact, grave and serious. Thus, defendant's LWOP sentence, although severe, does not run afoul of the Eighth Amendment or article II, section 20 of the Colorado Constitution and was not grossly disproportionate.

People v. Crawley, 2024 COA 49. Under *Wells-Yates* a crime should not be given the designation unless it is grave or serious in every potential factual scenario. Second-degree murder – "knowingly causing the death of a person" under §18-3-103(1)(a) – is a per se grave or serious offense. COA performed its own abbreviated proportionality review.

People v. Kennedy, 2023 COA 83. Because vehicular homicide under §18-3-106(1)(b)(I) is not grave or serious in every potential factual scenario, it should not be considered a per se grave or serious offense for purposes of proportionality review. This division disagrees with another division of this court that reached the opposite conclusion, albeit before *Wells-Yates*. Disagrees with *People v. Strock*, 252 P.3d 1148 (Colo. App. 2010). *[Cert Accepted (8/5/24) in case #23SC847: (1) Whether vehicular homicide-DUI, §18-3-106(1)(b)(I), is a per se grave or serious offense for purposes of proportionality review; (2) Whether the COA erroneously ruled that the maximum sentence in the aggravated range, for a defendant with no prior felony convictions, did not give rise to an inference of gross disproportionality (SAAG Melissa Allen)]*

People v. Caime, 2021 COA 134. COA holds, as a matter of first impression, that vehicular assault (reckless driving) is not a per se grave or serious offense for purposes of conducting a proportionality review.

People v. Session, 2020 COA 158. Second-degree burglary and attempted second-degree burglary are not per se grave or serious crimes when conducting an abbreviated proportionality review.

People v. McCrae, 2019 CO 91. In determining gravity/seriousness of triggering and predicate offenses during abbreviated proportionality review, court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively.

Melton v. People, 2019 CO 89. Possession of a schedule I/II controlled substance is not a per se grave/serious offense in abbreviated proportionality review.

People v. Porter, 2019 COA 73. Defendant sentenced as habitual offender is not entitled to an extended proportionality review merely because some of his prior convictions arose from crimes committed as juvenile.

People v. Terry, 2019 COA 9. Attempted extreme indifference murder constitutes a per se grave and serious crime for purposes of abbreviated proportionality review; because it involves elements of intent/violence, it poses an extreme danger to victim and public.

People v. Loris, 2018 COA 101. Under abbreviated sentencing proportionality review, defendant's 32-year habitual offender sentence for possession with intent to distribute did not raise inference of gross disproportionality, and thus, case did not merit remand for extended proportionality review; defendant's triggering offense of possession with intent to distribute was per se grave or serious, defendant's underlying crime of conspiracy to distribute controlled substance was per se grave or serious, and defendant's convictions, in combination, indicated persistent disrespect and disregard for the rule of law and social norms.

People v. Oldright, 2017 COA 91. In abbreviated proportionality review of habitual sentence, court errs if it fails to consider legislature's reclassification of any of defendant's prior offenses.

Lucero v. People, 2017 CO 49. Eighth Amendment's proportionality principle requires consideration of each individual crime and each sentence imposed, and it does not consider aggregate term-of-years sentence for different offenses.

People v. Stellabotte, 2016 COA 106. Defendant's triggering offenses – 2 counts of felony theft/1count AMVT – either individually or in combination are grave/serious for the purposes of abbreviated proportionality review; underlying offenses of AMVT and felony menacing are also grave/serious.

Rutter v. People, 2015 CO 71. While legislature can change classification of crimes, courts determine whether offenses are grave/serious under Eighth Amendment. *Here:* legislature made no change with regard to triggering offense of manufacturing meth; because offense is per se grave/serious, 96-year sentence does not yield inference of gross disproportionality.

People v. Gee, 2015 COA 151. Defendant's prior conspiracy conviction (based on some acts committed as juvenile and some as adult) is properly considered an adult conviction so *Graham/Rainer* do not apply; *Graham/Rainer* apply only when conviction constituting a predicate offense for habitual criminal sentence is based solely on crimes committed as juvenile.

People v. Ellis, 2015 COA 108. *Graham* does not prohibit a "de facto" life without parole sentence under an aggregate, consecutive term-of-years sentence; *Graham* never addressed this issue; *Graham* also distinguished homicide and nonhomicide offenses and stated it did not apply to homicide crimes.

People v. Foster, 2013 COA 85. CSC has not addressed whether failure to register as a sex offender is per se grave/serious, COA declined to do so holding that each situation should be judged on its particular facts. *Here:* after examining the facts underlying the offenses in question in order to assess harm caused or threatened to victim and defendant's culpability, COA determined that one of defendant's failure to register offenses was grave/serious, since he failed to register at any address for many years, while defendant's other failure to register caused little harm to society, since he remained in contact with law enforcement and was unregistered for only short time.

People v. Green, 2012 COA 68M. Defendant's failure to register as sex offender is grave/serious because it threatens harm to society by hindering state's ability to treat/supervise the sex offender. While first degree criminal trespass may not be a per se grave/serious offense, circumstances of defendant's trespass (breaking into victim's home during early morning hours, encountering her naked, refusing to leave despite repeated demands, causing victim considerable fright) made offense grave/serious.

People v. Strock, 252 P.3d 1148 (Colo. App. 2010). Whether crime is grave /serious is a "somewhat imprecise" inquiry and requires a comparison of the harm caused to victim or society and culpability of defendant. Vehicular homicide – DUI is per se grave/serious because of the grave harm caused and defendant's culpability; it is not necessary for each of predicate offenses to be grave/serious for court to conclude that offenses taken together are grave/serious. *Here*: defendant's vehicular homicide/DUI conviction plus his predicate convictions for felony DARP were grave/serious because: license revocations were for prior DUI convictions; one offense involved an accident causing property damage; defendant had an extensive history of traffic violations including 6 prior DUIs and multiple driving after revocation convictions; and at the time of triggering offense, his BAC was .256; no error for to deny request for extended proportionality review.

People v. Gallegos, 226 P.3d 1112 (Colo. App. 2009). Defendant's 6-year sentence for F6 impersonation was not grossly disproportionate; though no one was seriously harmed, criminal impersonation is not lacking gravity/seriousness because of the harm it may cause its victims.

People v. Gonyea, 195 P.3d 1171 (Colo. App. 2008). Reviewing courts must grant substantial deference to legislature's broad authority to determine punishments for crimes; outside context of capital punishment, successful challenge to proportionality of a particular sentence is exceedingly rare. *Here:* because one of the primary counts was considered grave/serious and 3 of habitual counts were grave/serious, sentence was not

grossly disproportionate, abbreviated review was appropriate, and sentence did not constitute cruel and unusual punishment.

People v. Reese, 155 P.3d 477 (Colo. App. 2006). Upon a timely request, defendant entitled to abbreviated proportionality review; if defendant's habitual criminal sentence is based on offenses that are per se grave/serious, then the sentence is nearly impervious to a proportionality attack. De novo is the appellate standard of review.

People v. McNally, 143 P.3d 1062 (Colo. App. 2005). Defendant's 24-year F4 theft sentence was not grossly disproportionate, where 2 of 3 triggering offenses for habitual criminal charges (burglary/attempted burglary) were grave/serious crimes.

People v. Patnode, 126 P.3d 249 (Colo. App. 2005). Defendant's 2 prior driving felonies, by themselves and absent other aggravating factors that would implicate the direct safety of the public were essentially a violation of an administrative order and not grave/serious. Prior criminal trespass was arguably not grave/serious. So habitual criminal sentence imposed for predicate offense of possession of schedule II drug with intent to distribute raised inference of gross disproportionality when compared to predicate crime/prior offenses. Case remanded for an extended proportionality review.

People v. Allen, 111 P.3d 518 (Colo. App. 2004). Defendant's triggering robbery conviction and prior convictions for robbery, attempted possession of a controlled substance, POWPO, and vehicular eluding, are all grave/serious; 24-year sentence for robbery conviction and habitual criminal adjudication was not grossly disproportionate.

People v. Martinez, 83 P.3d 1174 (Colo. App. 2003). Defendant's 48-year sentence was not unconstitutionally disproportionate where he was convicted of solicitation for child prostitution, and his habitual criminal counts were based on convictions for aggravated incest, felony menacing, engaging in a riot, and violation of bail bond conditions.

People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003). Cruel and unusual punishment does not require strict proportionality between the crime committed and the sentence imposed; it forbids only extreme sentences that are grossly disproportionate to the crime; abbreviated proportionality review is all that is required when the offense is a serious one.

People v. Borghesi, 66 P.3d 93 (Colo. 2003). Constitutional question of whether a sentence is excessive is eighth amendment not double jeopardy question. Considerations of disproportionate sentencing are legally irrelevant to a double jeopardy multiplicity analysis. Under Eighth Amendment, no sentence is per se constitutional. Although courts afford great deference to legislative determinations regarding sentencing, defendant is still entitled to an abbreviated proportionality review upon request for each separate sentence imposed under COV statute.

People v. Strean, 74 P.3d 387 (Colo. App. 2002). Defendant was sentenced to 48 years to life under SOLSA; entitled only to an abbreviated proportionality review because his conviction was for 2 inherently grave/serious offenses, SAOC and SAOC-POT and he will eventually be eligible for parole.

People v. McNeely, 68 P.3d 540 (Colo. App. 2002). Trial court erred by refusing to conduct a proportionality review; error was harmless because COA could conduct its own abbreviated review and find no disproportionality in the sentence.

People v. Valdez, 56 P.3d 1148 (Colo. App. 2002). When a sentence has been invalidated for constitutional disproportionality, trial court in resentencing should consider all options otherwise authorized by statute; after invalidating a sentence imposed under the big habitual statute, court may not resentence defendant under the

little habitual statute because the prior convictions are older than 10 years; court may impose sentence under §18-1-105.

Presentence Confinement Credit (PSCC): §18-1.3-405, §18-1.3-509

People v. Bonde, 2023 COA 75. COA considers whether §18-1.3-405 and §18-1.3-301(1)(j) entitle a defendant, who served time in a nonresidential community corrections program, to credit for the entire period of that time if defendant's community corrections sentence is later revoked. Relying in part on People v. Hoecher, 822 P.2d 8 (Colo. 1991), the COA concludes that neither statute defendant to that credit. *[Cert Accepted (6/10/24) in case #23SC784: (1) Whether an offender who is being resentenced from a community corrections program to the department of corrections is entitled to presentence confinement credit for time served in a nonresidential community corrections program, overruling People v. Hoecher, 822 P.2d 8 (Colo. 1991) (SAAG Brock Swanson)]*

Russell v. People, 2020 CO 37. Defendant is entitled to PSCC for each day served where there is a substantial nexus between the conduct or charges for which he is confined and the sentence ultimately imposed, and causation, not geography, is the defining question in determining if there is a substantial nexus. Abrogating Massey v. People, 736 P.2d 19 (Colo. 1987); People v. Freeman, 735 P.2d 879 (Colo. 1987). In determining whether a defendant is entitled to PSCC for each day served where there is a substantial nexus between the conduct or charges for which he is confined and the sentence ultimately imposed, the court should ask what would happen if only the sentencing charge existed; in such a scenario, would defendant have remained confined, and if the answer to this question is yes, a substantial nexus exists, and the defendant is entitled to PSCC so long as it is not duplicative. Overruling People v. Torrez, 2017 CO 91. *Here:* defendant was entitled to presentence confinement credit (PSCC) for the period of time he was confined after his termination from community corrections until his resentencing.

Fransua v. People, 2019 CO 96. When defendant, who is out of custody on bond in one case, commits another offense and is unable to post bond in that second case, defendant is not entitled to PSCC in the first case for time spent in custody for the second case. Defendant is entitled to PSCC for both the first and last days of his presentence confinement.

People v. Garcia, 2016 COA 124. §18-1.3-407(2)(a)(I) states that the court may award PSCC to an offender sentenced to YOS; but the PSCC cannot reduce the offender's actual time served in YOS to fewer than 2 years; the word "may" does not mandate that a court award PSCC to a YOS sentence, instead it is at the court's discretion based on circumstances of each case.

People v. Pimble, 2015 COA 112. Defendants are not entitled to PSCC for time served in nonresidential COMCOR. *People v. Hoecher,* 822 P.2d 8 (Colo. 1991) remains good law following the 2011 amendments to COMCOR statutes because offenders in nonresidential COMCOR are not "confined" as required under PSCC statute§18-1.3-405.

People v. Stroud, 2014 COA 58. When trial court imposes consecutive misdemeanor and felony sentences it has discretion to give PSCC against either sentence.

People v. Houston, 2014 COA 56. Defendants are not entitled to PSCC for time held in other jurisdictions where those jurisdictions have a separate and independent basis for confinement. PSCC should be awarded for both defendant's date of arrest and as well his date of release.

People v. Smith, 2014 CO 10. Neither § 18-1.3-405(PSCC on DOC sentences) nor §18-1.3-509 (PSCC on misdemeanor sentence) require PSCC on a jail term imposed as condition of probation. Trial court has discretion to award less than the full amount of PSCC against a jail sentence imposed as condition of probation.

People v. Henry, 2013 COA 104M. There are 2 components to PSCC statute: (1) it grants the trial court the authority to determine whether, and how much, PSCC a defendant should receive; and (2) it grants DOC the authority to determine how such credits are applied. Trial court's only responsibility is to determine the amount of PSCC, if any, to which defendant is entitled, and to enter that amount on the mittimus.

People v. Carrillo, 2013 COA 3. Under §18-1.3-509, defendant convicted of a misdemeanor and sentenced to county jail is not entitled to PSCC for the time he was confined prior to sentencing if he was serving a parole sentence for another offense.

People v. Howe, 2012 COA 177. Where defendant's commission of a crime in one county triggers his confinement in that county as well as a probation revocation complaint and arrest warrant in another county, he is entitled to PSCC upon revocation of the probation.

People v. Herdman, 2012 COA 89. Where trial court failed to rule on defendant's motion for PSCC, appellate court remands for PSCC calculation.

People v. Roy, 252 P.3d 24 (Colo. App. 2010). Before 2004, PSCC requests could be filed under Crim.P. 35 (a) or (c). After 2004, such motions are Crim.P. 35(a) motions because they allege defendant's sentence was "not authorized by law" or "inconsistent with the statutory scheme." Defendant is not entitled to duplicative credit; credit against one consecutive sentence is sufficient to assure defendant receives full credit against the total term of imprisonment.

People in the Interest of J.R., 216 P.3d 1220 (Colo. App. 2009). Generally, trial court has discretion whether to apply PSCC against a juvenile's sentence. *Here*: because juvenile was not sentenced until 88 days after the 45-day deadline, juvenile was entitled to PSCC for 88 days; trial court acted within its discretion in not awarding credit for the 167 days juvenile was confined prior to sentencing deadline.

Edwards v. People, 196 P.3d 1138 (Colo. 2008). Sentencing court does not have discretion to grant or deny PSCC; it simply notes whether a defendant is entitled to PSCC and enters the amount on the mittimus. By making a finding of the amount of PSCC, trial court does not interfere with parole board's authority, because it is DOC, by authority of the parole board, that applies credit to the parole portion of a sentence.

Edwards v. People, 196 P.3d 1138 (Colo. 2008). Sentencing court does not have discretion to grant or deny PSCC; it simply notes whether a defendant is entitled to PSCC and enters the amount on the mittimus. By making a finding of the amount of PSCC, trial court does not interfere with parole board's authority, because it is DOC, by authority of the parole board, that applies credit to the parole portion of a sentence. Term "sentence" in §18-1.3-405 includes the mandatory parole portion as well as the confinement portion of defendant's sentence. *Here:* although awarding defendant PSCC will likely shorten his parole term, it will be the DOC that shortens it, not the trial court; defendant who earned PSCC is entitled to have that credit deducted from his mandatory parole.

People v. Wallin, 167 P.3d 183 (Colo. App. 2007). §18-1.3-405 did not entitle defendant to PSCC toward his new sentence for the time he spent in jail on a parole hold prior to being sentenced in the new case; this time would apply only to the sentence for which defendant was on parole. §17-2-103(6)(c), which tolls the expiration of a parolee's parole upon the filing of a complaint by a parole officer, does not impose additional punishment, and does not negate or change the general rule for applying PSCC under §18-1.3-405.

People v. Finley, 141 P.3d 911 (Colo. App. 2006). To receive PSCC, defendant must be actually confined and there must be a substantial nexus between the confinement and the charge for which sentence is ultimately imposed; defendant is not entitled to duplicative credit.

People v. Chavez, 122 P.3d 1036 (Colo. App. 2005). Defendant is not entitled to PSCC for time on bond, even if he was subject to electronic monitoring and confined to a residence during the night hours. Electronic monitoring and curfew do not so limit liberty as to constitute confinement under §18-1.3-405, because defendant is able to enjoy such freedoms as work, attending school, and socializing with family and friends. The penalty of escape charges for violating curfew is not determinative of whether defendant is confined.

People v. Norton, 63 P.3d 339 (Colo. 2003). When defendant serving mandatory parole is jailed during the pendency of new charges, PSCC must be awarded against the mandatory parole term he was serving when the new charges arose, and not against the new charge sentence.

People v. Ostuni, 58 P.3d 531 (Colo. 2002). Defendant was convicted of crimes committed while he was on parole; he sought a Rule 21 order to compel DOC to calculate his combined sentences by applying PSCC to his new sentences rather than to his previous parole revocation sentence. *Here*: annotation indicating credit for time served on a mittimus that expressly requires service of new sentences concurrently with a parole violation, cannot reasonably be understood as anything more than a factual finding of the period of time the defendant spent in confinement prior to sentencing.

People v. Reed, 43 P.3d 644 (Colo. App. 2001). In order to arrive at appropriate sentence, court may take into account the amount of PSCC defendant will receive.

People v. McGraw, 30 P.3d 835 (Colo. App. 2001). After defendant was terminated from COMCOR, but before he was re-sentenced to DOC, he attempted suicide while in custody, resulting in 36-day stay at state mental hospital. Under §16-11-306, defendant was "confined" and was entitled to 36-days PSCC for his hospital stay, notwithstanding its rehabilitative purpose.

People v. Sloan, 3 P.3d 497 (Colo. App. 2000). No PSCC for time out on appeal bond because standard bond conditions do not limit liberty enough to constitute "confinement" under §16-11-307.

People v. Gangruth, 990 P.2d 697 (Colo. 1999); Meredith v. Zavaras, 954 P.2d 597 (Colo. 1998). DOC must comply with an unappealed (even if erroneous) order about application of PSCC. Trial court did not act outside scope of its jurisdiction, even if it was wrong, as long as it followed its understanding of the law and imposed a criminal sentence.

Time Computation: §17-22.5-303, §17-22.5-403. §18-1-105(1)(a)(V)

Thorson v. DOC, 801 P.2d 540 (Colo. 1990); Bynum v. Kautzky, 784 P.2d 735 (Colo. 1989). Good-time and earned-time credits do not constitute service of a sentence but are only used to determine defendant's parole eligibility date.

Rather v. Suthers, 973 P.2d 1264 (Colo. 1999); People v. McCreadie, 938 P.2d 528 (Colo. 1997). Defendants do not have a constitutional right to good-time credit; any claim to good-time credit arises is statutory.

People v. Jim, 2017 COA 123. Under §18-1.3-301(1)(k), if defendant escapes from COMCOR he forfeits earned time credits but not time actually served in residential community corrections.

People v. Norton, 63 P.3d 339 (Colo. 2003). Part 2 of Article 22.5 of Title 17, which is entitled "Inmate and Parole Time Computation — offenders sentenced for crimes committed prior to July 1, 1979," applies only to offenders sentenced for crimes committed prior to July 1, 1979.

People v. Boyd, 23 P.3d 1242 (Colo. App. 2001). Because defendant had not begun serving parole, issues raised regarding his time credit computations were not ripe for adjudication.

TYPES OF SENTENCES

Community Corrections: §18-1-301, §17-27-101

People v. Bonde, 2023 COA 75. COA considers whether §18-1.3-405 and §18-1.3-301(1)(j) entitle a defendant, who served time in a nonresidential community corrections program, to credit for the entire period of that time if defendant's community corrections sentence is later revoked. Relying in part on People v. Hoecher, 822 P.2d 8 (Colo. 1991), the COA concludes that neither statute defendant to that credit. *[Cert Accepted (6/10/24) in case #23SC784: (1) Whether an offender who is being resentenced from a community corrections program to the department of corrections is entitled to presentence confinement credit for time served in a nonresidential community corrections program, overruling People v. Hoecher, 822 P.2d 8 (Colo. 1991) (SAAG Brock Swanson)]*

People v. Sandoval, 2018 CO 21. COMCOR sentences beyond presumptive range must be based on *Blakely* compliant/*Blakely* exempt facts.

People v. Reyes, 2016 COA 98. After defendant's COMCOR sentence is terminated, court may set a resentencing hearing without a request from parties; court's decision to set hearing on own motion does not violate equal protection/separation of powers.

People v. Herrera, 2014 COA 20. When defendant is sentenced to COMCOR but rejected before placement, court has discretion to resentence defendant without holding a hearing.

People v. Griego, 207 P.3d 870 (Colo. App. 2008). Defendant terminated from COMCOR may be sentenced to any sentence which might have originally been imposed; under §18-1.3-301(1)(h) the authority to modify COMCOR sentence is same as for defendant who has been revoked from probation; after COMCOR termination defendant may be sentenced to DOC for term that is greater than maximum DOC sentence available under original plea agreement; when defendant was originally sentenced to COMCOR, she received benefit of plea agreement; but following COMCOR termination a different factual predicate existed for re-sentencing.

Romero v. People, 179 P.3d 984 (Colo. 2007). After COMCOR termination, re-sentencing court can increase defendant's sentence if he is first given a hearing. §18-1.3-301(1)(e). Increased sentence under this provision does not violate double jeopardy because defendant lacked legitimate expectation of finality in original sentence.

People v. Adams, 128 P.3d 260 (Colo. App. 2005). Defendant had no legitimate expectation of finality in COMCOR sentence, and because court conducted resentencing hearing, court was not subject to limitation in §18-1.3-301(1)(e). Following defendant's COMCOR termination, court was authorized to run sentence consecutively to sentence serving in another case, even though original COMCOR sentence was ordered to run concurrently to that other sentence.

People v. Kitsmiller, 74 P.3d 376 (Colo. App. 2002). Trial court must make specific findings on record to detail extraordinary aggravating circumstances to support a sentence beyond presumptive range. *Here*: Because court made required findings at original sentencing hearing and, upon defendant's COMCOR termination only remainder of original sentence was imposed, new findings to support aggravated range sentence were not required.

People v. Rodriguez, 55 P.3d 173 (Colo. App. 2002). Under §17-27-105(2)(e), defendant has no legitimate expectation that a resentence to DOC will not be followed by mandatory parole period. *Here*: No double jeopardy violation where trial court resentenced COMCOR defendant to same term in DOC plus a mandatory parole; sentencing statutes put defendant on notice of mandatory parole period.

People v. McPherson, 53 P.3d 679 (Colo. App. 2001). Trial court revoked defendant's 3-year probation and resentenced him to 6-years COMCOR; when terminated from COMCOR, court resentenced to 6-years DOC without holding hearing/appointing counsel; no due process violation because DOC sentence did not exceed COMCOR sentence which was imposed after a hearing and with counsel.

People v. Pauley, 42 P.3d 57 (Colo. App. 2001). Defendant knew reasons for COMCOR termination and did not request statutory informal review prior to being resentenced to DOC; defendant not entitled to belated review/vacated sentence.

People v. Lanzieri, 25 P.3d 1170 (Colo. 2001). Defendant ordered to COMCOR facility by parole officer; he later left without permission and was tried for escape. *Here*: Assuming parole officer's directive was an irregularity in defendant's placement in facility, it was not so egregious as to negate "lawful custody or confinement" element of escape; defendant may not challenge sentence legality by resorting to self-help when he has means to seek relief through judicial channels.

Benz v. People, 5 P.3d 311 (Colo. 2000); People v. Rogers, 9 P.3d 371 (Colo. 2000). Defendant rejected from COMCOR after initial acceptance receives administrative review required by §17-27-101 if he receives actual notice of, and reasons for, rejection. sentencing court provides informal review contemplated by statute when it conducts informal review of facts underlying defendant's rejection.

Lawson v. Zavaras, 966 P.2d 581 (Colo. 1998). COMCOR initially accepted then rejected defendant; no liberty interest created when defendant is first accepted-then rejected; revocation does not implicate due process.

People v. Lopez, 961 P.2d 602 (Colo. App. 1998). Defendant who is resentenced to DOC, after initial COMCOR sentence is entitled to PSCC for any time served as program resident; COMCOR program administrator must provide sentencing court with a written summary of the number of days defendant was program resident, as well as any other time credits for which the offender is eligible.

People v. Abdul, 935 P.2d 4 (Colo. 1997). Defendant has neither constitutional/statutory right to resentencing hearing after COMCOR termination.

Suspended Sentences: §18-1-105(1)

People v. Propst, 2021 COA 13. COA considers whether a district court must impose a prison sentence, which was suspended as a condition of probation, upon a finding that defendant violated probation. Contrary to People v. Frye, 997 P.2d 1223 (Colo. App. 1999), but consistent with Fierro v. People, 206 P.3d 460 (Colo. 2009), §16-11-206(5), provides a sentencing court with discretion to continue probation, revoke probation, or impose any sentence that it might originally have imposed.

Fierro v. People, 206 P.3d 460 (Colo. 2009). Under §18-1.3-401(1), court has authority to suspend imposition/execution of sentence for such period and upon such terms and conditions as it may deem best. Usually, sentence is suspended on condition that defendant successfully fulfill a lesser sanction, such as probation. *Here*: when court imposes/suspends sentence, and defendant fails to fulfill lesser sanction, court is not bound to execute previously imposed suspended sentence-it must consider all available sentencing alternatives; suspended sentence is equivalent to a mere announcement of sentence that court would have imposed but for its decision to try a lesser sanction first.

People v. Sisson, 179 P.3d 193 (Colo. App. 2007). Court suspended portion of DOC sentence on condition defendant complete sex offender treatment; when DOC informed court ex parte that defendant had not completed treatment, court sua sponte revoked the suspended sentence. *Here:* revocation was resentencing under Crim.P. 35(a) so defendant had 120 days from revocation date to challenge manner in which resentencing was accomplished. Defendant has liberty interest in suspended portion of sentence when language of suspension

mandates a suspension if defendant meets condition. Such mandatory language creates legitimate claim of entitlement to the suspension if the condition was met. Revocation of suspended portion of sentence for failure to meet suspension's conditions must be accompanied by due process, including written notice of failure of condition, disclosure of evidence against defendant, fair opportunity to be heard, limited right to confrontation, and other protections.

Deferred Judgment & Sentence (DJ&S): §18-1.3-102

People v. Carbajal, 198 P.3d 102 (Colo. 2008). Because DJ&S is not subject to Crim.P. 35(c) review, where validity of DJ&S is in question, CAR 21 is appropriate remedy. §18-1.3-102 strictly controls court's authority to grant DJ&S. DJ&S statute divests court of authority to hear revocation petition filed more than 30 days after DJ&S expires. *Here:* although court tried to impose DJ&S to run after sentence in another case, by law DJ&S commenced as soon as defendant entered his plea; where DJ&S expired 8 months before DA filed petition for revocation, court was without authority to act.

People v. Manzanares, 85 P.3d 604 (Colo. App. 2003). Decision not to pursue revocation at a given time may bar subsequent revocation for an earlier violation under following conditions: (1) earlier decision not to revoke is evidenced by dismissal of revocation complaint after probation department knew of purported violation; and (2) defendant has agreed to extend DJ&S period on the dismissal of revocation complaint. CRE exclusionary rules do not apply to revocation proceedings; evidence not excluded because illegally obtained or seized because it arose out of defendant's attempts to comply with unenforceable sex offender treatment conditions. DJ&S revocation proceedings are conducted according to probation revocation procedures. Defendant may not be convicted solely on strength of uncorroborated confession or admission; where revocation is not sought on basis of alleged criminal offense, confession corroboration requirement does not apply. DJ&S language put defendant on notice that he could expect probation to impose additional conditions reasonably related to rehabilitation and purpose of supervision. Limitations period of §16-5-402 does not commence until DJ&S is revoked and judgment of conviction entered. Although, §16-11.7-104(1) and §16-11.7-105(1) apply only when PSI is required for use in sentencing sex offenders, they apply to DJ&S involving a sex offender; court must order a sex-offender-specific evaluation when DJ&S imposes sex offender treatment. *Here*: because court failed to order evaluation, treatment condition was unenforceable.

People v. C.G., 12 P.3d 861 (Colo. App. 2000). Before DJ&S may end early, DA must approve; court cannot act unilaterally.

People v. Allen, 973 P.2d 620 (Colo. 1999). Court is not required to give defendant *Curtis* advisement at DJ&S proceeding.

People v. Dulac, 2024 COA 14. A defendant who successfully completes a DJ&S for a sex offense is ineligible to petition for removal from the sex offender registry under §16-22-113(1)(d), if they have other outstanding convictions in the same case. §16-22-113(1)(d) requires dismissal of the case—not merely the charge that is the subject of the DJ&S—before a petition may be filed under that subsection.

People v. C.H., 2023 COA 86. §24-72-706(2)(b) allows a court to seal the records of a misdemeanor offense that would otherwise be ineligible for sealing under §24-72-706(2)(a) if the court finds, by clear and convincing evidence, that defendant's need for sealing is significant and substantial, the passage of time is such that the defendant is no longer a threat to public safety, and disclosure of the record is no longer necessary to protect or inform the public. Because the trial court didn't apply this standard when it denied defendant's motion to seal her criminal records, the COA reverses the order and remands the case for the trial court to consider the request

under the applicable standard. §24-72- 705(1)(a)(IV) does not allow a court to seal the records of a successfully completed DJ&S if defendant was convicted of an offense in the same case as the DJ&S. COA affirms the trial court's order to the extent that it denied defendant's request to seal a successfully completed DJ&S entered in the same case as a conviction. Lastly, COA concludes that a successfully completed DJ&S is not a "conviction" under the sealing statutes. §24-72-703(12)(a)(I) — which permits the sealing of "conviction" records only if "every conviction of defendant" in the case may be sealed — doesn't prevent the records of a conviction from potentially being sealed simply because of the existence of a successfully completed DJ&S in the same case.

Williams v. People, 2019 CO 101. When defendant introduces some evidence of inability to pay restitution, court must make ability-to-pay findings under §18-1.3-702(3)(c) before revoking DJ&S for failure to pay restitution; prosecution must prove by preponderance that defendant: (1) has ability to comply with order to pay monetary amount due without undue hardship to defendant/dependents, and (2) has not made good-faith effort to comply with order.

Carrera v. People 2019 CO 83. DJ&S statute (2002-2012) does not prohibit trial court from extending defendant's DJ&S as many times as it deems appropriate so long as aggregate period does not exceed 4 years; when DJ&S reaches 4 years, court may extend the period by 180 days so long as restitution is only outstanding condition.

Pineda-Liberato v. People, 2017 CO 95. DJ&S is sentencing alternative that is not a sentence but rather a continuance with probation-like supervision conditions; in exchange for continuance, DJ&S statute authorized court to impose probationary-like supervision conditions on defendant. DJ&S restitution order remains in force until restitution is paid in full even if DJ&S is successfully completed. Obligation to pay unpaid court costs/fees do not survive successful completion of DJ&S because pertinent statutes do not provide for it.

Flores-Heredia v. People, 2017 CO 64. Withdrawal of guilty plea and dismissal of charge with prejudice occur by operation of law even if no court enters a formal order when DJ&S completed.

People v. Roman, 2017 CO 63; Zafiro-Guillen v. People, 2017 CO 62; Espino-Paez v. People, 2017 CO 61; People v. Corrales-Castro, 2017 CO 60. Plain terms of Crim.P. 32(d) require a plea to exist in order for it to be withdrawn; Crim.P. 32(d) does not authorize withdrawal of defendant's DJ&S guilty plea because it was already withdrawn by statute when it was completed.

People v. In the Interest of A.B., 2016 COA 170. Under Children's Code, DJ&S carries a different meaning than adjudication - means a plea has entered, not a conviction.

People v. Blackwell, 2016 COA 136. Defendant who pleads guilty to state criminal offense in DJ&S is "convicted" within meaning of the revocation hearing statute §16-11-206(3).

People v. Sosa, 2016 COA 93. While DJ&S is still in effect, COA lacks jurisdiction to consider appeal of Crim.P. 32(d) denial because there is no final judgment.

Finney v. People, 2014 CO 38. Defense counsel waived advisement on penalties upon DJ&S revocation and defendant admitted revocation complaint. *Here*: §16-11-206 requires court to advise probationer of potential penalties upon DJ&S revocation, at or before revocation hearing; right is statutory, not constitutional; statute does not require Crim.P. 11(b) advisement; defense counsel can/did waive defendant's statutory right to pre-revocation penalty advisement; Crim.P. 11(b) nor constitutional due process independently required such advisement; even if defendant had not waived pre-revocation penalty advisement, he was advised on consequences of revocation on several occasions (providency hearing, several pre-revocation agreements, and PSI).

People v. Bassford, 2014 COA 15. Trial court is not statutorily authorized to suspend portion of prison sentence conditioned upon successful completion of term of probation; court may suspend entire prison term on condition defendant complete probation.

Kazadi v. People, 2012 CO 73. DJ&S is a continuance of defendant's case in lieu of sentence imposition; it is not judgment of conviction or a final, appealable judgment; defendant serving DJ&S may not collaterally attack his plea under Crim.P. 35(c) but may seek to withdraw plea under Crim.P. 32(d) since no sentence has been imposed/suspended; defendant has burden to establish fair/just reason for plea withdrawal.

People In Interest of D.S., 2012 COA 199. Juvenile deferred adjudication statute provides court can continue case for additional one-year for good cause, it does not require that good-cause determination be made at end of first year; good cause determination can be made any time; trial court need not expressly state on record that it found good cause, but it should provide sufficient findings to reflect such determination. *Here*: trial court did that by stating 2-year adjudication period was appropriate, by expressly considering recommendations of treatment providers and PSI, identifying juvenile's need for rehabilitative treatment, and crediting defense counsel's concession to 2-year period.

People v. Carbajal, 2012 COA 107. DJ&S is statutory creation, and court lacks authority to impose DJ&S outside of statutory limits. DJ&S statute allows court to continue defendant's case, without entering judgment, for up to 4 years. Period may be extended for 180 days for payment of restitution. If defendant violates any DJ&S condition, it can be revoked; but DA must file revocation petition no later than 30 days after expiration of 4-year period; if defendant completes DJ&S, guilty plea is withdrawn, and case dismissed with prejudice.

People v. Walker, 252 P.3d 1225 (Colo. App. 2011). Where DA waited 6 years to set hearing on motion to revoke DJ&S, it was abandonment of motion.

People v. Loveall, 231 P.3d 408 (Colo. 2010). Statutory requirement that defendant, his attorney, and DA consent to/sign written stipulation for DJ&S is not jurisdictional requirement; court does not exceed its jurisdiction by entering DJ&S sex offense because it is a continuance with probation-like conditions, not a sentence and SOLSA indeterminate sentence does not apply.

People v. Nichols, 140 P.3d 198 (Colo. App. 2006). Defendant on DJ&S failed to pay restitution, and DA filed motion to revoke; rather than ruling on motion, court simply extended time in which defendant could pay, going beyond original 1-year term of DJ&S. After original 1-year term expired, defendant committed additional violations and had not paid restitution; COA held that because original motion to revoke was timely, DA could file amended motion to revoke based on failure to pay and violations that occurred after expiration of initial DJ&S period.

People v. Hummel, 131 P.3d 1204 (Colo. App. 2006). Under plain language of §18-1-105(1), court does not have power to suspend DOC sentence when defendant is sentenced pursuant to mandatory sentencing provision.

People v. Simonds, 113 P.3d 762 (Colo. 2005). DA filed timely application to revoke DJ&S, but later withdrew it on condition defendant agree to additional 4-year DJ&S period. *Here:* Because court lacked statutory authority to continue DJ&S for additional 4 years, condition on which application was withdrawn failed, and application was not effectively abandoned. After discovery of illegality, court acted within its jurisdiction in refocusing on, and adjudicating, timely revocation application and entering a judgment of conviction, even though adjudication occurred after original 4-year period expired.

People v. Darlington, 105 P.3d 230 (Colo. 2005). Court may accept nolo contendere plea under DJ&S because; §18-1.3-102 authorizes DJ&S in any case where defendant entered plea of guilty.

People v. Lopez, 97 P.3d 223 (Colo. App. 2004), aff'd other grounds, 113 P.3d 713 (Colo. 2005). Defendant committed vehicular homicide (drunk driving) during his DJ&S for possession of a controlled substance, causing court to revoke DJ&S. *Here:* trial court does not violate double jeopardy by using fact of a subsequent conviction, and circumstances surrounding that conviction, to justify a discretionary aggravated range sentence for an earlier offense for which DJ&S was revoked.

People v. Rivera-Bottzeck, 119 P.3d 546 (Colo. App. 2004). Crim. P. 25 does not require that DJ&S resentencing be by same judge who accepted guilty plea.

People v. Marez, 39 P.3d 1190 (Colo. 2002). Court must advise about mandatory parole, even when the defendant is pleading guilty to receive DJ&S; although imprisonment/parole are not inevitable at time of the plea, they are direct consequences.

People v. Wright, 53 P.3d 730 (Colo. App. 2002). If defendant adequately advised of mandatory parole when entered DJ&S, court need not readvise him about it upon revocation of DJ&S.

People v. Guerrero, 26 P.3d 537 (Colo. App. 2001). §16-7-403(2) governs DA authority to apply for entry of judgment and imposition of sentence in DJ&S cases. *Here:* DA did not timely file complaint to revoke; although investigator notified court defendant had failed to pay restitution and warrant issued, these acts did not toll 30-day deadline in §16-7-403(2); court lacked jurisdiction to revoke DJ&S.

Probation §18-1.3-201

People v. Gore, 774 P.2d 877 (Colo. 1989). Trial courts lack jurisdiction to revoke probation unless revocation proceeding is instituted before term of probation expires.

Salah v. People, 2024 CO 54. CSC rejects defendant's argument that a biological connection alone is dispositive of whether a probationer has a constitutional right to familial association in this context. Like most other courts that have addressed the parameters of sex offender probation conditions when a probationer asserts a right to familial association, the CSC holds that whether a probation condition implicates a probationer's constitutional right to familial association with an extended relative depends, as a threshold matter, on whether the probationer demonstrates the nature of their relationship with the family member. This threshold showing is necessary so that a trial court reviewing a claim of familial association can determine where on the spectrum of protection the relationship falls. *Here:* defendant didn't present any evidence at his sentencing or his revocation hearing demonstrating the nature of his relationship with his nephew. Consequently, the trial court didn't err by prohibiting defendant from contacting or living with his nephew or by failing to make specific findings identifying the compelling circumstances that justified the imposition of these restrictions.

People v. Zoller, 2023 COA 117. COA considered the due process standards that apply when a defendant moves to modify a mandatory protection order that infringes on the fundamental constitutional right to parental association. Relying on federal and state law concerning conditions of probation, the COA concluded that when a defendant challenges such an infringement pursuant to §18-1-1001(6), the trial court may not deny the motion without first finding that: (1) the infringement is justified by compelling circumstances, and (2) the purpose of the infringement cannot be accomplished by less restrictive means. *Here:* the MPO prevented defendant from contacting or directly/indirectly communicating with his minor daughter, victim and witness of his DV crimes, until he completed his prison/parole sentences. The trial court found the order was justified for the daughter's safety and refused to modify it before defendant's sentence is complete. Because the trial court did not make the latter finding, the COA reversed the order denying modification and remands for additional findings. Note:

Because *Brockelman* interpreted the parameters of a trial court's statutory discretion and authority to impose geographic conditions of probation, and didn't address any constitutional concerns, COA concluded it did not control the resolution in this case.

People v. Snedeker, 2023 COA 46. COA holds that: (1) after a prison-plus-probation sentence is found to be illegal under Allman v. People, 2019 CO 78, the court may resentence defendant to probation even if defendant has served the prison portion of the original, illegal sentence; and (2) a court may sentence defendant to prison on a charge in one case and to probation on a charge in another case as part of a global disposition of charges without running afoul of *Allman*. *[Cert Accepted (2/26/24) in case #23SC511: (1) Whether in cases where a prison-plus-probation sentence violates Allman v. People, 2019 CO 78, 451 P.3d 826, re-imposition of the original probation sentence after the defendant has served the prison sentence (thereby resulting in the same sentence) remains violative of Allman; (2) Whether, in cases where a defendant is resentenced in a global sentencing hearing, it violates Allman for the court to impose prison in one case concurrent to probation in another (SAAG Trina Kissel)].*

People v. Silvanic, 2023 COA 16. Defendant, a convicted sex offender, appeals court's denial of his objection to the probation department's request to continuously monitor all aspects of his electronic devices and internet usage. As a matter of first impression, COA concludes that before imposing a condition that subjects a probationer to ongoing, unfettered monitoring of their electronic devices and internet usage, the court must: (1) make sufficient factual findings concerning the extent of the electronic monitoring necessary to accomplish the legitimate purposes of the probationary sentence; and (2) evaluate whether less restrictive means are available to achieve those ends. Because the court failed to make such findings and conclusions, COA reversed the order and did not reach defendant's First and Fourth Amendment challenges. The dissent concludes that there is no material difference between the subject monitoring condition and other previously approved sex offender intensive supervised probation conditions that defendant does not challenge on appeal. To the extent there are material differences, the dissent concludes that the additional restrictions are warranted given the nature of defendant's convictions. The dissent also addresses defendant's remaining constitutional challenges, concluding that any impingement the monitoring condition imposes on defendant's First or Fourteenth Amendment rights is substantially outweighed by the government's interest in ensuring he complies with the terms and conditions of his probation.

People v. Vigil, 2023 COA 12. As a matter of first impression, the State cannot revoke a sex offender's probation based on a valid invocation of the Fifth Amendment privilege against self-incrimination as to a sex offender treatment contract statement where the conviction is final (direct appeal completed) but defendant's three-year period for seeking postconviction relief has not run.

People v. Karwacki, 2023 COA 3. COA decides for the first time whether a trial court may sua sponte order a probation department to initiate probation revocation proceedings. COA concludes the trial court does not have the power to initiate such proceedings sua sponte under §16-11-205, which sets forth the law governing the initiation of probation revocation proceedings; initiating such proceedings creates the appearance of partiality and substantially affects the fairness of the probation revocation proceedings.

People v. Martinez, 2022 COA 142. COA addresses two issues concerning the extension of a defendant's probation where defendant has made regular restitution payments pursuant to a payment schedule established under §16-18.5-104(4)(a)(I), but still has not paid the full amount of restitution. COA concludes that §16-18.5-105(3)(d)(III) does not authorize an extension of probation where a defendant has made all the payments required under a payment schedule, simply because the restitution hasn't been fully paid. It also concludes that the circumstances of the case do not establish "good cause" to extend probation under §18-1.3-204(4)(a). COA

reverses the trial court's order extending defendant's probation for an additional five years and remands the case with directions to terminate probation.

People v. O'Day. 2022 COA 24. COA holds that trial court did not violate defendant's Fifth Amendment privilege against self-incrimination by requiring him to answer questions in a DJ&S revocation hearing. The questions —whether he had been charged with and convicted of crimes in another case — did not call for answers that could be used as evidence of guilt in this case or which could provide evidence of guilt in another pending or future criminal case. during a revocation hearing, a defendant-probationer isn't entitled to the full range of constitutional guarantees afforded to a defendant in a criminal prosecution who faces substantive criminal charges. A defendant's privilege against self-incrimination isn't implicated when he is asked questions to determine whether he violated the conditions of his probation.

Walton v. People, 2019 CO 95. Defendant convicted of DUI should not have been barred, as condition of probation, from using medical marijuana, as she was lawfully authorized to do by state, without finding that this was necessary and appropriate to promote statutory sentencing goals.

Allman v. People, 2019 CO 78. Probation statute does not grant trial court authority to impose consecutive terms of prison and probation in a single multi-count case.

Sharrow v. People, 2019 CO 25. When probationer defends against alleged violation of nonpayment condition of probation based on lack of financial means, court cannot revoke probation/impose imprisonment without first determining whether he failed to comply with probation willfully or failed to make sufficient bona fide efforts to acquire resources to comply with probation. If court finds defendant willfully refused to comply with probation/failed to make sufficient bona fide efforts to acquire resources to do so, it may revoke probation/impose imprisonment. If trial court finds that defendant could not comply despite sufficient bona fide efforts to acquire resources, it must consider prison alternatives. If trial court finds that indigent defendant is not at fault for failing to comply with probation because he made sufficient bona fide efforts to acquire resources, imprisonment following revocation of probation is appropriate if there is no adequate alternative to fulfill State's sentencing interests.

People v. Timoshchuk, 2018 COA 153. Defendants have statutory right to counsel in probation revocation proceedings under §16-7-207 and §16-11-206(1).

People v. Trujillo, 2018 COA 12. Court had statutory authority to impose an indeterminate probation sentence of 7-years-to-life under §18-1.3-202(1) to ensure restitution repayment on theft and criminal mischief convictions.

People v. Al-Turki, 2017 COA 39, aff'd operation of law, 2019 CO 77. CSC's sweeping and unqualified language in Chavez v. People, 2015 CO 62 answers negatively question whether a COV sex offender's mandatory sentence to an indeterminate term of incarceration can later be modified to probation.

Veith v. People, 2017 CO 19. Defendant pled and requested probation in lieu of prison; plea agreement specified that sentencing was at trial court's discretion with DOC cap of 12 years. Court gave defendant 10-years DOC for theft, and a consecutive 25-years' probation for securities fraud. CSC considered question of consent where defendant requested probation in lieu of incarceration but received both. In light of fact that court cannot impose probation without defendant's consent, Court concluded that court exceeded scope of Defendant's consent when it imposed prison sentence in addition to probation.

People v. Ruch., 2016 CO 35. While his conviction was on appeal, probationer completely refused to enroll/participate in sex offender treatment based on his concern that, in the course of treatment, he would be compelled to incriminate himself; trial court revoked his probation. *Here:* because defendant completely refused

to attend treatment, his invocation of the Fifth Amendment was premature and amounted to prohibited, blanket assertion of privilege; court properly revoked probation based on total refusal to attend treatment.

People v. Roletto, 2015 COA 41. Defendant argued that court had to make findings on factors outlined in People v. Romero, 559 P.2d 1101 (Colo. 1976): (1) a job for which probationer is qualified is available; (2) the job would allow him to meet his financial obligations; and (3) he unjustifiably refuses to take the job, before it could revoke his probation. COA held courts are not required to determine defendant's ability to pay based exclusively on *Romero* factors because it was inconsistent with burden-shifting procedure in §16-11-206(3)(if prosecution presents prima facie evidence of defendant's failure to pay, burden shifts to defendant to prove by a preponderance that he was financially unable to pay).

People v. Anderson, 2015 COA 12. Defendant moved to terminate probation §18-1.3-1008(2), which permits court to discharge indeterminate probation of sex offender convicted of F4 after offender has served 10 years of probation, arguing that his DJ&S time counted toward his total time on probation. *Here*: DJ&S period does not qualify as time served on probation.

People v. Calderon, 2014 COA 144. Defendant's probation revocation appeal is not moot where he is deported and barred from lawfully reentering U.S. under 8 U.S.C. §1182(a)(9)(C)(i)(II) (2012), because that provision has exception permitting defendant to seek admission after ten years. Actual notice of specific condition of probation cannot be derived from sentence to probation itself. Initiation of revocation proceedings tolls probationary period until proceedings are completed, terminated by probation, or dismissed by court. *Here*: even though defendant was sentenced to 2-years' probation and more than 2 years passed since he was sentenced, his sentence should not be discharged; rather, case is remanded to district court to reinstate defendant's original sentence.

People v. Garcia, 2014 COA 85. Appeal of revocation order should be dismissed as moot where: (1) resulting sentence is complete; (2) underlying conviction is not at issue; and (3) defendant has been deported and permanently barred from reentering U.S. because underlying conviction was for "Crime Involving Moral Turpitude" under Immigration and Naturalization Act.

People v. Bassford, 2014 COA 15. Trial court is not statutorily authorized to suspend portion of prison sentence conditioned upon successful completion of term of probation; court may suspend entire prison term on condition defendant complete probation.

People v. Smith, 2014 CO 10. Prison sentence is primarily punitive - probation intended rehabilitative; because probation is opportunity for defendant to avoid harsher sentence, probation is privilege not a right. Defendant must choose to accept probation terms and conditions; court may not impose probation without defendant's consent; if rejects it, court sentences defendant to prison. Under §18-1.3-202 court has broad discretion to impose whatever conditions it considers appropriate to ensure defendant leads a law-abiding life; condition will only be considered outside scope of court's authority if it is not reasonably related to that purpose. Court's discretion to impose probation conditions of probation includes imposition of county jail sentence; for felony court may impose up to 90-days jail.

People v. Wilburn, 2013 COA 135. DJ&S statutory condition that defendant not commit any new offenses includes federal offenses. Medical marijuana provision of the Colorado Constitution does not exempt defendant from complying with federal law outlawing possession/use of marijuana.

People v. Fair, 2013 COA 41. Interpretation of SOMB regulation is reviewed de novo. Review begins with regulation's plain language and applies usual canons of statutory construction. *Here*: SOMB regulation provides that offender who denies committing any criminal offense (a risk level 3) but receives community-based sentence such as probation/COMCOR, shall be placed in "Denier Intervention" program as a precursor to sex

offender treatment. *Here:* Revocation upheld because SOMB regulation requiring Denier Intervention applies only to offenders who are at risk level 3 *at the time they receive a community-based sentence*; regulation does *not* apply to offenders who are reclassified at risk level 3 after being placed in community.

People v. Gravina, 2013 COA 22. Under §18-1.3-202 (1), probationer may be sentenced to period of confinement as condition of probation; term is statutorily limited and attaches to probation sentence - not underlying conviction; each time defendant's probation is revoked and he is resentenced to probation, court may sentence him to a period of confinement up to maximum number of days permitted by statute.

People v. Dinkel, 2013 COA 19. Court does not have discretion to reduce sex offender's probation below statutorily mandated minimum term pursuant to §§18-1.3-1008 and 18-1.3-104(1); sex offender's successful discharge from treatment does not allow for early release; it is only a factor to consider after minimum probation term has passed.

People v. Lientz, 2012 COA 118. Conditions of probation prohibiting sexual contact without prior approval/prohibiting possession of pornography were reasonably related to purposes of probation despite fact that defendant's victims were children and not adults. In addressing whether probation condition impermissibly infringes on constitutional right, courts have considered the following five factors: (1) whether condition is reasonably related to underlying offense; (2) whether condition is punitive to the point of being unrelated to rehabilitation; (3) whether condition is unduly severe and restrictive; (4) whether defendant may petition court to lift the condition temporarily when necessary; and (5) whether less restrictive means are available. *Here*: Court did not err in not concluding that challenged conditions violated defendant's constitutional rights to liberty, privacy, and freedom of association. Condition prohibiting possession pornography was not unconstitutionally overbroad. Conditions prohibiting sexual contact without prior approval/prohibiting pornography were not unconstitutionally vague. Whether court adequately stated its reasons for revoking probation and evidence it relied on is a legal question subject to de novo review.

People v. Finney, 2012 COA 38. Defendant has no right, under due process/Crim.P. 11, to: (1) a pre-revocation penalty advisement; or (2) personally waive a revocation hearing. Safeguards applicable to revocation of probation/DJ&S include statutory rights – right to reading of allegation and advisement on possible penalties following revocation; defense counsel can waive such statutory/regulatory rights, pre-revocation penalty advisement, and may enter guilty plea to the revocation complaint. Crim.P. 11 does not require repeated advisements. Here: even if defendant's waiver of probation revocation hearing must be knowing and voluntary, guilty plea entered by counsel met that standard, where defendant was advised on 6 previous occasions that revocation could result in indeterminate prison term.

People v. Watkins, 2012 COA 15. Statutorily mandated condition that probationer not commit any offenses while on probation includes committing offenses under federal law; medical marijuana provision of the Colorado Constitution does not exempt probationer from complying with federal law outlawing possession/use of marijuana.

People v. Montoya, 259 P.3d 555 (Colo. App. 2011). Where only evidence of defendant's ability to work consisted of 2 doctors' notes stating he was unable to work, sentencing court clearly erred when it found defendant could still perform some type of work; jail sentence requiring defendant to perform work/useful public service at jail is not a work release sentence; it is jail sentence. Work release requires that defendant be released to perform work; defendant who is physically unable to work may not be sentenced to work release/useful public service.

People v. Devorss, 277 P.3d 829 (Colo. App. 2011). Sex offender probation condition prohibiting contact with children under 18 was not unconstitutionally vague as applied to defendant who violated condition by sitting

beside child in a restaurant booth during lunch. Term "contact" in the "no contact with children" condition of sex offender probation should be interpreted broadly, because it: (1) is reasonably related to rehabilitation in that it "helps sex offenders learn to avoid situations that may lead to inappropriate and unlawful conduct," and (2) serves "dual purposes" of protecting society and reintegration of offender into a responsible lifestyle.

People v. Kiniston, 262 P.3d 942 (Colo. App. 2011). Term "conviction" in probation eligibility statute refers to initial entry of guilty plea on DJ&S, and not entry of conviction after revocation; defendant should have been deemed probation eligible at the time he was revoked because, at the time of original plea, he did not have 2 prior felonies.

People v. Loveall, 231 P.3d 408 (Colo. 2010). No rule requiring finding of good cause prior to admission of hearsay in probation revocation proceeding. Where one or more bases for revoking probation are set aside on appeal, revocation remains valid only where record clearly shows trial court would have revoked probation even without consideration of improper factors; remedy is a remand for factual findings. *Here:* admission of hearsay violated due process because declarants' identities were not disclosed prior to hearing, preventing defendant from testing declarant's credibility or accuracy of hearsay; new hearing required because trial judge retired.

People v. Nance, 221 P.3d 428 (Colo. App. 2009). Probation revocation does not negate DA's prior waiver of 2-felony rule; trial court retains discretion to sentence defendant to probation §18-1.3-201(4)(a)(I).

People v. Guatney, 214 P.3d 1049 (Colo. 2009); Lewis v. People, 214 P.3d 1059 (Colo. 2009). Because order declining to revoke probation is not final judgment (C.A.R. 1) COA lacked jurisdiction to entertain DA appeal challenging trial court's decision not to revoke defendant's sex offender intensive supervision probation. *Here:* order declining to revoke sex offender's probation, upon finding that his refusal to discuss his offenses was an exercise of his 5th amendment right such that it could not serve as basis for revocation, was not final judgment, and COA lacked jurisdiction to entertain DA appeal; constitutionality or operability of statutory provisions requiring progress in treatment as precondition of discharge from sex offender intensive supervision probation was never at issue, and conditions upon which allegations of probation violation were premised no longer existed.

Villanueva v. People, 199 P.3d 1228 (Colo. 2008). Defendant's admissions at probation revocation hearing may be used to impose aggravated sentence *only if* defendant first knowingly, voluntarily, and intelligently waives his constitutional right to have admitted facts found by a jury - legislature's decision not to provide a jury trial in probation revocation proceedings does not that right. Defendant's mere acceptance of probation, without an attendant waiver, does not constitute an implicit stipulation to judicial factfinding. *Apprendi / Blakely* error can be cured if defendant subsequently waives his constitutional rights and admits aggravating facts in dispute. Prior conviction exception includes any convictions and not just those entered before offense for which defendant is being sentenced. *Here*: Defendant pleaded guilty to sexual assault and was granted probation, he admitted violating probation, and court erroneously used admission to impose aggravated sentence. Later, defendant pled guilty to attempted stalking in another case. On remand for resentencing in sexual assault case, court can rely on subsequent attempted stalking conviction to impose aggravated range sentence.

People v. Firth, 205 P.3d 445 (Colo. App. 2008). Probation condition stating, "You shall attend and actively participate in a sex offender evaluation and treatment program approved by probation. You will abide by the rules of treatment program and treatment contract and will successfully complete program to satisfaction of probation and the treatment provider," was not unconstitutionally vague on its face or as applied.

People v. Smith, 183 P.3d 726 (Colo. App. 2008). §16-11-206(5) allows court to resentence defendant to aggravated-range sentence, even if court did not originally find extraordinary aggravating circumstances;

violating probation may constitute an extraordinary aggravating circumstance; as long as one of justifications for imposing aggravated-range sentence is *Blakely*-compliant/*Blakely*-exempt, there is no *Blakely* violation.

People v. Loveall, 203 P.3d 540 (Colo. App. 2008). Probationer's confrontation right does not depend on nature of underlying allegations (crime v. condition). In all probation revocation proceedings, trial court must: determine whether there is good cause to deny confrontation, if evidence is "substantially reliable," court may deny confrontation for that reason alone, ideally, court should explain on record: (1) why hearsay is reliable; (2) why reliability is "substantial enough" to supply good cause for not producing declarant; failure to make express findings may be overlooked if reviewing court can determine that hearsay is trustworthy. *Here:* court held that defendant was deprived of his "due process right of confrontation" during revocation hearing because trial court did not find good cause to deny confrontation/find that hearsay evidence was substantially reliable; independent review showed that evidence was unreliable because it consisted of statements that: were double/triple hearsay; lacked meaningful detail/contained material inconsistencies; and did not fall within a recognized hearsay exception. DA's failure to disclose declarants' identities until day of hearing deprived defendant of fair opportunity to rebut hearsay evidence (contrary to §16-11-206(3)).

People v. Hotle, 216 P.3d 68 (Colo. App. 2008). Under statutory provision governing extensions of probation, defendant who consents to probation extension has no statutory right to counsel or an advisement on right to counsel before extension is granted; and (2) defendant who consents to probation extension has no Sixth Amendment right to counsel, or due process right to an advisement on right to counsel, before extension is granted.

People v. Hernandez-Clavel, 186 P.3d 96 (Colo. App. 2008). Sentencing court may properly consider defendant's status as illegal alien subject to deportation in deciding whether to grant/deny probation; immigration status is relevant in evaluating appropriateness of probation sentence (whether defendant has ability to remain in jurisdiction/successfully comply with probation conditions). Notwithstanding §18-1.3-104(1)(a), defendant may properly appeal denial of probation if claim involves sentencing court's consideration of factors not statutorily/constitutionally authorized.

Hernandez v. People, 176 P.3d 746 (Colo. 2008). Under §16-11.7-106, sex offender treatment is not mandated in every case where sex offender subsequently commits an offense of any kind. Where recommendations of sex offender evaluation and facts of subsequent case do not support treatment, sentencing court is not required to order treatment; when sex offender evaluation and facts of case support it, trial court must impose treatment as condition of probation; trial court's discretion not to order treatment is tightly constrained.

People v. Romero, 198 P.3d 1209 (Colo. App. 2007). Probation filed defendant's consent to extend probation on last day of probation, but court did not sign extension until next day - defendant argued that probation expired because revocation proceedings not initiated before expiration of term. *Here*: Trial court did not lose jurisdiction to extend probation; initiation of revocation proceedings is not exclusive means for tolling probation; filing of qualifying consent to extend probation can also toll it; qualifying consent is one signed by defendant and DA, that establishes good cause for extension, and in which neither side requests a hearing on the extension. Probation here was tolled. Defendant has no right to counsel when he voluntarily consents to probation extension and does not request hearing. *Here*: following facts support conclusion that he was aware of/waived counsel: (1) defendant twice previously agreed to probation extensions in lieu of revocation while represented by counsel; (2) in instant case, defendant signed above statement "attorney waived with regard to this matter."

People v. Heimann, 186 P.3d 77 (Colo. App. 2007). 5-day time limit in §16-11-206(5) for revoking probation upon finding violation is directory not jurisdictional. *Her*e: delay of more than 1 month between defendant's

formal admission of violation and official revocation of probation did not require reversal and reinstatement of probation.

People v. Conner, 148 P.3d 235 (Colo. App. 2006). Where a defendant consents to an extension of his or her probation, there is no requirement for a hearing or other proceedings to assure that the decision is knowing and voluntary. *Here*: evidence from postconviction hearing supported trial court's finding that defendant's consent to extend his probation was knowing and voluntary.

People v. Rossman, 140 P.3d 172 (Colo. App. 2006). Probation condition that required probationer provide a biological sample for DNA database did not violate probationer's right to privacy; government interests served by DNA databases are undeniably compelling and monumental in weight, and intrusion occasioned by a blood test is minimal.

People v. Valenzuela, 98 P.3d 951 (Colo. App. 2004). Trial court has discretion to release sex offender from sex offender intensified supervision probation (SOISP) and place him on intensified supervision probation (ISP) even when defendant has not begun his treatment; reason for releasing defendant was to allow him to maintain contact with minor children.

People v. Goldfuss, 98 P.3d 935 (Colo. App. 2004). Trial court had authority to order DV treatment as condition of defendant's probation without a jury finding that defendant committed "an act of domestic violence." Court's order imposing such treatment does not implicate *Apprendi* because defendant received sentence within original range.

In re: People v. Kennaugh, 80 P.3d 315 (Colo. 2003). For misdemeanors committed before 4/17/03, §16-11-101(1) prohibited imposition of probationary sentence that exceeded maximum period of incarceration.

In re: Chism v. People, 80 P.3d 293 (Colo. 2003). §18-1.3-201(4)(a)(II) does not overrule/limit §18-1.3-201(4)(a) (I), which provides that upon DA recommendation, 2-felony rule restriction on probation may be waived by sentencing court.

People v. Scura, 72 P.3d 431 (Colo. App. 2003). Revocation/execution of a suspended sentence requires same procedural protections as revocation of probation/parole: (1) written notice; (2) disclosure of inculpatory evidence; (3) fair opportunity to be heard, including an evidentiary hearing; (4) right to cross-examine witnesses, unless there is a good reason not to allow it; (5) neutral fact finder; and (6) written decision.

People v. Moses, 64 P.3d 904 (Colo. App. 2002). "Preponderance of the evidence" standard of proof applies when the probationer is alleged to have violated a specific enumerated condition of probation (to not use drugs), even though conduct might constitute a criminal offense. Testimony from a probation officer that the probationer submitted a urine sample that tested positive for a controlled substance was sufficient to warrant revocation of that probation. Where probation revocation is otherwise warranted on other grounds, any error in revoking probation on basis of a violation not alleged in complaint was harmless error.

People v. Antonio-Antimo, 988 P.2d 655 (Colo. App. 1999), rev'd other grounds, 29 P.3d 298 (Colo. 2000). Probation cannot be conditioned on agreement to be deported or leave the country.

People v. Birdsong, 958 P.2d 1124 (Colo. 1998). Defendant entered an *Alford* plea to sex assault in exchange for probation; his probation was properly revoked because he refused to admit his guilt in court-ordered sex offender treatment. There is nothing inherent in an *Alford* plea that gives defendant any rights, or promises any limitations, with respect to punishment imposed after conviction.

Juvenile Sentences

People v. Morris, 2024 COA 105. Addressing an issue of first impression, the COA held that under the YOS statute, §18-1.3-407(5)(b), and existing case law, a district court has no discretion to dismiss revocation proceedings based on a youthful offender's allegation of an undiagnosed behavioral or mental health disorder. Accordingly, the division concludes that the court did not abuse its discretion by revoking the offender's YOS sentence and imposing the original sentence to the custody of the Department of Corrections.

People v. Omar, 2023 COA 13. COA addressed an issue of first impression: whether the failure to meet the deadlines set forth in §18-1.3-407(5), divests the district court of jurisdiction to revoke an offender's YOS sentence. COA holds that, because §18-1.3-407(5) does not explicitly provide for that result, even if the DOC, the People, and the district court itself miss the statute's deadlines, the court retains jurisdiction to rule on a petition to revoke the offender's YOS sentence. It also concludes, consistent with People v. Martinez, 2015 COA 33, that the district court retained discretion to remedy the missed deadlines. Under the specific circumstances of this case, however, the district court did not abuse that discretion by refusing to order a remedy. COA affirms the district court's order.

PAROLE

People v. Abdul-Rahman, 2024 COA 118. Defendant was not required to pursue an administrative appeal before the State Board of Parole before seeking judicial review of a parole revocation. Specifically, §17-2-103(2)(b) has permissive language (that a defendant may appeal the parole revocation to the board). As well, §17-2-201(4)(b), which empowers the State Board of Parole to conduct parole revocation hearings, states that judicial review of parole revocation shall be held. And while §17-2-201(9)(c) says that if a parolee decides to appeal a parole revocation, the appeal shall be filed within 30 days, the word "shall" indicates "only that, *if* a parolee wants an administrative review of a revocation decision, such appeal must be initiated within thirty days of the decision." To the extent People v. Back, 2013 COA 114, intended "to dictate the only procedure by which a parolee can seek review of a parole revocation decision, we choose to depart from that holding." *Here:* the COA addressed the merits and affirmed the denial of defendant's Crim. P. 35(c) motion, which argued that his parole was unlawfully revoked because the Board didn't allow him to present witnesses/evidence and to cross-examine his parole officer. The COA could not "evaluate whether his witnesses' testimony would have altered the outcome of the parole violation hearing or whether the evidence would have factored into the Board's decision to revoke parole."

People v. Hopper, 284 P.3d 87 (Colo. App. 2011). Because defendant was convicted of F4s, he was subject to 3-year term of mandatory parole; plain language of §18-18-407(1) does not authorize court to enhance mandatory parole period based on special offender considerations.

Edwards v. People, 196 P.3d 1138 (Colo. 2008). Defendant who has earned PSCC is entitled to have it deducted from his mandatory parole. Term "sentence" in §18-1.3-405 includes mandatory parole portion and confinement portion of the sentence.

People v. Tucker, 194 P.3d 503 (Colo. App. 2008). Parole for sex offenders under SOLSA has mandatory and discretionary components. §18-1.3-1006(1)(b) requires a mandatory minimum period of parole once the parole board has released defendant under SOLSA. §17-2-201(5)(a.7) contains elements of discretion that apply to parole board's decision to release defendants on parole. Mittimus should read "parole is determined under §18-1.3-1006(1)(b), requiring the parole board to impose a minimum parole period of X years for the class X felony/felonies, subject to the provisions of §17-2-201(5)(a.7).

People v. White, 179 P.3d 58 (Colo. App. 2007). A sentence providing for concurrent mandatory parole periods under People v. Luther, 43 P.3d 660 (Colo. App. 2001)(*Luther I*), is illegal because it is inconsistent with the

statute providing that sentences for escape shall run consecutively with any sentences to be served by defendant. Follows People v. Luther, 58 P.3d 1013 (Colo. 2002)(*Luther II*).

People v. Starcher, 107 P.3d 1127 (Colo. App. 2004). If defendant is sentenced to consecutive prison terms in separate cases at separate times, the prison terms are treated as one continuous sentence, to be followed by the mandatory parole period for the highest class felony offense. Defendant will not be eligible for parole until he completes all of his incarceration time.

People v. Rockwell, 104 P.3d 900 (Colo. App. 2003), rev'd other grounds, 125 P.3d 410 (Colo. 2005). To determine, under §17-2-201(5)(a) and (a.5), whether defendant is convicted of an offense for which the factual basis involved an offense involving unlawful sexual behavior, trial court must look at the record as a whole. The "factual basis" is determined broadly by review of the PSI, law enforcement records, court transcripts, and any statements by defendant and prosecutor. Information obtained from that review, rather than the bare elements of the crime to which defendant pled, should be basis for trial court's finding.

People v. Hall, 87 P.3d 210 (Colo. App. 2003). When defendant receives consecutive sentences, one of which carries a mandatory term of parole and one of which has a discretionary term of parole, both terms of parole apply.

Whidden v. People, 78 P.3d 1092 (Colo. 2003). Under §17-2-103, governing parole revocation proceedings, and §16-11.5-101, the Substance Abuse Act, the parole board is authorized, but not required, to revoke parole and return parolee to DOC based on any positive drug test that occurs after the baseline/initial test.

People v. Carrasco, 85 P.3d 580 (Colo. App. 2003). Pursuant to *People v. Falls*, 58 P.3d 1140 (Colo. App. 2002), individuals who are sentenced as habitual criminals are subject to discretionary parole statute.

People v. Denton, 91 P.3d 388 (Colo. App. 2003). Persons sentenced as habitual criminals are subject to discretionary parole period established by §17-2-201(5)(a), §17-2-213, rather than mandatory parole period provided in §17-22.5-403(7), §18-1.3-401(1)(a)(V).

People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003). Discretionary parole, rather than mandatory parole, is required for a kidnapping offense in which the jury returned a special interrogatory specifying that kidnapping included a sexual assault. Although second-degree kidnapping is not enumerated as a sex offense in §18-3-421.5(1), discretionary parole statute applies to offenses in which the "factual basis" involved an offense involving unlawful sexual behavior, and not just to enumerated sex offenses.

People v. Barber, 74 P.3d 444 (Colo. App. 2003). While inmates and parolees are in legal custody and are constructively prisoners of the state, they are not similarly situated for equal protection purposes because their supervision is governed by separate entities: DOC governs conditions of confinement; the parole board establishes conditions of parole. Reincarceration after a parole violation is not a new sentence but is incarceration on an already- imposed sentence. Therefore: (1) parole board's power to revoke mandatory parole does not impinge on power of judiciary; and (2) no due process basis to limit parole board's discretion to determine appropriate penalty for violation of mandatory parole, including the length of the period of reincarceration.

People v. Luther, 58 P.3d 1013 (Colo. 2002). Reincarceration after a parole revocation is not a term of mandatory parole, nor does it carry a term of mandatory parole; defendant must first serve a reincarceration period equal to the remainder of the mandatory parole period before he begins to serve the new consecutive sentence on the escape conviction and the mandatory parole period that follows it; once the parole board has released prisoner to parole, trial court lacks authority to impact the terms of that parole or the penalties for violation of that parole.

People v. Garcia, 64 P.3d 857 (Colo. App. 2002). Parole board has the authority to place mandatory parolees in an ISP program. Although §17-27.5-106 allows some parolees, but not others, to be placed in ISP, this scheme does not violate equal protection.

People v. Myers, 45 P.3d 756 (Colo. App. 2001). People charged, and evidence established, that defendant committed SAOC-PATT from 1994 to 1998. Because the last sexual assault took place in July 1998, defendant was subject to parole provisions that apply from 1996-98 (*Cooper* period), not provisions that apply from 1993-96 (*Martin* period).

People v. Cooper, 27 P.3d 348 (Colo. 2001). Sex offenders who committed offenses between 7/1/96 and 11/1/98 are subject to discretionary parole under §17-2-201(5)(a.5).

Martin v. People, 27 P.3d 846 (Colo. 2001). Sex offenders who committed offenses between 7/1/93 and 6/30/96 are subject to discretionary parole under §17-2-201(5)(a).

People v. Boyd, 23 P.3d 1242 (Colo. App. 2001). §18-1-105(1)(a)(V)(E), which requires that the mandatory parole period for defendant serving consecutive sentences shall be the period established for the highest-class felony, is not unconstitutionally overbroad. The order in which defendant serves the consecutive sentences is irrelevant to determination of the period of mandatory parole. Because defendant had not begun serving parole, issues raised regarding his time credit computations were not ripe for adjudication.

Benavidez v. People, 986 P.2d 943 (Colo.1999); Craig v. People, 986 P.2d 951 (Colo. 1999). Although a mittimus that does not specify the mandatory parole period should be read as including the appropriate mandatory parole period, where mittimuses did not expressly include the parole period, trial court was ordered to correct it.

RESTITUTION

People v. Weeks, 2021 CO 75; People v. Roddy, 2021 CO 74. The deadline in §18-1.3-603(l)(b) refers to the trial court's determination of the restitution amount defendant must pay, not to prosecution's determination of the proposed amount of restitution. This deadline may be extended only if, before the deadline expires, the court expressly finds good cause for doing so. Under §18-1.3-603(2), DA must file the "information" in support of a motion for restitution -i.e., the amount of the proposed restitution - before the judgment of conviction or, if that information isn't yet available, no later than 91 days after the judgment of conviction. Court may extend this deadline only if, before the deadline expires, it expressly finds that there are extenuating circumstances affecting DA's ability to determine the proposed amount of restitution. Neither a request for more time to determine the proposed amount of restitution nor an order granting such a request justifies extending DA's deadline in subsection (2) or the court's deadline in subsection (1)(b). Rather, each deadline requires an express finding—one relating to extenuating circumstances affecting the prosecution's ability to determine the proposed amount of restitution and the other relating to good cause for extending the court's deadline to determine the amount of restitution defendant must pay. Neither a belated request for more time to determine the proposed amount of restitution nor an order granting such a request may act as a defibrillator to resuscitate an expired deadline. At a sentencing hearing, trial court must enter one or more of the four types of restitution orders listed in subsection (1). Nowhere does the restitution statute permit the prosecution to ask that the issue of restitution (not just the amount of restitution) remain open for any period of time after the judgment of conviction enters. Nor does subsection (1) authorize the court to address the issue of restitution in a judgment of conviction by entering an order deferring that issue in its entirety. §18-1.3-603(1)(b) allows the court to shelve the determination of the amount of restitution after entering a preliminary order requiring restitution.

People v. Mickey, 2023 COA 106. COA, for the first time, holds that the error in entering a restitution order after the expiration of the statutory ninety-one-day period, without an express timely finding of good cause pursuant to *Weeks* cannot be harmless.

People v. Ragsdal, 2025 COA 9. Citing *Cowen* and *Sosa*, defendant contended that by imposing restitution for theft in excess of the upper bound of the theft statute of conviction, the court abused its discretion. Recognizing that a court can't impose restitution based on acquitted conduct, *Cowen*, or uncharged conduct, *Sosa*, the COA rejects the contention that imposing restitution for theft in excess of the upper monetary bound of the charged and convicted level of offense violates either principle. Instead, restitution for theft is governed by the same principles that apply to any other request for restitution; restitution is imposed in favor of a crime victim for all out-of-pocket expenses proximately caused by the criminal conduct for which the offender was convicted, even if that conduct would have supported charging a higher-level offense.

People v. Lockett, 2025 COA 1. The restitution statute, §18-1.3-603(8)(a), permits the trial court to award restitution to a victim's insurance company for a non-felony conviction under title 42, but only if the prosecution proves the insurer cannot be compensated for its loss under a policy of insurance, self-insurance, an indemnity agreement, or a risk management fund. The special concurrence expressed doubt that the legislature intended for insurance companies to recover any restitution in non-felony convictions under title 42.

People v. Rubier, 2024 COA 67. COA applied the reasoning in *Brassill*, in considering the novel question of whether a trial court errs by extending the prosecutor's deadline to present restitution information pursuant to §18-1.3-603(2)(a), in the absence of a request for such extension of time or any representation that the restitution information is unavailable to the prosecutor before sentencing. COA held that, although the court

erred by granting the prosecution the extension of time, the error was harmless because the court determined the amount of restitution within ninety-one days following the date of the order of conviction, as §18-1.3-603(1)(b) requires.

People v. Snow, 21CA2074. In an UNPUBLISHED case, the COA held that a claim that restitution was ordered outside the 91-day limit is an illegal manner claim, not an illegal sentence claim under Crim.P. 35(a), that must be filed within 126 days. Because defendant presented this claim five years after he was sentenced, it was denied as untimely. *[Cert Accepted (2/20/24) in case #23SC775: (1) Whether a postconviction challenge to the timeliness of a restitution order is cognizable as an illegal sentence claim under Crim.P. 35(a); (2). Whether the court of appeals erred in relying on People v. Tennyson, instead of People v. Weeks, in denying Snow's restitution claim (SAAG Brock Swanson)].*

People v. Brassill, 2024 COA 19. The prosecution is obligated to exercise reasonable diligence to determine the amount of restitution before sentencing and the trial court has the authority to enter a contemporaneous scheduling order requiring the prosecution to file a supplemental pleading within a period of less than ninety-one days that discloses the amount of restitution. *Here:* the prosecution didn't exercise due diligence and didn't comply with the scheduling order. But the trial court didn't abuse its discretion by not dismissing the restitution proceedings after those violations because defendant wasn't prejudiced and because there had not been a pattern of disregard of the prosecution's obligations.

Martinez v. People, 2024 CO 6. Clear error, not abuse of discretion, is the standard of review for a trial court's determination of proximate cause for restitution. *Here:* when the victim pulled his car in front of defendant to stop him from stealing his bike, it wasn't an independent intervening cause that broke the chain of causation, because the victim's act was foreseeable, and defendant participated in the collision. Using the clear error standard of review, the trial court's finding that defendant's theft was the proximate cause of the damage to the victim's car was affirmed.

People v. Fregosi, 2024 COA 6. COA clarifies the relationship between §18-1.3-603 (1)(b) and (1)(c) following *Weeks* and holds that a trial court that defers a restitution determination for ninety-one days under subsection (1)(b) may further extend that deadline under (1)(c) when a victim incurs ongoing therapy expenses. The COA also concluded that sufficient evidence supported the trial court's decision not to review in camera or to disclose the CVCB records. *Here:* The prosecutor's amended restitution requests included CVCB summaries of the victim's ongoing therapy costs but excluded the identity of the victim's treatment provider. Defendant argued that the prosecution had not proved that his conduct was the proximate cause of the victim's loss and that he needed the name of the provider and the court needed to do an in-camera review of the CVCB records. The trial court correctly denied his requests finding that: defendant's purported evidentiary hypothesis for needing the CVCB records was speculative and didn't warrant an in camera review; releasing the records would pose a threat to the victim's welfare; the CVCB coordinator explained the CVCB's policy of excluding the identity of the victim's treatment provider in domestic violence cases; the CVCB coordinator testified concerning the application process for mental health reimbursement and the limitations on such requests, and the coordinator confirmed that these standards were followed in this case.

People v. Poot-Baca, 2023 COA 112. Defendant argued that the losses incurred by Discover Card were not proximately caused by his conduct because the identity theft/criminal possession of a financial device convictions were based only on evidence that he used the credit card at Foot Locker; he argued that Discover Card's losses did not result from his conduct underlying his convictions. COA held that even if they accepted the premise that Discover Card's losses could not be tied to those convictions, defendant's claims were still rejected because those losses could be tied to his robbery conviction. Viewing the evidence in the light most

favorable to the prosecution, COA concluded that defendant's robbery proximately caused the losses to Discover Card.

People v. Hollis, 2023 COA 91. A law enforcement agency cannot recover as restitution the amount of money spent as unrecovered "buy money" because such money is neither "money advanced by law enforcement agencies" for a victim's pecuniary loss nor an "extraordinary" direct public investigative cost under §18-1.3-602(3). Disagrees with People v. Juanda, 2012 COA 159. *[Cert Accepted (7/1/24) in case #23SC834: (1) Whether a law enforcement agency is entitled to restitution for unrecovered "buy money" under §18-1.3-602(3)(a) and (b), C.R.S. (2023), as was held in People v. Juanda, 303 P.3d 128 (Colo. App. 2012) and contrary to the court of appeals holding here. (AAG Marixa Frias)]*

People v. Roberson, 2023 COA 70. COA distinguishes two recent decisions from other divisions: People v. Johnson, 2023 COA 43M, which held that a trial court made an express good cause finding to extend the ninety-one-day statutory deadline under §18-1.3-603(1)(b) by entering orders allowing the defendant to object to restitution beyond the deadline, and People v. Babcock, 2023 COA 49, which held that defendant waived his right to challenge the timeliness of a restitution order by requesting that a restitution hearing be set outside the statutory deadline. Because the trial court did not make an express good cause finding to extend its deadline to determine restitution, as required by People v. Weeks, 2021 CO 75, the COA concludes that the court lacked authority to enter the restitution order. And because the COA also concludes that defendant did not invite or waive the error by accepting a hearing date beyond the statutory deadline, it vacates the restitution order.

People v. Babcock, 2023 COA 49. When the CSC held in *Weeks* that a sentencing court loses the authority to impose restitution after 91 days absent an express finding of good cause, it did not mean that the court loses subject matter jurisdiction. Because the deadline is not jurisdictional, a defendant waives any challenge to the timeliness of the restitution award by requesting a hearing on restitution outside the 91-day period.

People v. Johnson, 2023 COA 43. COA majority applied *Weeks* to conclude that: (1) the final restitution amount wasn't available to DA at the time of the guilty plea; (2) the parties' agreement to allow DA 91-days to provide restitution amount and the court's acceptance of the agreement satisfied §18-1.3-603(1)(b); (3) DA complied with §18-1.3-603(2)(b) by providing a restitution amount on the 91st day; (4) the court complied with §18-1.3-603(1)(b) by entering the restitution order on the 91st day; and (5) the court's standing case management order, permitting defendant to object to restitution within 30-days, coupled with its specific order at the plea and sentencing granting the defense 60-days to object, constituted good cause under §18-1.3-603(2)(b). The majority rejected defendant's challenge to the amount of restitution and held that the plea agreement showed defendant specifically agreed to pay restitution for dismissed counts and uncharged misconduct. COA concurrence would not decide whether the restitution information was available to the DA at the time of plea and sentencing and would instead hold that defendant waived any challenge to granting the DA 91-days to provide the restitution amount, under the terms of the plea agreement. The dissent concluded that the court did not enter a restitution order that complied with §18-1.3-603(1) because: (1) the People conceded that although the victim provided a final restitution figure shortly before 91-days, the DA possessed the underlying information necessary to determine restitution before the plea was entered and didn't provide this information to the court; (2) the DA offered no reason for requesting 91-days at the time of the plea and sentence; and (3) the court asked no questions to determine whether restitution information was available at the time of the plea and sentence. It also concluded that the court made no express good cause finding as required by *Weeks* and that good cause can't be implied from the surrounding circumstances. Accordingly, it would reverse the order and remand with directions for the court to enter a restitution order in the amount of zero.

People v. Tennyson, 2023 COA 2. A defendant's postconviction challenge to the restitution component of a sentence due to a DA's untimely determination of the restitution amount constitutes an illegal manner claim under Crim.P. 35(a).

People v. Martinez, 2022 COA 142. COA addresses two issues concerning the extension of a defendant's probation where defendant has made regular restitution payments pursuant to a payment schedule established under §16-18.5-104(4)(a)(I), but still has not paid the full amount of restitution. COA concludes that §16-18.5-105(3)(d)(III) does not authorize an extension of probation where a defendant has made all the payments required under a payment schedule, simply because the restitution hasn't been fully paid. It also concludes that the circumstances of the case do not establish "good cause" to extend probation under §18-1.3-204(4)(a). COA reverses the trial court's order extending defendant's probation for an additional five years and remands the case with directions to terminate probation.

People v. Rodriguez-Morelos, 2022 COA 107. Defendant knowingly, intelligently, and voluntarily waived his right to be present at restitution hearings, even if transcript of initial hearing did not clearly show that defendant was aware of it and had decided not to attend it; defense counsel told court that she had made many efforts to notify defendant about hearings, defense counsel reported at second restitution hearing that defendant did not want to attend it, waiver was knowing since record as a whole demonstrated that defendant generally understood the right, waiver was intelligent since defense counsel spoke to defendant who unambiguously said that he did not wish to participate, and waiver was voluntary since no evidence suggested that prosecution coerced defendant into waiving the right. *[Cert Accepted (9/25/23) in case #22SC982: (1) Whether the COA erred in holding that the crime of identity theft does not apply to a business entity's personal identifying information and applies only to information concerning single, identified human beings. (SAAG Christine Brady)]*

People v. Moss, 2022 COA 92. For restitution to be considered related to charged conduct, the pecuniary loss must be tied to conduct committed on the date or dates the defendant is charged with having committed the offense.

People v. Le, 2022 COA 32. As a matter of first impression, the Colorado Department of Revenue can be considered a "victim" entitled to restitution under Colorado's Restitution Act where defendant has illegally evaded marijuana excise taxes.

People v. Martinez, 2022 COA 28. COA analyzes whether, under the 2000 amendments to the restitution statutes, an insurance company that indemnifies a policyholder for losses proximately caused by a felony, misdemeanor, or other offense specified in the restitution statutes is a "victim" entitled to restitution from the offender. In People v. Oliver, 2016 COA 180M, COA assumed, without conducting a statutory analysis, that the 2000 amendments did not alter prior case law holding that an insurance company can be a "victim" for purposes of restitution. *Here:* the COA concludes that, under these circumstances, the insurance company is a "victim" under the post-2000 restitution statutes. Martinez v. People, 2024 CO 6 clarifies the appropriate standard of review for restitution proximate cause determinations.

People v. Johnson, 2021 CO 79. CSC considers whether the General Assembly has abrogated the common law doctrine of abatement ab initio as to restitution orders in criminal cases; the statute governing restitution requires a final conviction to maintain an order of restitution; thus, if defendant dies of natural causes while his direct appeal is still pending, the abated conviction cannot support an obligation to pay restitution. Overruled People v. Daly, 313 P.3d 571, 578 (Colo. App. 2011).

People v. Dyson, 2021 COA 57. COA considers whether trial court may award restitution to an assault victim for the costs of facial and neck treatments: (1) that Medicaid deemed were cosmetic in nature; and (2) for which

the People presented no expert evidence of medical necessity. COA upheld restitution because the expenses for the treatments were proximately caused by defendant's conduct: victim underwent the treatments just "trying to get her face … and neck back to what [they] looked like … prior to the assault."

Williams v. People, 2019 CO 101. When defendant introduces some evidence of inability to pay restitution, trial court must make the ability-to-pay findings under §18-1.3-702(3)(c), before revoking a DJ&S for failure to pay restitution. Prosecution bears the burden of proving by a preponderance of the evidence that (1) defendant has the ability to comply with the court's order to pay a monetary amount due without undue hardship to defendant or defendant's dependents, and (2) defendant has not made a good-faith effort to comply with the order.

Cowen v. People, 2018 CO 96. Restitution statutes do not allow trial courts to order restitution for pecuniary losses for underlying charge where defendant was acquitted, even where defendant was convicted of another separate charge.

In Interest of A.V., 2018 COA 138. Under juvenile restitution statute §19-2-918, court does not need to consider whether restitution amount would cause serious hardship or injustice; a provision in the plea agreement may waive any aspect of proof of restitution; testimony is not required to prove restitution; a restitution award may be based on estimates; and when prosecutor provides a prima facie case-even if just based on victim impact statement-the burden shifts to the defense.

People v. Barbre, 2018 COA 123**.** Where defendant is challenging sufficiency of the evidence supporting restitution order, this should be reviewed de novo to determine whether the evidence, as a whole and in the light most favorable to prosecution, is sufficient to support court's ruling that prosecution proved by preponderance of evidence that defendant caused the amount of restitution awarded. Although prior cases indicate that an abuse of discretion standard applies, *Barbre* rejects this prior approach in *Henry*. COA cautioned that this de novo standard of review does not apply in every appeal and, in a case in which the central issue is how to value a unique piece of stolen property, trial court's ruling would still be subject to an abuse of discretion standard. *Here:* defendant's agreement in the plea paperwork that restitution was "reserved, admit causation" was too ambiguous to prevent defendant from later disputing causation as it related to some but not all of claimed losses.

People v. Madison, 2018 COA 62. Where defendant entered into an agreement with prosecution to obtain stolen property upon payment of restitution and upon requesting the property within 90 days, and where defendant did not satisfy these terms, defendant had no possessory or legal right to the stolen property. UCC, judgment lien principles, and civil conversion principles did not operate to supersede the agreement and grant him an entitlement to the property where he did not satisfy the terms of agreement.

People v. Belibi, 2018 CO 24. Orders for restitution are governed by statute and rule. §18-1.3-601 to §18-1.3-603; Crim.P. 32. Statutory scheme permits the court, under certain circumstances, to order defendant obligated to pay restitution and yet order that the specific amount of restitution be set within 91 days, or to order defendant to pay restitution covering the cost of specific future treatment of any victim, in addition to or in place of ordering a specific amount of restitution at sentencing. It also permits the court to order an increase in restitution, but only for victims/losses not known at the time of sentencing and, even then, only if the final amount of restitution has not yet been set by the court. The term "final amount" as applied to orders increasing restitution after judgment of conviction has already entered, finding that upon the entry of a judgment of conviction, which finalizes a criminal conviction for purposes of appeal, without also including one of the orders statutorily reserving a determination of the final amount of restitution for a future proceeding, the court loses any remaining power it may have to order restitution.

People v. Henry, 2018 COA 48M. Once a compensation board has established that it paid a victim a set amount, defendant has burden of introducing evidence to show that the amount paid was not the direct result of his criminal conduct. Under previous version of §18-1.3-603 divisions of this court had held that a compensation board's payment did not, by itself, establish its right to restitution and the court was still required to determine whether the amount paid was proximately caused by defendant's criminal conduct. After the 2015 addition of subsection (10), the trial court can presume that defendant's conduct was a direct result of victim's injuries unless defendant offers evidence to rebut that presumption. Under §24-4.1-107.5(3), defendant may ask court to conduct an in camera review of the records if the request is not speculative, and it "is based on an evidentiary hypothesis that warrants an in camera review to rebut the presumption established in §18-1.3-603(10). Where defendant does not offer such an evidentiary hypothesis, trial court must decline to conduct in camera review.

Pineda-Liberato v. People, 2017 CO 95. An order of restitution imposed on a DJ&S remains in force until restitution is paid in full; this is true even where a DJ&S is successfully completed.

Teague v. People, 2017 CO 66; People v. Rogers, 2017 CO 66. State may recover as restitution the cost of a SANE exam because it is an "extraordinary direct public investigative cost" under §18-1.3-602(3)(b).

People v. Perez, 2017 COA 52. Expended vacation/sick days are losses compensable under restitution because it is a loss of employee benefits comparable to victim's lost wages; lost leave qualifies as a pecuniary loss.

People v. Oliver, 2016 COA 180. Risk Management Department of City and County of Denver is an "insurer" within meaning of restitution statute. Department had a "contractual relationship" with murdered police officer as the combined result of (1) officer's employment with the City, and (2) City's obligation to provide workers' compensation insurance for its employees. Trial court did not err in awarding restitution that included the death benefits owed to deceased officer's minor daughter under Workers' Compensation Act; death benefits payments made prior to restitution hearing qualified as Department's "out-of-pocket expenses," and payments to be made in the future are calculable, fixed "future expenses."

People v. Foos, 2016 COA 139. Restitution obligations may not be discharged in bankruptcy proceedings, including where bankruptcy discharge occurs before criminal conviction enters.

People v. Vasseur, 2016 COA 107. Because restitution is a part of court's sentencing function, Sixth Amendment right to confrontation and rules of evidence do not apply.

People v. Ortiz, 2016 COA 58. Because the state patrol was a victim of the conduct-vehicular eluding-included among the charges against Defendant, it is a victim for purposes of the restitution statutes, even though he pleaded guilty to other charges.

People v. Stotz and Eicher, 2016 COA 16. Jury's verdict finding defendants guilty of computer crime-$1,000 to $20,000-did not limit trial court discretion to order restitution for a greater amount under preponderance of evidence standard.

People v. Bohn, 2015 COA 178. Trial court may order restitution to reimburse a crime victim compensation board for payments it made to a crime victim for lost wages, some of which covered post-payment periods, so long as wages at issue were based on work actually missed before restitution order was entered.

Nelson v. Colorado, 137 S.Ct. 1249 (2017). Colorado statutes violated due process by requiring defendants whose convictions have been reversed or vacated to prove their innocence by clear and convincing evidence in order to obtain the refund of costs, fees, and restitution paid pursuant to the invalid conviction.

People In the Interest of D.I., 2015 COA 136. When codefendants are participants and complicitors in "the same criminal acts," each is responsible for the damage he or she caused and also for the damage caused by the other during the commission of the crime. But while a complicitor may be liable for restitution for victim's

damages, complicitor's conduct must concern the same criminal acts that proximately caused victim's damages. *Here:* trial court twice expressly found that juvenile did not cause the damage to the car and was not complicit in the crime that caused the damage to the car; trial court abused its discretion in ordering juvenile to pay restitution.

People v. Martinez, 2015 COA 37. Trial court abused its discretion by including in restitution the cost of installing bars on the attempted-trespass victim's window without a finding that the expense involved a specific, ongoing threat related to defendant's conduct (as opposed to a general feeling of insecurity), and so that portion of the restitution order is vacated.

People v. Archuleta-Ferales, 2014 COA 178. Trial court has discretion to waive all or any portion of drug offender surcharge based on defendant's inability to pay. *Here*: trial court appropriately considered defendant's family contributions to her living expenses and her future financial circumstances in determining her ability to pay the surcharge.

People v. Lane, 2014 COA 48. Restitution statute's inclusion of a crime victim's "sibling" in the list of persons who are considered "victims" under the statute does not limit collection to only one sibling.

People v. Sieck, 2014 COA 23. Concepts such as comparative negligence/comparative fault will not relieve or reduce a restitution obligation, although such obligation may be relieved if a third party's conduct amounts to an independent intervening cause. Simple negligence is foreseeable and does not constitute an independent intervening cause; gross negligence is not foreseeable and may serve as an independent intervening cause. *Here:* failure to wear a seatbelt does not amount to gross negligence; evidence of victim's failure to wear seatbelt may not be used to limit restitution for which defendant is responsible.

People v. Russell, 2013 COA 121. Under Colorado Employment Security Act (CESA), §8-81-101(4)(a)(II), the statutory penalty of 50% may not be awarded as restitution unless prosecution proves that the general fund suffered a loss (such as investigative costs) as a proximate cause of defendant's actions.

People v. Henson, 2013 COA 36. Victim's wages, lost as a proximate cause of the crime, may be ordered in restitution from the date the crime was committed to the date restitution is imposed, or sooner if victim is comparably employed prior to that date. *Here:* victim was entitled to six and one-half days of wages lost while she was investigating and tracking down the whereabouts of her stolen purse and the thief. When a stolen item is returned to victim in an altered condition, the amount of restitution to be awarded for the item is determined by (1) adding the replacement value of the item and costs to repair it and restore it to its previous condition as far as practicable; and (2) subtracting from that sum the fair market value of the returned item. "Fair market value" (FMV) is the price at which a willing buyer and willing seller "with knowledge of all the relevant facts" would agree to exchange the property or interest at issue. When the seller is a thief, and the buyer plans to resell the item, the FMV should be determined by objective means, such as an appraisal.

People v. Juanda, 2012 COA 159. Government agency may recover costs expressly authorized by restitution statute, regardless of whether its legal rights have been infringed. *Here:* DEA's buy money qualifies as money advanced by law enforcement agency under §18-1.3-602(3)(a) and also constitutes an extraordinary direct public investigative cost under §18-1.3-602(3)(b). Buy money is considered an extraordinary cost because it is surrendered, not to those who provide goods and services, but to the criminal offender. Disagrees with People v. Hollis, 2023 COA 91.

People v. McCarthy, 2012 COA 133. Department of Health Care Policy and Financing is not a "victim" for restitution purposes and cannot collect restitution for providing Medicaid assistance to one of defendant's victims.

People v. Padilla-Lopez, 2012 CO 49. El Paso County Department of Human Services is not a "victim" under §18-1.3-602(4)(a) because it is not "aggrieved by" the crime of child abuse, and thus the restitution statute does not allow DHS to recover costs it has expended in the course of fulfilling its statutorily mandated duty to provide necessary care and guidance to dependent and neglected children.

People v. Welliver, 2012 COA 44. Where defendant was convicted of attempted forgery, not unemployment fraud, the 50% statutory penalty mandated by §8-81-101(4)(a)(II) for committing unemployment fraud cannot be made part of a restitution award. Restitution would be available for the actual investigative costs incurred by Colorado Department of Labor and Employment in investigating and prosecuting defendant for violating the act if the prosecution presents evidence of those costs.

People v. Cardenas, 262 P.3d 913 (Colo. App. 2011). Post-judgment interest is statutorily-mandated component of restitution which accrues during defendant's period of incarceration. Like restitution itself, post-judgment interest is not a fine so it cannot constitute an excessive fine under Eighth Amendment.

People v. Bowerman, 258 P.3d 314 (Colo. App. 2010). Crim.P. 35(a) claim that there was insufficient evidence to support restitution order was a time-barred illegal manner claim.

People v. Wilson, 251 P.3d 507 (Colo. App. 2010). Statute of limitations for charging a crime does not apply to plea bargains, and court has subject matter jurisdiction to impose restitution for a charge that would otherwise be barred by statute of limitations. Trial court's proximate cause determination for assessment of restitution is sufficient if there is anything in record to support it, regardless of whether defense presents rebuttal evidence. *Here*: based on testimony by field investigator and addresses listed on defendant's public assistance applications, court properly concluded defendant failed to report financial information for her common law husband living in her household, even though defendant testified that she was not living with her husband.

People v. Rivera, 250 P.3d 1272 (Colo. App. 2010). Under §24-4.1-107.5(2) defendant is not automatically entitled to in-camera review of records concerning victim's application for restitution; defendant must show that: (1) request is not speculative and (2) such documents would tend to disprove all or part of prosecution's request on basis that requested damages were not proximately caused by defendant's conduct.

People v. Suttmiller, 240 P.3d 504 (Colo. App. 2010). As part of restitution, an owner may recover from a thief at least the replacement rental value of an item, even where the owner suffered no out-of-pocket expenses. *Here:* defendant stole and retained for several months an asphalt roller from rival paving company; court-imposed restitution for the rental value of replacement roller, even though victim did not rent a replacement. Victim suffered a "loss" under restitution statute, and rental value is an appropriate way to measure that loss.

People v. Brooks, 250 P.3d 771 (Colo. App. 2010). Restitution is part of defendant's sentence; when court lacks authority to impose restitution, the resulting sentence is illegal. Restitution statute authorizes court to order restitution payments only to victims of offender's criminal conduct, not to victims of offender's juvenile conduct in an unrelated case. *Here:* court had no authority to include defendant's juvenile restitution order as condition of his adult probation sentence. Although juvenile court lacked authority to "transfer" offender's juvenile restitution order to his adult case, order remains valid and juvenile court continues to have jurisdiction until order is fully satisfied, or until court issues another order terminating restitution order.

People v. Rivera, 250 P.3d 1272 (Colo. App. 2010). Counseling and mental health costs are considered expenses under restitution statute. To obtain in-camera review of records underlying victim's restitution application, defendant must show: (1) his request is not speculative, and (2) such documents would tend to disprove all or part of prosecution's request on basis that the requested damages were not proximately caused by defendant's conduct. *Here*: defendant's request for disclosure of victim's medical records failed: (1) defendant's request was speculative because there was no evidence that victim received counseling prior to

being sexually assaulted by defendant; and (2) defendant failed to establish a basis for disclosure-although he argued that his sexual assault may not have been the sole basis for victim's therapy, he did not assert that it was not at least a partial contributing factor.

People v. Hagos, 250 P.3d 596 (Colo. App. 2009). When defendant was arrested for another offense, he possessed approximately $2,700 in cash. At sentencing, court ordered that $2,223.05 of that money be paid to Victim Compensation Board to satisfy his restitution obligation. *Held*: trial court's action did not constitute an "improper forfeiture proceeding."

People in the Interest of D.W., 232 P.3d 182 (Colo. App. 2009). If victim incurs expenses to avoid or mitigate consequences of specific and ongoing threat related to offender's unlawful conduct, such expenditures qualify as compensable restitution under §18-1.3-602(3)(a); but expenditures resulting from generalized feeling of insecurity are too attenuated from offender's conduct, and do not qualify. *Here*: trial court abused its discretion by ordering juvenile to pay for expenditures related to sale of victim's house because prosecution did not prove that victim faced a specific and ongoing threat sufficient to necessitate family's relocation.

Dubois v. People, 211 P.3d 41 (Colo. 2009). Statutory definition of victim-any person aggrieved by conduct of an offender-includes additional victims beyond those named in charging document. *Here:* officer who was injured in accident while responding to call for assistance on vehicular eluding incident fell within the definition; definition is not limitless in its reach and was not intended to include ordinary expenses of law enforcement absent specific inclusion of law enforcement costs within the restitution statute. But restitution may be awarded to law enforcement personnel and a governmental agency where underlying crime involves an officer as the primary victim, and it is reasonably foreseeable that multiple peace officers might be involved.

People v. Dunlap, 222 P.3d 364 (Colo. App. 2009). In circumstances in which defendant has already directly appealed his conviction and lost and has already failed to obtain postconviction relief upon application to the trial court and review by appellate court, his successful claim that an illegal sentence has been imposed because of failure to consider or fix restitution does not affect finality of his judgment of conviction. Defendant's remedy is limited to correction of his illegal sentence. He is not entitled to a new direct appeal, which would effectively open his entire case to relitigation, contrary to finality principles.

People v. Robb, 215 P.3d 1253 (Colo. App. 2009). Although a division of COA previously decided the identical restitution issues in a codefendant's appeal, the doctrine of issue preclusion does not apply where, due to the pendency of a petition and a cross-petition for certiorari, there is not yet a final judgment in codefendant's case. Trial court did not abuse its discretion in requiring the defendant to pay only $20,000 in restitution -- and not the full amount owed to all Colorado victims in the case -- because amount ordered represented the pecuniary losses of only those victims who were immediately and directly aggrieved by the defendant's conduct. Trial court did not err in ruling that defendants were not jointly and severally liable in restitution because each defendant was ordered to pay restitution to different victims; joint and several liability was not mandated pursuant to §18-1.3-603(5). Trial court erred in ordering AG's Office to distribute the restitution money to victims because §18-1.3-602(1) provides that an employee of the judicial department shall be responsible for apportioning restitution money.

People v. Reyes, 207 P.3d 872 (Colo. App. 2008). In probation revocation proceedings where parties stipulated that defendant was paying restitution to the best of his ability and had not willfully violated the restitution order, remand was required because-in extending probation for another 8 years-court failed to make findings as to whether defendant had missed or been late making any payments and, if so, whether defendant was able to make those payment(s). If court finds that defendant missed or was late making any payments and that he was able to do so, term of probation may be extended. If court finds that defendant missed or was late making any payments and was unable to do so; or did not miss or was not late making any payments, court should deny

revocation complaint based on failure to pay the total amount of restitution originally ordered. Order of restitution is a final civil judgment in favor of the state and any victim, and it remains in force until restitution is paid in full.

Sanoff v. People, 187 P.3d 576 (Colo. 2008). Trial court is required to consider restitution as part of every judgment of conviction. If restitution is due, court can: (1) impose restitution and endorse the amount on the mittimus; or (2) order that defendant is obligated to pay restitution but postpone a determination of specific amount to be paid. Filing of valid notice of appeal does not divest trial court of jurisdiction to set an amount of restitution during the course of an appeal.

People v. Dubois, 216 P.3d 27 (Colo. App. 2007). Under §18-1.3-602(4)(a), victim is any person aggrieved by defendant's conduct. An intervening cause interrupts the causal chain of events set in motion by defendant's conduct. However, victim's simple negligence is not an intervening cause. *Here*: second deputy sheriff who heard first deputy radio for assistance and responded, but who was not in close pursuit of defendant, was not named in the information, and was not dispatched or otherwise requested to respond, constituted a victim for damages that occurred when she wrecked her car. Alamosa County, deputy's employer, was also a proper victim. Defendant's conduct proximately caused victims' pecuniary losses.

People v. Steinbeck, 186 P.3d 54 (Colo. App. 2007). Court is not restricted from ordering restitution because of charge elected so long as defendant's conduct underlying the conviction proximately caused victim's losses. *Here*: court held that defendant proximately caused victim's death where his conviction for leaving the scene of an accident arose from an act that caused victim's death (hitting victim with his car); court could order defendant to pay restitution for expenses related to victim's death even though he was not charged with causing the death.

People v. Smith, 181 P.3d 324 (Colo. App. 2007). *Apprendi/Blakely* does not apply to restitution orders; jury's verdict does not limit the restitution amount, which includes all the victim's losses or injuries proximately caused by defendant's conduct. *Here*: restitution was not limited to the broken object's value, but also included repair costs.

People v. Leonard, 167 P.3d 178 (Colo. App. 2007). Victims were entitled to the actual amount that defendant owed them because: (1) the reasonable expectation that a person engaged in a licensed occupation is properly licensed establishes proximate cause for purposes of restitution; and (2) by purporting to be licensed commodity handler, defendant effectively represented to victims that their transactions were subject to all the regulatory protections governing a licensed commodity handler, and not merely the bond requirement.

People v. Reyes, 166 P.3d 301 (Colo. App. 2007). Restitution is intended to make victim whole, not to put victim in a better position than before crime occurred. *Here:* court abused its discretion by ordering defendant to pay restitution for cost of installing locks on interior office doors, which did not have locks before defendant committed the offense.

People v. Martinez, 166 P.3d 223 (Colo. App. 2007). Where defense counsel appears for restitution hearing, but defendant does not, defendant does not waive his right to object to restitution amount; trial court should waive defendant's presence if requested and proceed with the hearing before ordering restitution.

People v. Pagan, 165 P.3d 724 (Colo. App. 2006). Jury's acquittal on charge of theft over $15,000 merely established that prosecution failed to prove beyond a reasonable doubt that defendant stole property worth over $15,000, and trial court was free to reach contrary conclusion for restitution purposes under preponderance of evidence standard.

People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006). Where police officer/victim was unable to work scheduled overtime as result of his injury, court properly included lost overtime wages in restitution order.

People v. Rosales, 134 P.3d 429 (Colo. App. 2005). Because restitution is a mandatory part of a sentence, no sentence is final until either restitution has been ordered or the trial court has found that the victim suffered no pecuniary damage. *Here:* defendant filed his notice of appeal prematurely, and trial court still had jurisdiction to order restitution.

People v. Stafford, 93 P.3d 572 (Colo. App. 2004). For purposes of Eighth Amendment analysis, restitution is not the equivalent of a fine-a fine is solely a monetary penalty, while restitution serves to make victim whole. Awarding full restitution, without regard to defendant's ability to pay, does not offend Eighth Amendment proportionality principles or due process, although due process prohibits revocation of probation based on a bona fide inability to pay. The value of property for restitution purposes is determined by victim's "actual, pecuniary loss" or the amount of money that will fulfill the statutory purpose of simply making victim whole to the extent practicable. *Here:* trial court did not err in basing its restitution order on the replacement value of the computers rather than their fair market value when stolen; award of a reasonable replacement value is appropriate when victim demonstrates that they must or will replace an item that is not readily replaceable at fair market value cost.

People v. Scearce, 87 P.3d 228 (Colo. App. 2003). Absent a knowing, voluntary and intelligent waiver, defendant is entitled to assistance of counsel at any hearing held to determine his restitution.

Interest Rates

People in the Interest of A.N., 2019 COA 67. Relying on reasoning in People v. Ray, 2018 COA 158, COA concluded that §18-1.3-603(4)(b)(I), permits the Judicial Department to compute and assess interest at a rate of 1% per month; COA rejects defendant's contention that §18-1.3-603(4)(b)(I) is void for vagueness under U.S. and Colorado Constitutions.

People v. Ray, 2018 COA 158. Timely payment of restitution lessens the financial burden of crime on victims, compensates them for suffering and hardship, and preserves their individual dignity. As a result, defendants must pay their restitution obligations in most expeditious manner. To encourage expeditious payment, the legislature requires defendants to pay post-judgment interest. Judicial Department's authority to charge monthly interest on restitution comes from supreme court's general power to administer the Colorado judicial system.

Roberts v. People, 130 P.3d 1005 (Colo. 2006). Sentencing and restitution statutes require trial courts, who grant probation, to include pre-judgment interest in restitution orders; victims are entitled to compensation for loss of use of money from the time that money is stolen until a restitution award is entered; rate applied to pre-judgment interest is a matter within trial court's discretion. *Here*: trial court's decision to set the rate at the civil interest rate of 8% was reasonable and appropriate.

People v. Garcia, 55 P.3d 243 (Colo. App. 2002). Under §16-18.5-103, court properly imposed 12% interest rate on defendant's restitution amount, even though offense was completed before effective date of the statute. Restitution is intended to make victim whole and including interest in the award is appropriate since victims are entitled to compensation for any delay in the return of their money.

FINES, COSTS, SURCHARGES

People v. DeBorde, 2016 COA 185. If defendant files a motion under the "wobbler" statute, §18-1.3-103.5, after successfully completing his probation/COMCOR sentence, court must vacate the felony conviction and enter a misdemeanor conviction. Wobbler statute contemplates vacating only the felony conviction, not the sentence. Drug offender surcharge amount is properly determined by initial conviction. Merely referring to PD application does not establish that defendant does not have present/future ability to pay surcharge.

People v. Griffiths, 251 P.3d 462 (Colo. App. 2010). Neither incarceration nor indigence renders defendant financially unable to pay statutorily-mandated drug offender surcharge.

People v. Lowe, 60 P.3d 753 (Colo. App. 2002). Withholding of court costs from an inmate account is authorized under §16-11-101.6(5), which provides that DOC may direct that a portion of inmate's compensation be applied to "any unpaid fines or fees," and the Restitution Act also contemplates that payments can be applied to other fines or fees.

POST-TRIAL MOTIONS

MISTRIAL

People v. Collins, 730 P.2d 293 (Colo. 1986). A mistrial is a drastic remedy that is warranted only when the prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means.

People v. Chastain, 733 P.2d 1206 (Colo. 1987). A trial court's denial of a mistrial will not be disturbed on appeal absent a clear showing of abuse of discretion and prejudice to the defendant.

People v. Berreth, 13 P.3d 1214 (Colo. 2000). If the case is terminated before its completion, double jeopardy bars retrial unless trial court has sufficient legal justification - "manifest necessity" - to declare a mistrial over defendant's objection.

People v. Ragsdal, 2025 COA 9. Trial court properly denied defendant choice-of-evils defense based on an insufficient offer-of-proof so denial of mistrial was not an abuse of discretion. *Here:* before trial, defense counsel endorsed choice-of-evils as an affirmative defense, and during voir dire, the court indicated defendant would be pursuing a choice-of-evils defense. Shortly before opening statements, the prosecutor argued defendant didn't have a sufficient evidentiary basis to pursue such a defense. The court asked defense counsel for an offer of proof in support of choice-of-evils. After providing defense counsel with multiple opportunities to present an offer of proof, the trial court ruled that defense hadn't presented an adequate basis for pursuing the choice-of-evils defense at trial. Following the court's ruling defense counsel moved for a mistrial based on "ineffective assistance of counsel," arguing that he wasn't adequately prepared to present the requisite offer of proof and needed more time to investigate the factual basis for asserting a choice-of-evils defense. COA affirmed trial court's denial of mistrial because defense counsel: (1) would be effective because counsel said that he was "prepared to go to trial and argue things in the absence of that choice of evils defense"; (2) hadn't provided the court with a "reason to believe anything would change in terms of [his] trial preparation or arguments [he] would make" if given more time; and (3) hadn't indicated or given the court a reason to believe "that any of the offer of proof would be different in the future." Lastly, the trial court encouraged defense counsel to bring to the court's attention any additional information that came to light to support the choice-of-evils defense.

People v. Feldman, 2024 COA 119. Before trial, the trial court ruled that the victim's aunt, could testify whether the victim had expressed "fears about anything in the marriage" but could not testify that "she was pretty sure [defendant] threatened to kill [the victim]." In response to the prosecutor's question, "Did she ever express any fears about the defendant?" at trial, however, the aunt testified, "She told me that when we had talked about her leaving and the options of, you know, moving and whatnot, she chuckled and she said to me, 'He'll kill me before he lets me leave.'" Denial of mistrial was not error because the word chuckled made it seem as if the victim was not serious, the statement was not elicited intentionally, and the court gave a curative instruction telling the jury to disregard it.

People v. Perez, 2024 COA 94. Where witness made fleeting refence to a nickname being tied to someone recently paroled in another state, a mistrial wasn't warranted where the statement was made once and trial court provided a limiting instruction. *Here:* court denied mistrial where law enforcement agent mentioned linking the moniker "Lucky," which was also a moniker that defendant used, to a person who had recently been released on parole in Kansas.

People v. Burdette, 2024 COA 38. The CSC added subsection (c)(4) to Crim.P. 24 which provided guidance on when a trial court may declare a mistrial due to a public health crisis. At the time of defendant's mistrials in this case, no clear statutory command, settled legal principle, or Colorado case law suggested Crim.P. 18 24(c)(4) violated the separation of powers doctrine. To the contrary, the legislature approved legislation that bolstered Crim. P. 24(c)(4)'s objective by authorizing trial courts to exclude an additional period from the speedy trial calculation to account for any "restriction, procedure, or protocol" related to the COVID-19 pandemic. Crim.P. 24(c)(4) authorizes the trial court to declare a mistrial if a fair jury pool cannot be safely assembled due to a public health crisis like the COVID-19 pandemic. *Here:* the trial court made findings that the second and third mistrials were caused solely by the COVID-19 pandemic; the court was unable to safely assemble a jury due to social distancing requirements imposed by public health officials. Such requirements constituted a "limitation brought about" by the COVID-19 pandemic. *[Cert Accepted (11/12/24) in case #24SC388: (1) Whether it violates "anew" the right to counsel to transform a misdemeanor into a felony based on a prior conviction obtained in violation of the right to counsel. (AAG Brenna Brackett)]*

People v. Owens, 2024 CO 10. Whether a mistrial is required following a witness's emotional outburst depends, in part, on whether the outburst was unexpected, the steps taken by the trial court to address the outburst, and how quickly those steps were undertaken. Additionally, a mistrial is not always required when a witness testifies that she thinks the defendant committed the crime, because, in general, an error in the admission of evidence may be cured by withdrawing the evidence from the jury's consideration and instructing the jury to disregard it. *Here:* the trial court, which was in the best position to judge the potential prejudice of the witness' outbursts and declarations, determined that her conduct did not unduly prejudice Owens so as to warrant a mistrial because her outbursts were part of several long diatribes that went to her overall credibility. Moreover, the court employed several curative measures, including recessing the proceeding for the remainder of the afternoon, ordering the prosecution to ask Sailor the next morning to explain why she had been emotional, allowing Owens to cross-examine her on that issue, and instructing the jury to disregard Sailor's opinions as to Owens's guilt. Although Owens claims that these remedies were 56 insufficient, he has not presented any evidence of specific prejudice or that the jury did not follow the court's instruction.

People v. Jackson, 2018 COA 79. Trial court acted within its discretion when it declared a mistrial after defendant elicited alibi testimony from a witness without first complying with alibi disclosure requirements of Crim.P. 16(II)(d); court considered, but properly rejected, merely striking the testimony finding this was insufficient to cure the prejudice; court also considered, but properly rejected, a short delay of 48 hours for prosecution to investigate and meet the new evidence; trial court carefully considered the options and it was in the best position to assess the prejudicial impact of the evidence.

People v. Van Meter, 2018 COA 13. Deputy sheriff's, who was a member of the venire, statements during voir dire did not warrant a mistrial; defendant did not request any lesser remedies than a mistrial, and trial court was not required to sua sponte offer a lesser remedy where none was requested.

People v. August, 2016 COA 63. One of double jeopardy principles is defendant's right to have his trial completed by a particular tribunal. Ordinarily, defendant's motion for mistrial functions as a waiver of that right. However, when defendant's motion for mistrial is attributable to a particular type of prosecutorial misconduct, the motion will not result in such a waiver. If prosecutorial misconduct is intended to provoke a

mistrial, defendant's motion is not a waiver. To bar re-prosecution for prosecutorial misconduct under double jeopardy, the record must support a finding that the prosecutorial misconduct giving rise to a successful motion for mistrial was intended to provoke defendant to move for mistrial. Defendant has the burden of establishing that the prosecutor acted with the intent to provoke the defense into obtaining a mistrial. The "intent to provoke a mistrial" standard is an extremely exacting standard, which is met only in rare circumstances. An intent to prevail at trial by improper means is not the same as an intent to provoke a mistrial. *Here:* trial court's finding concerning prosecution's motivation/intent in engaging in prosecutorial misconduct is a finding of fact, which the reviewing court defers to so long as it is not tainted by legal error or otherwise clearly erroneous; reviewing court reviews de novo whether trial court correctly applied the appropriate legal standard in making its findings of fact.

People v. Marko, 2015 COA 139. Trial court properly refused to declare mistrial after a juror made statements during voir dire regarding the amount of time defendant might spend in the state hospital if found NGI. There was no reasonable possibility that the statements influenced the verdict because: (1) juror's statements did not indicate a reliable basis of knowledge; and (2) court repeatedly advised jury that the amount of time defendant might spend in state hospital if found legally insane was unknown and not to be considered.

People v. Krueger, 2012 COA 80. Defendant's motion for mistrial was properly denied where prosecutor did not intentionally elicit testimony that defendant had been in jail, testimony was only a single brief reference to jail, and defendant declined court's later offer, to give a curative instruction. Defendant's motion for mistrial was also properly denied where 1 witness referred to a prior "trial," as the comment did not clearly indicate that the prior trial occurred in defendant's case and the reference was a "momentary remark[] in a lengthy trial."

People v. Santana, 255 P.3d 1126 (Colo. 2011). Prosecutor's comments/questions implying that defendant has burden of proof do not necessarily shift the burden of proof. Court set forth three factors to be considered, in light of the entire record, to assess whether the burden was actually shifted. The non-exhaustive list included consideration of the degree to which: (1) prosecutor specifically argued or intended to establish that the defendant carried the burden of proof; (2) prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) jury is informed by counsel and the court about the defendant's presumption of innocence and the prosecution's burden of proof. *Here:* trial court did not abuse its discretion in denying defendant's motion for mistrial because prosecutor's actions were more likely meant to highlight the strength of prosecution's case and to dispel any negative implications raised by defense counsel's questioning of the expert, than they were an attempt to shift the burden of proof.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). Mention of defendant's homelessness, although it violated a pretrial order, was not obvious and substantial error that undermined the fundamental fairness of the trial and was not unduly prejudicial to defendant.

People v. Wood, 230 P.3d 1223 (Colo. App. 2009). Prosecutor's statement characterizing defendant's testimony as a "nice story" was not grounds for a mistrial when judge admonished prosecutor for the statement, and sustained defendant's objection.

People v. Moore, 226 P.3d 1076 (Colo. App. 2009). Prosecutor's oblique reference to defendant's prior criminal act did not warrant mistrial.

Bloom v. People, 185 P.3d 797 (Colo. 2008). Witness's inadvertent statement that another witness failed a polygraph was not so unduly prejudicial as to violate defendant's right to a fair trial and did not warrant a mistrial. Jury had already heard that polygraphed witness was a convicted felon and had observed videotapes of his police interviews, and he testified at trial. As such, jury could assess his credibility without reference to the polygraph results. Also, jury was not told which statements failed the polygraph, trial court gave curative

instructions both at the time of the reference and in writing prior to deliberations, and there was sufficient other evidence of defendant's guilt.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). Standard of review for a trial court's denial of a motion for mistrial is whether the court abused its discretion; mistrial is a drastic remedy that is warranted only when the prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means. *Here:* mistrial not required where police officer testified that defendant had an extensive criminal history, and trial court struck the testimony; mere reference to defendant's past criminal act is not per se prejudicial, requiring a new trial. Ccourt remedied any possible prejudice by striking the testimony, and it is presumed the jury followed the instruction. Where victim knew defendant only by his "street name," and officer testified that he contacted gang intervention unit for a database of street names, trial court did not abuse its discretion when it denied a motion for mistrial. There was no further testimony that defendant was a gang member and case did not involve a dispute between gang members or evidence of any gang-related motive.

People v. Owens, 183 P.3d 568 (Colo. App. 2007). No abuse of trial court's discretion in ordering a mistrial where defense counsel willfully violated court order not to discuss sexual relationship between victim and a third party and where order later reversed on appeal.

People v. Dahl, 160 P.3d 301 (Colo. App. 2007). Trial court abuses its discretion in denying defense motion for mistrial where the circumstances create an unacceptably high risk of a coerced verdict. *Here*: when juror failed to appear for deliberations, trial court issued a warrant for his arrest and recessed for the day because it had not seated an alternate juror; when missing juror was arrested and brought to court, court cited him for contempt and on 3 separate occasions severely admonished him and identified the serious consequences likely to befall him because of his absence, including 180 days jail and a fine of $1,000. Based on juror's assurance he could be fair, court left him on the jury. Under these circumstances, court erred in denying mistrial.

People v. Mersman, 148 P.3d 199 (Colo. App. 2006). Where prospective juror made a prejudicial comment during voir dire, trial court did not abuse discretion in denying mistrial, and in absence of request for curative instruction/jury canvassing, trial court did not commit plain error by failing to give curative instruction/canvas jury sua sponte.

Paul v. People, 105 P.3d 628 (Colo. 2005). Inadequate discovery disclosures by the defense, which deprived the prosecution of an opportunity to effectively cross-examine a defense expert, did not constitute manifest necessity for a mistrial.

People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004). Trial court properly denied mistrial and, instead, struck the testimony. Witness's testimony – that his laboratory addresses the possibility of false positive results by making the evidence available for retesting – did not shift the burden of proof to defendant; witness never testified the evidence was retained for use by defendant and never alluded to defendant's failure to test the evidence. Trial court's instruction striking the testimony and instructing jury to disregard it was a sufficient remedy.

People v. Valencia-Alvarez, 101 P.3d 1112 (Colo. App. 2004). Trial court did not abuse its discretion in denying defendant's motion for sanctions, including mistrial, after prosecutor stated, "we would note that copies of this exhibit were provided to defense counsel" because the prejudice, if any, was not so severe as to require either a mistrial or a sanction.

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). Denial of mistrial proper where defendant had not demonstrated prejudice.

People v. Simpson, 93 P.3d 551 (Colo. App. 2003). In denying mistrial based on asserted misconduct of prosecutor, witnesses, and trial spectators, trial court may properly rely on its own observations rather than reports from other participants.

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). Defendant claimed prosecution had repeatedly characterized a decree by National Association of Securities Dealers as "barring defendant from the securities industry." An expert later testified that in fact the NASD decree: (1) did not bar defendant from trading securities, but only barred him from associating with NASD members; and (2) was not final until long after defendant sold the securities upon which prosecution was based. Following the expert's testimony, defendant moved for a mistrial. Mistrial properly denied: even assuming that prosecution referred to defendant as being "barred from the securities industry" when he sold the securities in question, all parties believed that defendant was barred from the industry, and that the bar was final, until the expert testified; prosecution did not mischaracterize the evidence in bad faith; and court found jury understood the true legal effect and ramifications of the NASD decree.

People v. St. James, 75 P.3d 1122 (Colo. App. 2002). In a child sex assault case, trial court properly denied defendant's motion for mistrial based on admission of evidence that defendant was involved in a "residential placement" program. Such evidence would not have naturally led jury to infer that defendant was in custody or guilty of committing prior bad acts. Any misconduct inferable from "residential placement" would hardly distract a jury and cause overmastering hostility toward a defendant.

People v. Kerber, 64 P.3d 930 (Colo. App. 2002). Witness inadvertently blurted out that he had failed a lie detector test; trial court denied defense request for a mistrial. To determine whether evidence of a witness's polygraph test results requires reversal, reviewing court may consider, among other things, whether: (1) defendant objected or sought a cautionary instruction; (2) the reference was inadvertent; (3) there were repeated references; (4) the reference was an attempt to bolster a witness's credibility; and (5) the results of the test were admitted rather than only the fact that a test was conducted. *Here*: reversal not required because although lie detector or polygraph evidence is per se inadmissible at trial, mere reference to such testing does not require a mistrial where the remark was inadvertent, court immediately gave a cautionary instruction, and prosecutor made no other reference to the testing.

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). Witness's reference to the fact that defendant took a polygraph test did not require a mistrial.

People v. Hendrickson, 45 P.3d 786 (Colo. App. 2001). Prosecutor mistakenly distributed an unredacted transcript, and then retrieved it as jurors were placing it in their notebooks. Mistrial properly denied because jurors only had time to see first page of the unredacted exhibit; nothing on that page was so prejudicial that mistrial was a manifest necessity; and any prejudice was remedied by an instruction to disregard.

People v. Sherman, 45 P.3d 774 (Colo. App. 2001). Trial court's erroneous attempt to clarify meaning of "reasonable doubt" did not warrant mistrial: (1) court gave jury the correct reasonable doubt instruction at the beginning, and then in writing at end of case; (2) court advised jury to contrast reasonable doubt with mere "speculating" or "guessing," and implied that various ways exist to perceive reasonable doubt; (3) defendant failed to make a contemporaneous objection to trial court's elaboration on reasonable doubt, thus depriving court of the opportunity either to correct the error or to bring in a new jury panel.

People v. Martinez, 32 P.3d 520 (Colo. App. 2001). Trial court properly denied defendant's motion for mistrial when co-defendant, who was tried separately, was brought into courtroom in jail clothing, shackles, and under guard.

People v. Berreth, 13 P.3d 1214 (Colo. 2000). Circumstances must be serious and outside of the judge's control to constitute "manifest necessity" justifying a mistrial over defense objection. *Here:* trial court erroneously declared mistrial sua sponte because of the sudden resignation of the division clerk and the unanticipated slow pace of the trial; double jeopardy bars retrial of defendant.

People v. Copenhaver, 13 P.3d 413 (Colo. App. 2000). Trial court properly denied mistrial after defense counsel inadvertently raised a privileged communication: (1) defense counsel and prosecutor both stated they did not want a mistrial; (2) court instructed jury to disregard the colloquy; and (3) prosecutor made no use of the testimony.

People v. Blackmon, 20 P.3d 1215 (Colo. App. 2000). On redirect, officer said he had known about defendant's limp before the incident; did not warrant mistrial because defendant failed to show prejudice; response did not indicate that the earlier contact with defendant occurred in connection with criminal activity.

People v. Zamora, 13 P.3d 813 (Colo. App. 2000). Detective's rebuttal testimony that he did not believe defendant's initial denials was not credibility opinion evidence because it neither corroborated nor contradicted defendant's veracity. Since any error in admitting the testimony was harmless because it did not reasonably influence the verdict, trial court properly exercised its discretion in denying motion for mistrial.

BOND BEFORE CONVICTION: §16-4-101 ET SEQ.; COLO. CONST. ART. II, §19

People v. Fallis, 2017 COA 131M. Under §16-4-110(1)(d), if a compensated surety is exonerated by surrendering defendant prior to the initial appearance date fixed in the bond, the court may require the surety to refund part or all of the bond premium paid by defendant if necessary to prevent unjust enrichment. *Here*: since the surety surrendered defendant to the court 14 months after the court process began, it was well after defendant's initial appearance; the court was without authority to order the surety to refund all or part of defendant's premium.

People v. Serra, 2015 COA 130. Legislature's intent in enacting violation of bail bonds conditions and violation of a protection order was to proscribe conduct that would endanger witnesses/victims.

APPEAL BONDS: §16-4-201 TO §16-4-205; COLO. CONST. ART. II, §19(2.5)(A)

People v. Gurule, 174 P.3d 846 (Colo. App. 2007). For direct appeals, the court may deny an appeal bond without a hearing if the motion, files, and record demonstrate that the defendant's request is without merit, and if the trial court makes sufficient findings to enable review of its decision. An appellate court reviews a trial court's order denying an appeal bond for an abuse of discretion.

People v. Kyu Ho Yi, 741 P.2d 1264 (Colo. App. 1987). The trial court must hold a hearing and make written findings on a request for appeal bond.

People v. Roca, 17 P.3d 835 (Colo. App. 2000). Defendant is not entitled to a hearing on a motion for appeal bond pending review of denial of a Crim. P. 35(c) motion.

People v. Lewis, 2024 CO 57. In this C.A.R. 21 proceeding, the CSC holds that once a county court has found that a convicted defendant poses a danger to an individual or the community it cannot grant that defendant an appeal bond. Appeal bonds in such circumstances are prohibited by §16 4 201.5(2)(a), and article II section 19 of the Colorado Constitution. However, county courts are still required, upon request, to stay the execution of a defendant's sentence pending appeal under People v. Steen, 2014 CO 9. Further, the court holds that §16 4 204, provides the exclusive method of appeal for trial court rulings on appeal bonds under §16-4-201.5.

People v. Fallis, 2017 COA 131M. Defendant challenged a bond condition that he remain in Colorado during the pendency of his criminal case, arguing that this unconstitutionally interfered with his right to parent his children, who are now in another state. *Held*: A bond condition of the type at issue, which was imposed in accordance with statutory requirements and grounded in the facts and circumstances of the case, does not violate a defendant's right to exercise his parental rights.

People v. Serra, 2015 COA 130. The General Assembly's intent in enacting violation of bail bonds conditions and violation of a protection order was to proscribe conduct that would endanger witnesses or victims.

People v. Blagg, 2015 CO 2. When trial court grants a motion for new trial, defendant is restored to the bond status that existed upon the filing of charges; once requested, trial court must set a hearing at which the DA and victim (or victim's family if victim is deceased) have a right to be heard before the court sets bond.

People v. Cruz-Velasquez (re: Vargas), 2014 COA 180. Surety was not entitled to relief under §16-3-503(1)(a) or (c) because he did not establish a factual basis for his contentions that a law enforcement agency investigated defendant's immigration status or determined that there was probable cause to believe that he was illegally in this country. Defendant's possession of a Honduran identification card and the lack of an identifying document listed under §16-3-503(3) was insufficient to establish that the defendant was illegally in the United States. A law enforcement agency does not have an affirmative duty under §16-3-503 to investigate the immigration status of every defendant who is charged with a felony or a class 1 or 2 misdemeanor, or to make a probable cause determination as to whether he or she is illegally in this country. The statute only requires that if a law enforcement agency has made such a determination, it must inform the bonding agent before a bond is posted.

People v. Luna, 2013 COA 67. Interpreting the statute to conclude that it implicitly requires that the bond be in effect at the time of the alleged conduct implements the plain meaning and purpose of the statute – to criminalize violations of bail bonds. Where the record contains evidence that a bond was issued prior to the charged date of violation, and no evidence is offered that the bond was no longer in effect, a reasonable inference may be drawn that the bond was in effect at the time of the charged violation.

Oram v. People, 255 P.3d 1032 (Colo. 2011). The common law bonding agent's privilege to enter the principal's residence was abrogated by statute in Colorado and does not exist in this state.

People v. Chavarria-Sanchez (re: Montoya, d/b/a Reliable Bail Bonds), 207 P.3d 902 (Colo. App. 2009). Under §16-3-503(1)(c), a surety who posts bond for a defendant who is later determined to be illegally in this country is liable only for the fees associated with any forfeiture, not the amount of the forfeited bond itself. §16-3-503 does not apply retroactively to forfeitures that occur prior to its effective date of 6/1/07.

People v. Gurule, 174 P.3d 846 (Colo. App. 2007). Trial court's finding that defendant was a flight risk mandates denial of an appeal bond, pursuant to §16-4-201.5(2)(a). Trial court may deny an appeal bond without a hearing if the motion, files, and record demonstrate defendant's request is without merit, and if the trial court makes sufficient findings to enable appellate review.

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). When taking a person out of the county jail for medical treatment, sheriff may deliver such person to home detention for medical treatment and recuperation at that person's, and not the State's, expense. Under these circumstances, the committed person remains in sheriff's custody. §§17-26-102, 103, 104(5).

People v. Hoover, 165 P.3d 784 (Colo. App. 2006). Defendant does not have a right to bail after trial, although appeal bonds are authorized by statute and may be granted at trial court's discretion. Where the court carefully considered all of the factors relevant to the appeal bond determination, and made detailed findings in support of its order, the court's order granting a $1 million "cash-only" appeal bond was a proper exercise of its discretion.

People v. Nishikawa, 32 P.3d 630 (Colo. App. 2001). Trial court continued bond after allowing the filing of an additional felony charge. Surety's obligation was not terminated because the new charge did not substantially increase the likelihood that defendant would jump bail.

People v. Rodriguez, 43 P.3d 641 (Colo. App. 2001). Where defendant was no longer in custody, his claim on appeal that the trial court erred by revoking his bond before sentencing was moot.

People v. Haghshenas, 31 P.3d 180 (Colo. App. 2001). Where defendant posted his own bond without the assistance of a professional surety, he was to be considered the principal obligor on the bond. Because defendant was incarcerated in a foreign jurisdiction in excess of 90 days and the state had not extradited him, he was entitled to exoneration from the bail bond under §16-4-108(1)(b.5).

People v. Gonzales, 28 P.3d 967 (Colo. App. 2001). Where a non-party was mistakenly required to post a $25,000 bond in connection with this case, the trial court properly ordered the sureties to refund the $2,500 premium. Although the bail bond statutes did not apply to a refund under these unique circumstances, the trial court had common law authority to order a refund to prevent unjust enrichment.

MOTION FOR NEW TRIAL: CRIM.P. 33(B)

People v. Hill, 228 P.3d 171 (Colo. App. 2009). The decision to grant or deny a new trial is generally entrusted to the trial court's discretion.

People v. Pollard, 3 P.3d 473 (Colo. App. 2000). A trial court is not required to grant a hearing on a motion for a new trial.

People v. Eckert, 919 P.2d 962 (Colo. App. 1996). Trial court may grant a new trial if it determines that the interests of justice so require.

People v. Bueno, 2018 CO 4. Motions for new trial under Crim.P. 33 are timely if they are filed before the trial court sentences defendant, even if, as here, that occurred 15 months after the jury rendered it verdicts.

People v. Gee, 2015 COA 151. A co-defendant's assertion of his Fifth Amendment privilege during trial does not make his later statements "newly discovered evidence," but only "newly available evidence." If defendant knew or should have known that his codefendant could offer material testimony as to defendant's role in the charged crime, it cannot be true that defendant was unaware of codefendant's potential ability to exculpate him.

People v. Lopez, 2015 COA 45. IAC claims raised in a motion for new trial are reviewed under Crim.P. 33 rather than Crim.P. 35(c) standards - an evidentiary hearing is not required and trial court's ruling is reviewed for abuse of discretion.

People v. Clark, 2015 COA 44. Trial court should not disregard and cast aside an affidavit alleging juror misconduct solely because that affidavit contains hearsay; trial court should determine whether the affidavit sets forth "factual allegations" that are not conclusory in nature to the extent it can be reasonably said that the party moving for a new trial acted upon a basis of knowledge, not merely suspicion or hope.

People v. Blagg, 2015 CO 2. When a trial court grants a motion for new trial, the defendant is restored to the bond status that existed upon the filing of charges. Once requested, the trial court must set a hearing at which the DA and the victim (or victim's family if victim is deceased) have a right to be heard before the court sets bond.

People v. Miranda, 2014 COA 102. Defendant was not entitled to a new trial based on the admission of his interview because the redactions did not create a misleading impression of his testimony for the jury.

People v. Rhea, 2014 COA 60. Trial court has discretion to decide a post-trial motion alleging prosecutorial misconduct and all preserved claims of error underlying that decision, including trial court's findings regarding harmless error, are reviewed for an abuse of discretion.

People v. Lahr, 2013 COA 57. A new trial was not warranted where, although the POWPO charge was bifurcated from the other charges prior to trial, the court, when reading the instructions to the jury, read a verdict form entitled "Charge of Possession of a Weapon by a Previous Offender." Notably, the court immediately told the jurors that the form was a mistake and directed them to turn their copies of the form back into the court.

People v. Rivera, 56 P.3d 1155 (Colo. App. 2002). Trial court gave defendant only 5 minutes to testify on her motion for a new trial. This was harmless error, if any, based upon her later offer of proof, any testimony would have been cumulative to evidence already before the court.

People v. Pollard, 3 P.3d 473 (Colo. App. 2000). Trial court was not required to appoint counsel or conduct a hearing before denying defendant's pro se motion for a new trial, and it did not abuse its discretion where defendant failed to allege and record did not reveal how he was prejudiced by any of the errors he claimed, including IAC.

People v. Renaud, 942 P.2d 1253 (Colo. App. 1996). Defendant did not abandon his motion for new trial simply because he did not seek a ruling sooner than when he got it - 4 years after the motion was filed.

MOTION RETURN SEIZED PROPERTY

Strepka v. People, 2021 CO 58. Trial court retains jurisdiction to rule on a motion for return of unlawfully obtained property after a case is dismissed so long as the motion is filed before the appeal deadline expires.

People in the interest of J.P.L., 214 P.3d 1072 (Colo. App. 2009). A motion for a new trial based on newly discovered evidence shall be supported by affidavits pursuant to Crim. P. 33(c). *Here*: the magistrate did not abuse his discretion in denying the juvenile's motion for a new trial because the juvenile failed to file supporting affidavits with his motion.

People v. Hargrave, 179 P.3d 226 (Colo. App. 2007). When the need for property seized in a case has ended, the trial court has the jurisdiction and the obligation to order its return and, if necessary, to conduct a hearing to determine its appropriate disposition and any ancillary issues. Evidence of seizure from the defendant is prima facie evidence of his or her ownership of the property. *Here:* several months after his conviction/sentencing, defendant filed a motion for return of his property; trial court declined to get involved in matters it considered to be civil; COA found that trial court should have determined the rightful owner of the property and allocated or discharged towing and storage fees.

People v. Fordyce, 705 P.2d 8 (Colo. App. 1985). Defendant must show which property was seized. Then DA must show by a preponderance of evidence that items seized were the fruit of, or connected to, illegal activity.

People v. White, 701 P.2d 870 (Colo. App. 1985). Seized property against which the government has no claim must be returned to its rightful owner.

MISCELLANEOUS ON POST-TRIAL MOTION

People v. Martinez, 2015 COA 33. There is no criminal rule permitting a trial court to reconsider an order dismissing a criminal case. Trial court did not abuse its discretion in refusing to consider information attached

to People's motion to reconsider, as that information should have been submitted with the original motion to revoke the YOS placement.

People v. Storlie, 2014 CO 47. Trial court may only deny prosecution's unopposed motion to dismiss where it has been shown by clear and convincing evidence that the interests of defendant or public are jeopardized by the refusal to prosecute. Prosecution is presumed to be acting in the best interest of the public unless the prosecution is shown to have been acting in bad faith.

Warren v. People, 192 P.3d 477 (Colo. App. 2008). Where felony case was dismissed and refiled as a misdemeanor (that was also later dismissed), felony case was not "completely dismissed." Defendant is not eligible to file for a sealing of the records in either case until: (1) the misdemeanor SOL expires, (2) the misdemeanor case is refiled but dismissed with prejudice, or (3) defendant is tried and acquitted.

POST-CONVICTION MOTIONS

CRIM.P. 35(a) CORRECTION OF ILLEGAL SENTENCE

People v. Wenzinger, 155 P.3d 415 (Colo. App. 2006). A sentence is "not authorized by law" if it is inconsistent with the statutory scheme outlined by the legislature, while a sentence is "imposed without jurisdiction" if it lies within the range contemplated by statute but was otherwise imposed in excess of the court's subject matter jurisdiction. Crim.P. 35(a) now provides: "The court may correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." A *Blakely* claim is not an illegal sentence claim.

McDonald v. People, 2024 CO 75. *Wells-Yates* did not announce new substantive rules of constitutional law. Although some of *Wells-Yates'*s holdings announced new rules, those rules are procedural. Accordingly, none of *Wells-Yates'*s holdings apply retroactively to cases on collateral review.

People v. Tennyson, 2023 COA 2. A defendant's postconviction challenge to the restitution component of a sentence due to a DA's untimely determination of the restitution amount constitutes an illegal manner claim under Crim.P. 35(a).

Hunsaker v. People, 2021 CO 83. A court's correction of an illegal sentence is precisely the sort of outside circumstance that excuses the untimely filing of a collateral attack with regard to claims that the illegal sentence rendered the conviction itself infirm. But the court's correction of an illegal sentence cannot excuse the defendant's failure to timely bring a collateral attack unrelated to that illegality. Those arguments were always available to the defendant, regardless of whether the court would eventually correct the sentence. *Here:* in assessing defendant's six arguments, the COA correctly determined that the only one that relates to the illegality in the original sentence is the argument that counsel was deficient for failing to object to the imposition of an extraordinary risk sentence for count I. Defendant's other five arguments address counsel's performance and the court's errors leading up to and during trial, violation of his right to a jury trial, and error related to the reinstatement of his count II sentence, which was actually lawful. Because such arguments are unrelated to the illegality in his count I sentence, their late filing cannot be excused by the correction of his sentence.

Yeadon v. People, 2020 CO 38; Waddell v. People, 2020 CO 39. Whether sentence imposed during defendant's sentencing hearing was authorized by law was question that CSC reviews de novo. Sentence that is contrary to legislative mandates is illegal and may be corrected at any time by sentencing court without violating defendant's rights against double jeopardy. If trial court did not impose lawful sentence in open court, then no double jeopardy infringement occurred with court's subsequent imposition of drug offender surcharge because sentence that was contrary to legislative mandates was illegal and could be corrected at any time by sentencing court without violating defendant's rights against double jeopardy. *Here:* because sentencing court did not hold the necessary hearing or make the necessary finding as to whether defendant had financial means to pay any portion of drug offender surcharge, court had no choice but to impose the mandatory surcharge, and consequently, the sentence imposed in open court was not authorized by law and, thus, was subject to correction; because drug offender surcharge was statutorily mandated, trial court's failure to order it in open court rendered defendant's sentence on his class 6 felony drug conviction illegal.

People v. Baker, 2019 CO 97M; Fransua v. People, 2019 CO 96. Because presentence confinement credit is not part of a sentence and does not impact the finality of a sentence, a challenge to the amount of presentence confinement credit noted in the mittimus is not a cognizable claim that the sentence was not authorized by law, for purposes of the rule permitting a court to correct such a sentence. There is at least one other mechanism available for challenging an incorrect PSCC amount in the appropriate circumstances: Rule 36, which permits the court at any time to correct "[c]lerical mistakes ... and errors in the record arising from oversight or omission."

People v. Trujillo, 2019 COA 74. Treatment order which required defendant to participate in DV treatment program was not part of his sentence, and was therefore not cognizable under 35(a), but, rather, under section of rule governing other remedies; statute requiring courts to order defendants convicted of DV-related crimes to attend treatment "in addition to any sentence imposed" characterized a DV treatment order as something other than a sentence and indicated that it was "not a form of punishment." COA holds claim should have been raised in 35(c) motion.

People v. Valadez, 2016 COA 62. Postconviction claim by defendant, whose sentence for a misdemeanor offense that occurred while he was imprisoned was to be served consecutively in county jail after expiration of prison sentence, that he was entitled to serve jail sentence prior to remainder of prison sentence, was a claim that his sentence was not authorized by law, and therefore, claim was not time barred even though it was filed more than six years after sentencing.

People v. Isom, 2015 COA 89. Whether a sentence is authorized by statute presents a question of law that the appellate court reviews de novo. Here: defendant's claim on motion to correct sentence for sexual assault of child, that trial court failed to adequately explain reasons for aggravating his sentence as habitual sex offender against children, was challenge to propriety of sentence that defendant had to raise on direct appeal. But, his indeterminate sentence on the sexual assault on a child count is vacated, and the case is remanded for resentencing on that count. In resentencing defendant on the sexual assault on a child count, the trial court shall impose an indeterminate prison sentence of eighteen years to life, unless the court finds extraordinary aggravating circumstances under §18–1.3–401, in which case the bottom end of the sentence may be between eighteen years and thirty-six years. Again, if the court determines that a bottom end sentence in the aggravated range is warranted, it shall state on the record its reasons for imposing the sentence.

Hunsaker v. People, 2015 CO 46. While an illegal sentence on one count renders the entire sentence illegal, the illegality does not necessarily entitle defendant to resentencing on the counts with legal sentences, in postconviction proceedings under rule governing correction of illegal sentences. Sentences can be illegal in different ways, and the nature of the illegality will dictate how courts correct those sentences. If a sentencing

court imposes a definite sentence in excess of the statutory maximum, the sentence can be corrected by removing that excess. Where defendant files a motion to correct illegal sentence and an alternative motion for reduction of legal sentence and the court grants the motion to correct because the sentence contains an illegal component, the motion to reduce is rendered premature; however, defendant may renew the motion within 126 days of the court's order correcting the sentence or the court may, within the 126–day timeframe, reconsider and reduce the entire sentence on its own initiative. *Here:* in 35(a) proceeding, the illegality of defendant's sentence on one count for sexual assault of a child did not entitle him to resentencing on other count with legal sentence, on conviction for sexual assault of a child as part of a pattern of sexual abuse; therefore, because defendant's sentence of eight years to life on count one was illegal, the postconviction court could correct that portion of the sentence by reducing the bottom end to a term within the statutorily permissible range.

People v. Fritz, 2014 COA 108. Defendant pleaded guilty to the probation revocation and stipulated to a new legal sentence. The court sentenced him according to the new plea agreement, thereby vacating his original sentence. Defendant is not entitled to withdraw his guilty plea. Because the new legal sentence necessarily supersedes the original sentence, our determination of whether his sentence was illegal would not have any practical effect on this case. Therefore, his appeal challenging the legality of his original sentence is moot.

People v. Jenkins, 2013 COA 76. Defendant's appeal from the denial of his second motion to correct illegal sentence was not procedurally barred, even though second motion raised the same issue as defendant's first motion to correct illegal sentence; rule governing motions to correct illegal sentence did not contain language barring relief for claims raised and resolved in a prior postconviction proceeding.

People v. Ortega, 266 P.3d 424 (Colo. App. 2011). Contentions that defendant raised in motion to correct illegal sentence but did not pursue on appeal would be deemed abandoned. Nineteen-year sentence for F3 child abuse resulting in SBI was not illegal within the meaning of procedural rule allowing the correction of an illegal sentence; presumptive range of 4- 12 years for a F3 was expanded under the extraordinary-risk-of-harm provision so as increase maximum presumptive sentence to 16 years, and another provision required that sentence for child abuse resulting in SBI be at least the midpoint, i.e., 10 years, of the presumptive range but not more than twice the maximum of 16 years, i.e., 32 years.

People v. Bowerman, 258 P.3d 314 (Colo. App. 2010). Although claims that a sentence was not authorized by law or was imposed without jurisdiction may be raised at any time, a claim that a sentence was imposed in an illegal manner must be raised within 120 days of the imposition of the sentence. A sentence may be imposed in an illegal manner "when the trial court ignores essential procedural rights or statutory considerations in forming the sentence." Illegal manner claims must be raised within 120 days of sentencing and can include such claims as: (1) defendant was denied his right to allocution; (2) where the court did not consider factors established by statute; (3) where the defendant was not given the complete range of testing required by statute before being sentenced as a sex offender; or (4) where the manner of imposing a sentence in a sexual assault case resulted in a denial of procedural due process. *Here:* defendant's claim that the trial court's restitution order was "illegal" because the prosecution did not prove, by a preponderance of the evidence, that defendant stole items in addition to those specified in the information was an illegal manner claim and was required to be filed within 120 days.

People v. Tolbert, 216 P.3d 1 (Colo. App. 2007). Claims of an illegal sentence include mandatory parole challenges, which must be brought under Crim.P. 35(a).

People v. White, 179 P.3d 58 (Colo. App. 2007). The legislature in §18-8-208.1(1) has specified that sentences for attempted escape "shall run consecutively with any sentences to be served by the offender." The July 2002 order here resulted in a sentence for attempted escape that was, in part, concurrent with defendant's sentence for motor vehicle theft. Thus, the July 2002 order resulted in an illegal sentence. We acknowledge that this

conclusion differs from the one reached by the division in People v. Heredia, 122 P.3d 1041 (Colo. App. 2005), we respectfully decline to follow that opinion.

People v. Collier, 151 P.3d 668 (Colo. App. 2006). The substance of a postconviction motion controls whether it is designated as a Crim.P. 35(a) or 35(c) motion. Crim.P. 35(a) provides: "The court may correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." A sentence is "not authorized by law" if it is inconsistent with the statutory scheme outlined by the legislature. 35(a) is the proper procedural vehicle for a defendant to use to challenge an illegal sentence. A sentence is not authorized by law if it is "inconsistent with the statutory scheme outlined by the legislature," and an allegation that a sentence is illegal raises questions about the sentencing court's subject matter jurisdiction. *Here:* whether a court aggravated sentence in violation of *Apprendi*, whether SOLSA violates equal protection, and whether defendant had an opportunity to be heard at sentencing are all 35(c) claims. The claim that defendant was not given all of the statutory required testingwas an illegal manner claim subject to the 120 within sentencing hearing time requirements.

CRIM.P. 35(B) MOTION FOR REDUCTION OF SENTENCE

People v. Fuqua,764 P.2d 56 (Colo. 1988); People v. Arnold, 907 P.2d 686 (Colo. App. 1995). A Crim.P. 35(b) motion is "essentially a plea for leniency" and the rule "is intended to give every convicted offender a second round before the sentencing court and to give the court the opportunity to reconsider the sentence in light of further information about the defendant or the case which is presented after the initial sentence."

People v. Barnett, 2020 COA 167. Crim.P. 35(b) enables trial courts to review a sentence to ensure that it is proper before making it final. A court's review of a Crim.P.35(b) motion focuses on the fairness of the sentence in light of the purposes of the sentencing laws. When presented with a Crim.P. 35(b) motion, the court may consider all relevant and material factors, including new evidence and evidence the trial court knew when it imposed the original sentence. The rule does not require the postconviction court to make findings of fact, but the court should provide a statement of the basic reasons in support of its ruling. The rule also does not require the court to hold a hearing on the motion. An order denying a Crim.P. 35(b) motion is reviewed to determine if the postconviction court failed to exercise its judicial discretion by refusing to consider any information in mitigation. The propriety of the sentence is not subject to review.

People v. Chavez, 2020 COA 80M. Appellate courts review a ruling on a Crim.P. 35(b) motion for an abuse of discretion. Crim. P. 35(b) cannot expand the trial court's authority in resentencing beyond that which it had initially. The same statutes that governed the original sentencing limit the trial court's authority on resentencing. *Here:* defendant was correctly sentenced consecutively and there was no conflict between the habitual criminal statute and the crime of violence statute.

People v. Bryce, 2020 COA 57. Crim.P. 35(b) provides that, on motion, a court may reduce a defendant's sentence if the motion is filed within 126 days after (1) imposition of the sentence; (2) receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal; or (3) entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence. A motion filed outside of these prescribed periods must be denied unless it falls under a recognized exception. *Here:* defendant was sentenced on October 18, 2018. Under the plain language of Crim.P. 35(b), he was required to seek sentence reconsideration within 126 days of his sentence date or, alternatively, no more than 126 days after the issuance of the appellate mandate. Because more than 126 days

have passed since sentencing and this court has not yet issued its mandate, his proposed motion does not fall within either time period. It is therefore either untimely or premature.

Hunsaker v. People, 2015 CO 46. While an illegal sentence on one count renders the entire sentence illegal, the illegality does not necessarily entitle defendant to resentencing on the counts with legal sentences. Nothing in our precedent or Crim.P. 35(a)'s language suggests that a court must resentence defendant as to all counts with legal sentences. Sentences can be illegal in different ways, and the nature of the illegality will dictate how courts correct those sentences. If a sentence is subject to correction on one count under Crim.P. 35(a), Crim.P. 35(b) authorizes a resentencing court to reconsider and reduce the legal sentences as to all counts once it has corrected the entire sentence. *Here:* because defendant's sentence of eight years to life on count I was illegal, the post-conviction court can correct that portion of the sentence by reducing the bottom end to a term within the statutorily permissible range.

People v. Bassford, 2014 COA 15. Crim.P. 35(b) for motion to reduce sentence did not authorize modification of illegal sentence on conviction for Colorado Organized Crime Control Act and imposition of sentence at resentencing in manner designed to effect intent of original sentence.

People v. Brosh, 2012 COA 216M. Because sex offender registration is not part of a sentence, the trial court cannot reconsider defendant's SVP designation under Crim.P. 35(b).

Herr v. People, 198 P.3d 108 (Colo. 2008). In order to determine whether a trial court enjoys proper jurisdiction to evaluate a timely filed 35(b) motion, there is a two-step analysis: (1) whether the court ruled on the 35(b) motion within a reasonable time; (2) if it did rule in a reasonable time, the court then considers whether defendant abandoned his motion. If defendant does not undertake reasonable efforts to secure a ruling in the face of a trial court's excessive delay, the motion is deemed abandoned. The clearest example of delay with an improper purpose is that undertaken solely to allow defendant an opportunity to compile a favorable DOC record. *Here:* the delay was unreasonable because: the trial court granted the delay in response to defendant's motion requesting an alternative of delay in order to show the court progress in his DOC therapy and classes; the trial court's order granted up to one year of delay, a period seemingly unconnected to any workload or scheduling considerations of the court; and perhaps most concerning, at the hearing on the motion, the court stated, "I think it's the practice of this district sometimes to allow up to a year before the motion is actually heard," indicating judges routinely grant excessive delay for the purpose of allowing offenders to accumulate favorable DOC records.

People v. Shepard, 151 P.3d 580, 585 (Colo. App. 2006). For purposes of Crim.P. 35(b), a conviction is final 120 days after the imposition of sentence if the conviction is not directly appealed. Once a conviction is final, the trial court has no jurisdiction to review the propriety of the sentence. However, when defendant is originally sentenced to probation and that sentence is revoked, and defendant is resentenced to DOC, he is entitled to file a motion for reduction of the later sentence under Crim.P. 35(b).

Delgado v. People, 105 P.3d 634 (Colo. 2005). Trial court has jurisdiction to modify a corrected sentence pursuant to Crim.P. 35(b) when any portion of the original sentence did not fully comply with statutory requirements and a motion for reduction of sentence has been filed within 120 days of the new, legal sentence's imposition.

People v. Banuelos-Landa, 109 P.3d 1039 (Colo. App. 2004). Crim.P. 35(b) grants district courts authority to consider motions for reduction of sentence. Neither the language of the rule nor any Colorado appellate decision requires that such a motion be considered and resolved by the same judge who imposed sentence.

People v. Campbell, 75 P.3d 1151 (Colo. App. 2003). The failure to file a Crim.P.35(b) motion with the trial court within 120 days after the sentence is imposed is jurisdictional. Because Crim.P. 35(b) provides a 120-day

time limitation and §17-27.7-104 requires that an offender complete boot camp before the DOC may refer him or her for resentencing, defendant must file his Crim.P. 35(b) motion within 120 days of completing boot camp. Here: Because the issue of whether defendant's delay in filing his motion was caused by excusable neglect is a question of fact, case remanded to trial court.

People v. Belgard, 58 P.3d 1077, 1079 (Colo. App. 2002). When a mandatory minimum sentence is reduced once pursuant to §16-11-309(1)(a), no further reductions are permitted under Crim.P. 35(b) because the resulting sentence would be outside the statutory limits.

Keller v. People, 29 P.3d 290 (Colo. 2000). Boot camp statute, which mandates automatic referral to sentencing court for consideration of sentence reduction within 60 days of termination or completion of a regimented inmate training program (RITP), provides a special statutory procedure for seeking a sentence reduction, separate and distinct from rule governing postconviction application for reduction in sentence.

Crim.P. 35(c) Motions

Duran v. Price, 868 P.2d 375 (Colo. 1994). Crim.P. 35(c) motions must be filed in the court that rendered the sentence. There is no constitutional right to counsel in 35(c) proceedings. While a trial court has the authority to appoint counsel, it may decline to exercise that authority when the claim is meritless.

Patton v. People, 35 P.3d 124 (Colo. 2001); People v. Naranjo, 840 P.2d 319 (Colo. 1992). In Crim.P. 35(c) proceedings, the conviction under attack is presumed valid, and defendant has the burden of proving invalidity by a preponderance of the evidence.

People v. Segura, 2024 CO 70. The CSC holds that when, as here, a defendant files a pro se Crim. P. 35(c) motion that contains a request for counsel, the trial court has two, and only two, choices. First, it may conclude, based on its review of the motion, the record, and the file, that none of the claims has arguable merit, in which case it must deny the motion in its entirety without further action by entering written findings of fact and conclusions of law. Second, it may conclude, based on its review of the motion, the record, and the file, that at least one claim has arguable merit, in which case it must grant the request for postconviction counsel and forward a complete copy of the motion to the prosecution and the public defender. The PD must then determine which claims (if any) lack arguable merit and should be abandoned, which arguably meritorious claims (if any) should be supplemented, and which new claims (if any) have arguable merit and should be added. Thus, upon its initial review of a postconviction motion, the court must either deny the motion and all of the claims, or not deny the motion and none of the claims—there is no betwixt and between option. If the court denies none of the claims, it may not restrict the scope of postconviction counsel's representation. *Here:* because the COA was spot-on in ruling that the trial court violated Crim. P. 35(c)(3)(IV)–(V), and because the prosecution does not challenge the COA's conclusion that the error was not harmless, the CSC affirms.

People v. Smith, 2024 CO 3. Defendant abandons the Crim.P. 35(c) claims that he ceased pursuing; COA erred in concluding that all of his pro se claims were preserved. Because the "captain of the ship" doctrine gives defense counsel the authority to make strategic decisions, including which post-conviction claims to pursue, counsel may abandon some, although not all, of a defendant's pro se Crim.P. 35(c) claims without defendant's informed consent. Counsel cannot choose to abandon post-conviction appeal completely though. A claim is abandoned when a party decides not to pursue or reassert a claim that the party had raised previously. *Here:* defense counsel's supplemental Crim.P. 35(c) motion addressed three of the twelve original pro se claims, added two new ones, never stated any intention to continue with the excluded pro se claims, and only addressed

counsel's claims at the evidentiary hearing, defendant intended to abandon the pro se claims that he ceased pursuing, and the court need not decide whether the abandonment of individual postconviction claims requires a showing of intent to abandon such claims. COA is reversed.

People v. Marquez, 2020 COA 169M. Claims of alleged incompetence are subject to the bar against successive postconviction claims. The obligations of the PDs under 35(c)(3)(V) apply with equal force to postconviction counsel who is appointed to represent defendant. Therefore, within forty-nine days of being appointed, all postconviction counsel must either file a 35(c) motion or seek an extension of time to do so. If postconviction counsel fails to file a motion or seek an extension, a postconviction court can summarily deny a request for postconviction relief. When read together, 35(c)(3)(IV) and (V)'s plain language requires the postconviction court to comply with 35(c)(3)(V)'s procedure only when it decides not to summarily deny defendant's motion. Accordingly, even when a postconviction court has appointed postconviction counsel to represent defendant, it may summarily deny the defendant's 35(c) motion under 35(c)(3)(IV) and (V) without directing the prosecution to respond to defendant's motion and without conducting a hearing.

People v. Melnick, 2019 COA 28. A parolee who appeals his parole revocation to the Appellate Board of the Colorado State Board of Parole is not barred from raising the same issues in the district court pursuant to Crim.P. 35(c)(2)(VII) and §18-1- 410(1)(h). Because §17-2-201(4)(b) explicitly provides for postconviction judicial review of a claim that parole was revoked illegally, any claims raised in the parole board appeal do not constitute claims that were raised, or could have been raised, in a prior appeal, and thus are not successive.

People v. Taylor, 2018 COA 175. This case holds, for the first time that 35(c)(3)(VII) supersedes the rule stated in People v. Hubbard, 519 P.2d 945 (Colo. 1974) and People v. Naranjo, 738 P.2d 407 (Colo. App. 1987) that a defendant can file a second 35(c) motion raising new postconviction claims if defendant filed his initial 35(c) motion pro se. Defendant has no right to access to trial transcripts in filing a postconviction motion. Therefore, defendant may not raise new claims in a second postconviction motion on the ground that he lacked access to trial transcripts when the first postconviction motion was filed.

People v. Baker, 2017 COA 102, rev'd other grounds, 2019 CO 97M. Defendant may collaterally attack a designation as an SVP under 35(c) because it is part of the judgment of conviction.

Lucero v. People, 2017 CO 49. A claim that a sentence is unconstitutional is a 35(c) claim, it is not a 35(b) claim. Therefore, even if defendant raises it as a 35(b) claim, a court may review it under 35(c).

People v. Higgins, 2017 COA 67. A 35(c) motion alleging IAC is not successive, despite fact that defendant previously filed a post-conviction motion arguing IAC, when the relief sought is reduction of sentence.

In re People v. Owens and Ray, 2014 CO 58. Crim.P. 16 imposes disclosure obligations on the prosecution only with regard to materials and information acquired before or during trial and does not apply to postconviction proceedings. The prosecution is constitutionally obligated to disclose information favorable to an accused through the appeal of a death sentence; the trial court's evaluation of whether disclosure is required should follow the due process standard and procedure announced in People v. Rodriguez, 786 P.2d 1079 (Colo. 1989).

People v. Moore, 2014 CO 8. A defendant's challenge to the knowing, voluntary, and intelligent nature of his waiver of the right to testify may only be brought in a postconviction proceeding; such claims are not subject to review on direct appeal.

Dooly v. People, 2013 CO 34. The trial court erred in granting postconviction counsel's Crim.P. 12 motion to dismiss defendant's pro se postconviction motion (against defendant's wishes) based on counsel's belief that the motion lacked merit. When postconviction counsel believes a pro se motion lacks merit, the proper procedure is to withdraw from further representation, which still requires the court to rule on the motion's merits. Where, as

here, a trial court dismisses the entire motion, it effectively endorses postconviction counsel's finding that the motion has no merit, in violation of People v. Breaman, 939 P.2d 1348, 1351 (Colo. 1997).

Kazadi v. People, 2012 CO 73. A DJ&S is a continuance of defendant's case in lieu of the imposition of sentence, and is not a judgment of conviction or a final, appealable judgment; therefore defendant serving a DJ&S may not collaterally attack his guilty plea pursuant to 35(c).

People v. Finney, 2012 COA 38, aff'd other grounds, 2014 CO 28. Trial court has broad discretion as to the "mode and extent of evidence presentation" in postconviction hearings. *Here*: where trial court considered nine documents, some with attachments, held two hearings (one on plea counsel's alleged IAC and the second to reconsider sentence), and considered substantial testimony on both issues, trial court did not err in limiting the length of time allowed for each hearing.

People v. Davis, 2012 COA 14. Under 35(c)(3)(V), if the trial court does not deny defendant's 35(c) motion at the outset, it must serve a copy on the prosecuting attorney. If defendant has requested counsel, the court must serve a copy on the PD as well; the PD must then determine whether defendant qualifies for representation, and whether PD will weigh in.

People v. Stanley, 169 P.3d 258 (Colo. App. 2007). Pro se defendant's failure to file his 35(c) motion on Form 4 did not deprive the trial court of subject matter jurisdiction. 35(c)(3)(II) requires only that pro se motions substantially comply with Form 4. Therefore, trial court should have addressed the merits of pro se defendant's 35(c) motion that substantially complied with Form 4. A motion substantially complies with Form 4 "if it is readily apparent that defendant has made a good faith effort to include in a Crim.P. 35(c) motion, to the extent reasonably possible, each item of information required by Form 4." *Here:* defendant's motion, which included all of the information required by Form 4 except whether defendant had filed a prior postconviction motion and whether the present motion was timely, substantially complied with Form 4.

People v. Osorio, 170 P.3d 796 (Colo. App. 2007). 35(c)(3)(IV) requiring trial courts to adjudicate postconviction motions within 60 days of when they were filed is not jurisdictional.

Silva v. People, 156 P.3d 1164 (Colo. 2007). There is no constitutional right to post-conviction counsel under either the federal or state constitutions. There exists a limited statutory right to post-conviction counsel for meritorious post-conviction motions. The statutory right to post-conviction counsel is tenuously premised on an interpretation of the statutes creating and governing the OPD and requiring that office to prosecute post-conviction remedies which have arguable merit. Defendant did not bear risk of post-conviction counsel's allegedly deficient performance; rather, whether defendant was deprived of statutory right to post-conviction counsel was governed by *Strickland* standard for claims of IAC. A party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all, and for that reason, post-conviction counsel must at least be minimally effective in order to give any meaning to the limited statutory right to post-conviction counsel. *Here:* defendant was entitled to evidentiary hearing to determine whether defendant's failure to file second pro se motion for post-conviction relief, which alleged violation of statutory right to post-conviction counsel, within three years of mandate on direct appeal was justifiably excused based on delay in issuance of mandate on appeal from denial of first post-conviction motion.

People v. Vieyra, 169 P.3d 205 (Colo. App. 2007). Trial court's alleged denial of a statutorily entitled peremptory challenge is a ground for postconviction relief, cognizable under 35(c) because defendant's due process rights are violated if he does not receive that which state law provides. Trial court did not deny defendant his limited statutory right to postconviction counsel when it ruled on his pro se 35(c) motion, which appointed counsel had not yet supplemented despite having 18 months in which to do so. In denying appointed

counsel's subsequent motion to reconsider, trial court afforded counsel an opportunity to file a supplemental motion, but counsel instead elected to file an appeal.

People v. Sherman, 172 P.3d 911 (Colo. App. 2006). In his postconviction motion, defendant alleged the trial court erred in refusing to instruct the jury on the lesser-included offense of second degree murder. That issue was previously raised in his motion for new trial and listed as a potential issue in his notice of appeal for his direct appeal, although the opinion resolving the appeal did not address it. Because the People did not plead or prove an abuse of process in the trial court in response to defendant's postconviction motion, that defense was not available on appeal. There is no due process right to a lesser-included offense instruction, and, thus, that claim is not a cognizable constitutional claim under 35(c).

People v. Versteeg, 165 P.3d 760 (Colo. App. 2006). When a postconviction claim is properly presented for evaluation on the merits but is premised on trial error that was not preserved by a contemporaneous objection, courts must review the claim for plain error. Under this standard, defendant must identify (1) an error, (2) that is plain, and (3) so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. Under the plain error standard, defendant must show that the error casts "serious doubt on the reliability of the judgment of conviction." Thus, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (The Court expressly rejected a "reasonable possibility" formulation). A trial court's action may be considered "plainly" erroneous even though it comported with the law in effect at the time of trial. Where the law was settled at the time of trial but clearly contrary to the law at the time a postconviction motion was considered, the asserted errors are "plain." *Here:* because the law was settled, the court would not consider whether the errors were plainly wrong at the time of trial. Instead, as guided by *Johnson v. U.S.*, the court applies the current law and concludes that the error is "plain." Where defendant's postconviction motion was filed before 7/1/04, his claim was not subject to the automatic procedural bars set forth in 35(c)(3)(VII).

People v. Karpierz, 165 P.3d 753 (Colo. App. 2006). The court is not required to advise defendant per §16-8-117 (right to counsel, right to remain silent, right to hearing) before ordering defendant to submit to a postconviction retrospective competency examination. This section applies only to competency determinations made during the guilt phase of a criminal trial. Defendant is not entitled to an examination by a neutral and detached psychiatric expert when he claims, in a 35(c) motion, that he was incompetent at the time of his plea. Where defendant fails to object to the court's appointment of a forensic psychiatrist (who previously treated defendant) to perform a postconviction retrospective competency evaluation, it is defendant's burden to show that the appointment undermined the fundamental fairness of the proceeding.

People v. Starkweather, 159 P.3d 665 (Colo. App. 2006). Defendant's "limited statutory right" to counsel in postconviction proceedings does not entitle him to new appointed counsel when his original counsel withdraws based on his opinion that the claims lack arguable merit. The denial of new counsel does not violate due process or equal protection in these circumstances.

People v. Wenzinger, 155 P.3d 415 (Colo. App. 2006). Postconviction ***Blakely/Apprendi*** attacks on discretionarily aggravated sentences are governed by 35(c), not 35(a).

People v. Rockwell, 125 P.3d 410 (Colo. 2005). Crim.P. 35(c) permits motions for postconviction relief from convictions obtained in violation of the Constitution or laws of the United States or the Constitution or laws of Colorado. Motions that challenge the validity of defendant's plea or the manner in which it was taken are properly brought under 35(c).

People v. Carrillo, 70 P.3d 529 (Colo. App. 2002). A claim that DOC is improperly withholding funds from an inmate's account is not cognizable under 35(c) motion because it does not seek relief on any of the grounds specified in the rule.

People v. Munkus, 60 P.3d 767 (Colo. App. 2002). The trial and appellate courts need not consider a claim for postconviction relief that has been previously raised even in light of allegedly new and controlling case law.

People v. Fernandez, 53 P.3d 773 (Colo. App. 2002). If the court determines that a hearing is necessary, a copy of defendant's motion must be served on the prosecutor. Conversely, the court may provide a copy of the motion to the prosecutor and then determine that a hearing is unnecessary, based, in part, on People's response.

People v. McMurrey, 39 P.3d 1221 (Colo. App. 2001). A 35(c) motion is not the proper means of challenging a determination by DOC that an inmate is a sex offender for purposes of DOC's internal classification and treatment. Even if DOC's classification has parole-related effects, classification or registration as a sex offender is not an element of defendant's sentence. This determination does not impact defendant's sentence and does not fall within a ground for relief under 35(c).

Time Bar: §16-5-402

People v. Hampton, 876 P.2d 1236 (Colo. 1994). If there is no appeal, the period runs from the date of sentencing. If there is an appeal, the conviction is not final until the mandate issues.

People v. Baker, 2017 COA 102, rev'd other grounds, 2019 CO 97M. Correction of illegal sentence under Crim.P. 35(a) renews the three-year deadline for collaterally attacking a judgment of conviction in all respects.

People v. Metcalf, 979 P.2d 581 (Colo. App. 1999). Reconsideration of sentence, revocation of community corrections, and other re-sentencings do not affect the commencement of the limitation period.

People v. Wiedemer, 852 P.2d 424 (Colo. 1993). Defendant must explain why his failure to bring a timely attack should be excused or justified in his motion. Whether defendant qualifies for justifiable excuse or excusable neglect exception to statutory time limits for bringing postconviction motion is question of fact ordinarily to be resolved by trial court. Applicability of justifiable excuse or excusable neglect exception to statute establishing time limits for collaterally attacking conviction must be evaluated by balancing interests under facts of particular case so as to give effect to overriding concern that defendant have meaningful opportunity required by due process to challenge his or her conviction; in making this determination, it is appropriate to consider circumstances existing throughout entire period from inception of conviction in question. Whether defendant had any previous need to challenge conviction, whether he either knew that it was constitutionally infirm or had reason to question its validity, whether he had other means of preventing government's use of conviction so that postconviction challenge was previously unnecessary, as well as extent of time between date of conviction and defendant's challenge and effect that passage of that time has on state's ability to defend against challenge are relevant in determining whether justifiable cause or excusable neglect exists for failing to bring timely postconviction motion challenging conviction.

People v. Salinas, 55 P.3d 268 (Colo. App. 2002). A failure to state in the postconviction motion why the validity of a plea was not attacked before the expiration of the statutory limitations period, and a general unspecific assertion in a reply brief that there was justifiable excuse or excusable neglect is insufficient to warrant a remand to afford defendant an opportunity to allege justifiable excuse or excusable neglect.

People v. Worosello, 2019 COA 166. General provision in Title 13 for tolling of limitation periods due to

disability does not apply to toll the time limitations for collateral attacks on convictions.

People v. Hinojos, 2019 CO 60. Where the plea agreement or plea hearing contains an immigration advisement that provides notice to defendant that his plea may carry immigration consequences, an allegation of deficient advice by plea counsel will not normally establish justifiable excuse or excusable neglect.

People v. Chavez-Torres, 2019 CO 59. Where neither the plea agreement nor plea hearing contains an immigration advisement that provides notice to defendant that his or her plea may carry immigration consequences, an allegation of deficient advice by plea counsel can establish justifiable excuse or excusable neglect sufficient to warrant a hearing on why the defendant failed to timely file a collateral attack within the limitations period.

People v. Martinez-Huerta, 2015 COA 69. Counsel's affirmative and erroneous advice to defendant that his plea to a crime of moral turpitude would not have any adverse immigration consequences was sufficient to entitle defendant to a hearing on whether he could establish justifiable excuse or excusable neglect. The court distinguished the affirmative misadvice scenario from those where counsel gives no advice or where defendant is simply ignorant of the law. In either the no advice or the ignorance of the law situation, the time bar applies.

People v. Bonan, 2014 COA 156. Academic theories contained in research studies do not constitute evidence. As such, waiting until there existed an unassailable mass of scientific evidence supporting defendant's case does not constitute justifiable excuse or excusable neglect.

People v. Lanari, 2014 COA 73. Appellate courts review the trial court's findings concerning whether the elements of laches have been established for an abuse of discretion. The prejudice required to establish laches may include a detrimental change of position by the prosecution, loss of evidence, death of witnesses, or other circumstances arising during the period of delay that affect the prosecution's ability to bring the case to trial. The doctrine of laches, as set forth in Robbins v. People, 107 P.3d 384 (Colo. 2005), does not require intervening reliance by the prosecution.

People v. Stovall, 2012 COA 7M. The time limits under §16-5-402, apply to each conviction individually, even when defendant pleads guilty in a single case to a F1 (no time limit) and several lesser felonies (3-year limit). Collateral attack of plea filed over three years after sentencing was timely as to the F1, and untimely as the lesser felony convictions.

People v. Bowerman, 258 P.3d 314 (Colo. App. 2010). Defendant contended the court's restitution order was an illegal sentence because the prosecution did not prove, by a preponderance of the evidence, that she stole the items originally listed in the information. This 35(a) claim that there was insufficient evidence to support a restitution order was a claim that the sentence was imposed in an illegal manner and was thus time-barred.

People v. Loveall, 231 P.3d 408 (Colo. 2010). Defendant alleged that the trial court "lacked jurisdiction" to enter a DJ&S because of a failure to comply with the "written stipulation requirement" of the DJ&S statute. Because this claim does not implicate subject matter jurisdiction, the time bar exception §16-5-402(2)(a) is inapplicable. Because a trial court entering a DJ&S for a sex offense does not "exceed its jurisdiction," the time bar exception of §16-5-402(2)(a) does not apply.

People v. Thomas, 195 P.3d 1162 (Colo. App. 2008). COA lacks jurisdiction to review a postconviction order after the 45-day deadline of C.A.R. 2 has elapsed, unless for "good cause shown" the COA decides to suspend the deadline. COA will decline to suspend the deadline if defendant fails to allege "good cause" for filing a late notice of appeal. A motion to reconsider a postconviction order does not extend the 45-day deadline for filing a notice of appeal because the order is final and reviewable on appeal after the 45 days has elapsed. Colorado's rules of criminal procedure do not authorize a motion to reconsider postconviction orders. The primary purpose of C.R.C.P. 59 is to give the trial court an opportunity to correct its errors. This rule does not apply to

postconviction proceedings. Rather, defendants must proceed under Crim.P. 33 or Crim.P. 35. C.R.C.P. 60(b) permits relief from a judgment when a significant new matter of fact or law arises and attempts to strike a balance between the conflicting principles of finality and justice. This rule does not apply to postconviction proceedings because 35(c)(3) provides analogous relief. Even assuming the continued viability of postconviction relief by analogy to C.R.C.P. 60(b), relief is not available where the claims are successive.

Close v. People, 180 P.3d 1015 (Colo. 2008). Where the PD failed to raise an apparently meritorious legal claim in defendant's postconviction proceedings because of a conflict of interest, the trial court must hold a hearing to determine whether this failure would constitute IAC that would qualify as justifiable excuse or excusable neglect under §16-5-402(2)(d).

People v. Loveall, 203 P.3d 540 (Colo. App. 2008). Defendant's challenge of his unappealed conviction, after his second probation revocation, was untimely, however, the court assumed without deciding that the applicability of the DJ&S statute to sex offenders was a "jurisdictional" question and reached the merits.

People v. Valdez, 178 P.3d 1269 (Colo. App. 2007). Although the record demonstrates that defense counsel was ineffective in representing defendant in postconviction proceedings, it does not show with particularity whether defendant agreed to the delay, so remand for further proceedings is necessary. Proof of acquiescence in the delay could show defendant abandoned his claims. Facts establishing such acquiescence could also provide a basis for denying defendant relief because he may have waived his right to the effective assistance of counsel. Doctrine of laches applies where defendant filed a timely motion under §16-5-402 but did not timely pursue the claim within the statutory limits. Constituent elements of a claim of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of an available remedy; and (3) intervening reliance by and prejudice to another. Whether the elements have been established is a question of fact. *Here:* 7 year delay in asserting defendant's claim was an unreasonable delay. The concepts of justifiable excuse and excusable neglect may serve as an exception to the operation of the doctrine of laches in the postconviction review process. PD's IAC constituted justifiable excuse or excusable neglect to avoid application of the doctrine of laches.

People v. Stanley, 169 P.3d 258 (Colo. App. 2007). Under Crim.P. 45(f), defendant's 35(c) motion, deposited in the correctional institution's internal mailing system prior to the expiration of the three-year statute of limitation but received by the court after that date, was timely filed. "Mail-Box Rule"

People v. Moore-El, 160 P.3d 393 (Colo. App. 2007). The limitation period of §16-5-402 applies to defendant's request for a proportionality review.

People v. White, 179 P.3d 58 (Colo. App. 2007). A defendant forfeits the affirmative defense of laches by failing to assert it in the trial court.

People v. Versteeg, 165 P.3d 760 (Colo. App. 2006). Under §16-5-402, defendant could challenge his F1 murder conviction at any time, but he was required to challenge his F2 attempted murder conviction within 3 years of the conclusion of his direct appeal.

People v. Skufca, 141 P.3d 876 (Colo. App. 2005), rev'd other grounds, 176 P.3d 83 (Colo. 2008). Defendant's challenge to a 1983 conviction, made during a habitual criminal proceeding in 2002, would not be considered because it was untimely, and defendant failed to allege or establish justifiable excuse or excusable neglect.

People v. Silva, 131P.3d 1082 (Colo. App. 2005), rev'd other grounds, 156 P.3d 1164 (Colo. 2007). The time bar in §16-5-402(1) is not tolled during litigation of a first postconviction motion. A facially untimely postconviction motion alleging a conflict of interest regarding postconviction counsel must be evaluated for justifiable excuse or excusable neglect.

People v. Jackson, 98 P.3d 940 (Colo. App. 2004). Defendant's challenge to his conviction underlying a habitual criminal count was properly rejected as untimely under §16-5-402. Defendant had not established justifiable excuse to avoid the time bar where, although defendant was not advised of his right to appeal his prior conviction, he admitted that he knew what an appeal was.

People v. Manzanares, 85 P.3d 604 (Colo. App. 2003). The limitations period of §16-5-402 cannot commence until there is a right to pursue a collateral attack. Because defendant may not pursue a collateral attack until his DJ&S is revoked, the limitations period did not commence until that time and a judgment of conviction entered.

People v. Clouse, 74 P.3d 336 (Colo. App. 2002). Under §16-5-402(1), defendant not convicted of a F1, but sentenced to life in prison as a habitual offender, is subject to the 3-year time limit for pursuing a collateral attack. the 3-year time period commences upon the issuance of the mandate of the direct appeal; the 3-year time period is not tolled during the litigation of a postconviction relief motion; where defendant proffers no reason why newly-discovered evidence could not have been discovered by himself or others before the time limit expired, he fails to demonstrate justifiable excuse or excusable neglect for an untimely postconviction motion; under §16-5-402, IAC claims of postconviction counsel must be timely asserted and pleaded with reasonable specificity. Because ineffective postconviction counsel claims cannot be asserted until after timely postconviction relief proceedings and appeals therefrom are exhausted, the time to assert those claims should be assessed in light of the *Wiedemer* factors.

Summary Disposition

A Crim.P. 35(c) motion may be denied without a hearing for these reasons: The claims are bare and conclusory, without supporting allegations. Moore v. People, 485 P.2d 114 (Colo. 1971); People v. Rodriguez, 914 P.2d 230 (Colo. 1996). The claims are not legally cognizable-even if the allegations were true, there would be no basis for relief. White v. District Court, 766 P.2d 632 (Colo. 1988); People v. Muniz, 667 P.2d 1377 (Colo. 1983). The claims are facially valid but are plainly refuted by the record. People v. Blehm, 983 P.2d 779 (Colo. 1999); People v. Rodriguez, 914 P.2d 230 (Colo. 1996). The claims raise only an issue of law. People v. Rodriguez, 914 P.2d 230 (Colo. 1996); People v. Velarde, 616 P.2d 104 (Colo. 1980); People v. Triggs, 613 P.2d 317 (Colo. 1980). The claims were previously resolved. People v. Rodriguez, 914 P.2d 230 (Colo. 1996); People v. Muniz, 667 P.2d 1377 (Colo. 1983); People v. Johnson, 638 P.2d 61 (Colo. 1981). Although not previously resolved, the claims could have been raised in a prior proceeding. Turman v. Buckallew, 784 P.2d 774 (Colo. 1989).

People v. Segura, 2024 CO 70. The CSC holds that when, as here, a defendant files a pro se Crim. P. 35(c) motion that contains a request for counsel, the trial court has two, and only two, choices. First, it may conclude, based on its review of the motion, the record, and the file, that none of the claims has arguable merit, in which case it must deny the motion in its entirety without further action by entering written findings of fact and conclusions of law. Second, it may conclude, based on its review of the motion, the record, and the file, that at least one claim has arguable merit, in which case it must grant the request for postconviction counsel and forward a complete copy of the motion to the prosecution and the public defender. The PD must then determine which claims (if any) lack arguable merit and should be abandoned, which arguably meritorious claims (if any) should be supplemented, and which new claims (if any) have arguable merit and should be added. Thus, upon its initial review of a postconviction motion, the court must either deny the motion and all of the claims, or not deny the motion and none of the claims—there is no betwixt and between option. If the court denies none of the claims, it may not restrict the scope of postconviction counsel's representation. *Here:* because the COA was

spot-on in ruling that the trial court violated Crim. P. 35(c)(3)(IV)–(V), and because the prosecution does not challenge the COA's conclusion that the error was not harmless, the CSC affirms.

People v. Melendez, 2024 COA 21. A defendant's claim that he was denied his "right to a fair and impartial jury" should have been raised on direct appeal; COA denies claim as successive when raised for first time in post-conviction proceedings.

People v. Nozolino, 2023 COA 39. Relying on the reasoning from People v. Chalchi-Sevilla, 2019 COA 75, a this division also concludes that if a pro se defendant's postconviction motion contains at least one claim that is not ripe for summary denial and also requests the appointment of counsel, then under Crim.P. 35(c)(3)(IV) and (V), the postconviction court must serve the entire postconviction motion on the prosecutor and PD's office, affording appointed counsel the opportunity to further investigate the claims and add any claims that have arguable merit. This service is to be done without first disposing of any claims that the postconviction court determines on initial review do not have arguable merit.

People v. Smith, 2017 COA 12. We review de novo the denial of a Crim.P. 35(c) motion without a hearing. To demonstrate prejudice in the context of a guilty plea, defendant must show a reasonable probability that, but for counsel's errors or omissions, he would not have pleaded guilty and would have insisted on going to trial. Counsel's promise regarding the sentence to be imposed, rather than an expression of opinion only, may constitute ineffective assistance. Under 35(c)(3)(V), where the trial court refers the matter for additional briefing, it is permitted to enter a ruling without a hearing if, based on the pleadings, the court finds that it is appropriate to do so. The term pleadings is undefined by Rule 35, but in other contexts, the CSC has made clear that pleadings do not encompass attachments to the parties' filings. Claims raised in defendant's 35(c) motion but not reasserted on appeal are deemed abandoned, and thus should not be addressed on remand. *Here:* the court erred in concluding defendant was not entitled to a 35(c) hearing by relying, in part, on an investigator's report attached to the prosecution's response, because the attachment was not part of the files and record of the case and did not qualify as a pleading. Where defendant alleged in his 35(c) motion that plea counsel had advised him to ignore the trial court's sentencing advisement and remain silent in order to receive the sentence allegedly promised by counsel, the court erred in relying on the plea colloquy in determining that defendant failed to allege sufficient facts to warrant a hearing.

People v. Morones-Quinonez, 2015 COA 161. A defendant alleges sufficient prejudice when remaining in the U.S. may be more important than any potential jail sentence (e.g., when she has established roots and a family). An affirmative misrepresentation by counsel cannot be cured by a court advisement as easily as counsel's failure to advise; thus, particularly in the immigration context, a proper advisement by the district court does not preclude, as a matter of law, a finding of prejudice based on counsel's specific, erroneous advice. *Here*: defendant's contentions that her lawyer misadvised her about the immigration consequences of pleading guilty, and that she would not have pleaded guilty but for that erroneous advisement, were sufficient to warrant an evidentiary hearing.

People v. Aguilar-Ramos, 224 P.3d 402 (Colo. App. 2009). While trial court failed to set forth findings of fact and conclusions of law as required by 35(c)(3), the error was harmless and does not require reversal where, as here, the motion may be denied as a matter of law.

People v. Sisson, 179 P.3d 193 (Colo. App. 2007). Defendant filed a motion alleging that he had completed sex offender treatment, which entitled him to a suspension of part of his prison sentence. Trial court denied the motion, and defendant did not appeal. Trial court later revoked the suspension sua sponte for failure to complete treatment. Defendant filed a 35(a) motion alleging that the revocation violated due process. This 35(a) motion was not successive to the first motion.

People v. Osorio, 170 P.3d 796 (Colo. App. 2007). A trial court may summarily deny relief under 35(c) when the allegations are merely conclusory, vague, or lacking in detail.

People v. Wenzinger, 155 P.3d 415 (Colo. App. 2006). Because *Blakely* does not apply retroactively, a postconviction *Blakely* attack on a discretionarily-aggravated sentence is successive if the trial court has already rejected a similar postconviction attack based on *Apprendi*.

People v. Nguyen, 80 P.3d 903 (Colo. App. 2003). Defendant alleged, in his third post-conviction motion, that he received an inadequate advisement regarding collateral immigration consequences of his guilty plea. Trial court improperly denied the motion without a hearing because those allegations were insufficient to raise a IAC claim, which might have resulted in an involuntary plea.

People v. Simpson, 69 P.3d 79 (Colo. 2003). Defendant, who was 17, waived counsel and pleaded guilty. Trial court denied a postconviction motion without a hearing, and COA reversed, ordering that the plea be vacated as involuntary. COA erred in vacating conviction upon unproven postconviction allegations and case was remanded for hearing on postconviction allegations.

Ardolino v. People, 69 P.3d 73 (Colo. 2003). A trial court may deny a postconviction motion without a hearing alleging IAC only if the existing record establishes that defendant's allegations, if proved true, would fail to establish either deficient representation or prejudice. If the record reveals evidence of guilt so strong and so unlikely to have been adversely affected by counsel's alleged deficiencies that defendant cannot establish prejudice, the motion may be summarily denied. To prove deficient performance - when the record leaves open the possibility that defendant can establish prejudice-defendant will ordinarily be afforded a hearing to establish whether the attorney made reasonable strategic choices in engaging in potentially prejudicial acts or omissions. Defendant may also present evidence of prejudice. At least where defendant is able to identify "seemingly unusual or misguided action" by counsel and "plausible [other] options" for counsel to pursue," defendant cannot be deprived of a hearing where he could prove that the choices lacked any sound strategic motive-again assuming that the record clearly establishes no prejudice.

People v. Robles, 74 P.3d 437 (Colo. App. 2003). Defendant's resentencing at the conclusion of his direct appeal does not toll or otherwise modify the 3-year limitations period under §16-5-402. *Here:* defendant's pursuit of motions to reduce his sentence and for proportionality review did not toll limitations period for collaterally attacking his convictions. His 35(c) motion was time-barred and the court had no reason to reach merits of the claim (although it did).

Newly Discovered Evidence

Mason v. People, 25 P.3d 764 (Colo. 2001). After trial, to succeed on a claim of newly discovered evidence, the defendant must show: the evidence was discovered after the trial; defendant and his counsel exercised diligence to discover all favorable evidence before and during trial; the newly discovered evidence is material to the issues involved and not merely cumulative or impeaching; and the evidence would probably bring about an acquittal if presented on retrial.

People v. Schneider, 25 P.3d 755 (Colo. 2001). To vacate a guilty plea based on newly discovered evidence, defendant must show: the newly discovered evidence was discovered after the entry of the plea and the evidence could not have been discovered earlier in the exercise of reasonable diligence by defendant or his counsel; the charges that the People filed or to which defendant pled guilty were actually false or unfounded; the newly discovered evidence would probably bring about a verdict of acquittal in a trial.

People v. Rodriguez, 914 P.2d 230 (Colo. 1996). Motions for new trial based on newly discovered evidence are not looked on with favor, and a denial of such a motion will not be overturned absent a showing of clear abuse of discretion.

People v. Bonan, 2014 COA 156. Academic theories contained in research studies do not constitute evidence for the purpose of establishing the newly discovered evidence exception to the bar against successive 35(c) claims.

People v. Poindexter, 2013 COA 93. To warrant a new trial, newly discovered evidence must do more than merely impeach; it must be affirmatively probative of defendant's innocence by tending to show that no crime was committed, that defendant probably could not have committed it, or that someone else probably committed it. *Here:* although victim testified differently in some respects at co-defendant's trial than she had at defendant's, the differences would serve only to impeach her credibility and would not probably have resulted in defendant's acquittal, even though co-defendant was acquitted.

Farrar v. People, 208 P.3d 702 (Colo. 2009). In determining whether to grant a new trial based on a victim's recantation, the trial court should apply an objective standard: whether a reasonable person with the appropriate degree of skepticism and awareness of the relevant circumstances, rather than a typical juror, would probably believe the witness's new version of events. A victim's recantation can justify a new trial only to the extent that it not only impeaches the prior testimony but does so by contradicting it with a different and more credible account.

People v. Schneider, 25 P.3d 755 (Colo. 2001). Factors to consider when a claim of newly discovered evidence is based on witness recantation. When a post-conviction relief movant seeks to withdraw his guilty plea on the ground of newly discovered evidence, the trial court, in determining whether the original charges were false, need not merely measure the credibility of one witness at the post-conviction hearing based upon her testimony at that hearing; rather, the trial court may review all statements made by that witness or other witnesses at the time the charges were filed, and the surrounding circumstances at that time-as well as the testimony offered at the later hearing-to determine who was lying and when.

Mason v. People, 25 P.3d 764 (Colo. 2001). The failure to prove that the new evidence probably would bring about acquittal is fatal under the *Schneider* test.

People v. Ambos, 51 P.3d 1070 (Colo. App. 2002). A defendant who pleads guilty and then requests a new trial based on newly discovered evidence may not proceed under Crim.P. 33, but rather is limited to seeking relief under 35(c)(2)(V) and is subject to the §16-5-402 time bar.

Ineffective Assistance of Counsel (IAC)

Strickland v. Washington, 466 U.S. 668 (1984); People v. Garcia, 815 P.2d 937 (Colo. 1991). To succeed on a claim of ineffective assistance of counsel, the defendant must establish both of the following: (1) deficient performance-defendant must demonstrate that counsel's performance fell outside the wide range of competence for defense attorneys under prevailing norms; and (2) prejudice-defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The court must presume that defense counsel's advice fell within the range of reasonable professional assistance.

People v. Roybal, 949 P.2d 993 (Colo. 1997). The standard for determining whether defense counsel has violated ethical obligations is not the same as the standard for determining whether a conviction should be reversed for ineffective assistance of counsel.

People v. Townsell, 21CA2068. In this UNPUBLISHED opinion, the COA found that defendant's IAC claims addressing the lack of a defense expert to challenge the DNA evidence were properly denied without a hearing or the appointment of counsel. But Judge Shultz wrote a dissent stating that defendant's pro se incarcerated status and the importance of the DNA issues in this case, alleged sufficient facts to justify the appointment of counsel to assist him in developing and pursuing his petition. Here: the jury heard evidence about a mixed DNA profile on the mask, and defendant did not explain how a defense expert's testimony on this point would have overcome the other evidence admitted showing that only his DNA was found on the shoes, pantyhose, and bandana. Many of those items 7 were seen on still shots from the surveillance video of the robbery. Defendant also didn't specify how further investigation of the DNA evidence would have changed "the result of the proceeding," nor did he allege that a DNA expert was available and willing to testify consistent with his allegations that his DNA may not have been on the other items recovered by the police. *[Cert Accepted (9/9/24) in case #23SC924: (1) Whether the standard for appointment of counsel under Criminal Rule of Procedure 35(c) differs from the standard for granting a hearing; (2) Whether an indigent pro se petitioner alleging ineffective assistance of counsel for failure to investigate DNA evidence must specify how exculpatory DNA evidence would undermine confidence in the conviction to sustain a Rule 35(c) motion; and (3) Whether petitioner is entitled to postconviction counsel and a hearing to develop his claim that trial counsel rendered ineffective assistance of counsel by failing to investigate DNA evidence (FAAG Erin Grundy)].*

People v. Lopez, 2024 CO 50. In this case, the CSC considers whether a defendant who argues, for the first time on appeal, that his constitutional right to conflict-free counsel was violated by the simultaneous prosecution of defense counsel and defendant by the same prosecutor must prove that an actual conflict of interest adversely affected his representation. To answer this question the court must decide whether to adopt the COA's analysis in *Edebohls*, in which the COA concluded that pending criminal charges against defense counsel in the same district in which counsel was representing a defendant created an actual conflict of interest that, absent a valid waiver, required reversal. The CSC concludes that *Edebohls* has been superseded by subsequent case law, which has limited the categories of errors deemed to mandate reversal without a showing of prejudice (i.e., structural errors). The proper framework for analyzing a conflict like that at issue here is the framework set forth in West v. People, 2015 CO 5, which requires a court to determine whether the case falls within one of the

few scenarios that the Supreme Court has said support a presumption of prejudice and, if not, whether defendant has shown both a conflict of interest and an adverse effect resulting from that conflict. The CSC reverses the COA and remands this case for findings in accordance with this opinion. ** *Practice Tip:* be aware that ¶45 concludes: "[A] defendant who establishes that a conflict of interest actually affected the adequacy of his representation need not show prejudice to obtain relief." There is also a fairly strong dissent.

People v. Smith, 2024 CO 3. Defendant abandons the Crim.P. 35(c) claims that he ceased pursuing; COA erred in concluding that all of his pro se claims were preserved. Because the "captain of the ship" doctrine gives defense counsel the authority to make strategic decisions, including which post-conviction claims to pursue, counsel may abandon some, although not all, of a defendant's pro se Crim.P. 35(c) claims without defendant's informed consent. Counsel cannot choose to abandon post-conviction appeal completely though. A claim is abandoned when a party decides not to pursue or reassert a claim that the party had raised previously. *Here:* defense counsel's supplemental Crim.P. 35(c) motion addressed three of the twelve original pro se claims, added two new ones, never stated any intention to continue with the excluded pro se claims, and only addressed counsel's claims at the evidentiary hearing, defendant intended to abandon the pro se claims that he ceased pursuing, and the court need not decide whether the abandonment of individual postconviction claims requires a showing of intent to abandon such claims. COA is reversed.

People v. Hinojos, 2019 CO 60. Where the plea agreement or plea hearing contains an immigration advisement that provides notice to the defendant that his or her plea may carry immigration consequences, an allegation of deficient advice by plea counsel will not normally establish justifiable excuse or excusable neglect.

People v. Chavez-Torres, 2019 CO 59. Where neither the plea agreement nor plea hearing contains an immigration advisement that provides notice to the defendant that his or her plea may carry immigration consequences, an allegation of deficient advice by plea counsel can establish justifiable excuse or excusable neglect sufficient to warrant a hearing on why the defendant failed to timely file a collateral attack within the limitations period.

People v. Delgado, 2019 COA 55. The opinion recognizes that *Carmichael* is no longer good law with respect to the required showing of prejudice in the context of a rejected plea offer, and the remedies available. To establish prejudice where defendant asserts, he rejected a favorable plea offer on the erroneous advice of counsel he has to show not only a reasonable probability that: (1) he would have accepted the offer if his counsel had correctly advised him, but also that (2) the prosecution would not have withdrawn the offer, and (3) the trial court would have accepted it. If defendant establishes prejudice, the remedy is no longer limited to ordering a new trial. Trial court retains discretion to determine appropriate remedy under all relevant circumstances.

People v. Lancaster, 2018 COA 168. Where defendant has communicated a desire to appeal, trial counsel's failure to file notice of appeal constitutes IAC if his representation has not been terminated as provided in Crim.P. 44(e), regardless of an agreement between counsel and defendant that representation terminated earlier.

People v. Timoshchuk, 2018 COA 153. Defendants have a statutory right to counsel in probation revocation proceedings. An attorney's conduct in such proceedings is judged under the *Strickland* standard.

People v. Joslin, 2018 COA 24. The fact that interest will accrue on unpaid restitution obligations is a collateral consequence of a guilty plea and not a direct one. Trial court does not need to advise defendant of this. Defendant's attorney does not render IAC if he fails to advise his client that interest will accrue on unpaid restitution obligations unless counsel has reason to believe that the issue is "highly significant" to defendant's decision to plead guilty.

People v. Juarez, 2017 COA 127. Padilla v. Kentucky, 559 U.S. 356 (2010) requires that defense attorney give correct advice to defendant about the risk of deportation arising from a guilty plea. The advice does not need to be unequivocal, and it does not require counsel to tell defendant that his plea will subject him to mandatory removal, presumptively mandatory deportation, or automatic or mandatory deportation. Defense attorneys need not advise their clients regarding lifetime inadmissibility to the U.S., mandatory detention, and destruction of the defense of cancellation of removal.

People v. Higgins, 2017 COA 57. Crim.P. 35(c) motion alleging IAC is not successive, despite defendant previously filing a post-conviction motion arguing IAC, when the relief sought is reduction of sentence.

People v. Sifuentes, 2017 COA 48. In determining whether defendant was prejudiced by counsel's erroneous advice regarding the immigration consequences of a plea, defendant must show there was a reasonable probability he would have insisted upon going to trial. Some objective evidence must corroborate defendant's testimony he would have made a different decision had he been properly advised, and he must convince the court his decision would have been rational. To determine whether the decision would have been rational, the court must consider the strength of the prosecution's case, the attractiveness of the plea deal and the risks of going to trial, and defendant's ties to this country as judged against his ties to another country. *Here:* plea counsel's advice that there was a possibility defendant would not be deported was deficient because the offense to which he pleaded guilty subjected him to mandatory deportation and precluded the opportunity for him to defend against his removal through an immigration proceeding.

People v. Smith, 2017 COA 12. We review de novo the denial of a Crim.P. 35(c) motion without a hearing. To demonstrate prejudice in the context of a guilty plea, defendant must show a reasonable probability that, but for counsel's errors or omissions, he would not have pleaded guilty and would have insisted on going to trial. Counsel's promise regarding the sentence to be imposed, rather than an expression of opinion only, may constitute ineffective assistance. Under 35(c)(3)(V), where the trial court refers the matter for additional briefing, it is permitted to enter a ruling without a hearing if, based on the pleadings, the court finds that it is appropriate to do so. The term pleadings is undefined by Rule 35, but in other contexts, the CSC has made clear that pleadings do not encompass attachments to the parties' filings. Claims raised in defendant's 35(c) motion but not reasserted on appeal are deemed abandoned, and thus should not be addressed on remand. *Here:* the court erred in concluding defendant was not entitled to a 35(c) hearing by relying, in part, on an investigator's report attached to the prosecution's response, because the attachment was not part of the files and record of the case and did not qualify as a pleading. Where defendant alleged in his 35(c) motion that plea counsel had advised him to ignore the trial court's sentencing advisement and remain silent in order to receive the sentence allegedly promised by counsel, the court erred in relying on the plea colloquy in determining that defendant failed to allege sufficient facts to warrant a hearing.

People v. Chavez-Torres, 2016 COA 169M. Plea counsel's failure to advise of the immigration consequences of pleading guilty can constitute justifiable excuse or excusable neglect under §16-5-402, for an untimely filing of a postconviction motion alleging IAC of plea counsel.

People v. Villanueva, 2016 COA 70. Case remanded for findings under West v. People, 2015 CO 5 to determine whether a conflict existed that violated defendant's 6th Amendment right to counsel where the trial court did not have the benefit of the *West* test when it determined that defense attorney's previous representation of the victim in defendant's case did not violate the defendant's rights.

People v. Luong, 2016 COA 13M. Defense counsel's duty to provide effective assistance, including the duty to investigate, continues throughout trial and includes jury voir dire. Defense counsel did not provide deficient performance by failing to investigate the racial diversity of the jury wheel and jury pool because defendant did not allege that defense counsel knew or had reason to know the population of Asian-Americans in the county.

Even if counsel knew the Asian-American population in the county, the data failed two of the three statistical models for showing racial disparity, and therefore, counsel's failure to investigate was not deficient. Defendant claimed that the state destroyed records necessary for proving IAC for failing to investigate systematic discrimination in the jury pool. Defendant only claimed the records would have proved the prejudice prong of *Strickland*. COA affirmed the trial court's order solely on the deficient performance prong and no remand was necessary.

People v. Garner, 2015 COA 174. In applying the presumption that the challenged action by counsel might be sound strategy, a reviewing court must affirmatively entertain the range of possible reasons counsel may have had for proceeding as he or she did. As long as counsel performed as a competent lawyer would have, the attorney's subjective justification or lack thereof is irrelevant. *Here*: there was a possible strategic explanation for counsel to not request a voluntary intoxication instruction in that the instructions as given implied that intoxication was a complete defense to first degree murder.

People v. Pendleton, 2015 COA 154. Defendant claimed plea counsel was ineffective because he failed to discuss the possibility of an appeal. An attorney must consult with his client about an appeal when he has reason to think that either: (1) a rational defendant would want to appeal or (2) this particular defendant reasonably demonstrated that she was interested in appealing. To show prejudice, defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.

People v. Chipman, 2015 COA 142. A postconviction claim that defendant's trial counsel was ineffective is moot where an appellate court has reversed the convictions that related to the alleged errors by counsel and remanded for a new trial.

People v. Ray, 2015 CO 92. Where defendant was on death row in a separate case but the present case was used as an aggravating factor for his death sentence, COA assumed without deciding that heightened scrutiny applied to his IAC claims in the present case. Defendant has no right to counsel to pursue a petition for certiorari review in the USSC. Although it would have been a reasonable strategy for counsel to have filed a petition for certiorari where the USSC had granted certiorari on a similar issue, appellate counsel did not render IAC by failing to do so. Although *Strickland*'s deficient performance prong is governed by the law as it stood at the time of counsel's allegedly deficient performance, no such "contemporary assessment" is required for the prejudice prong. *Here: Davis v. U.S.*, 131 S. Ct. 2419 (2011) applied so that the exclusionary rule's good faith exception would apply to the 2004 car search because it was conducted before *Gant* was decided. Because COA determined on direct appeal that there was no reasonable probability the result of the trial would have changed if the trial court had admitted evidence that other people had driven the car, defendant's claim that trial counsel was ineffective for failure to investigate had already been raised and resolved. Trial counsel also did not render IAC by failing to investigate the affirmative defense of the right to possess firearms for self-defense because it was not supported by the evidence and would have conflicted with the theory of defense that defendant did not know the firearm was in his car.

People v. Thomas, 2015 COA 17. When defendant shows that a conflict of interest actually affected the adequacy of counsel's representation, he need not demonstrate *Strickland* prejudice to win IAC relief. A "conflict of interest" requires a showing that counsel actively represented conflicting interests–that is, an incompatibility between the interests of two of a lawyer's clients, or between the lawyer's own private interests and those of the client." Trial counsel adopted a strategy (self-defense) inconsistent with defendant's desire to testify he didn't shoot the victim. Neither defendant nor counsel brought the disagreement to the attention of the trial court until defendant asserted it as a postconviction IAC claim. The IAC claim argued that under *Bergerud*, the disagreement was "conflict of interest" entitling him to relief for IAC without showing prejudice. Contrary

to defendant's claim, *Bergerud* did not hold that an actual conflict of interest arises whenever trial counsel adopts a strategy that might impede defendant from exercising his right to testify. *Bergerud* involved a complete breakdown in communication between the defendant and counsel, caused by a strategic disagreement that might have threatened the defendant's right to testify. Such a disagreement does not, however, constitute an actual "conflict of interest" which would negate the necessity of showing prejudice under *Strickland*. Absent any conflicting duties or interests, IAC claims that arise from loss of defendant's right to testify are evaluated under both prongs of *Strickland*. This result is not affected by *West*, which described the showing required to win relief when counsel had an "actual conflict of interest." This result "do[es] not foreclose the viability of an ineffective assistance claim where an attorney's "other loyalties or interests" conflicted with a strategy that would allow a defendant to testify if such a strategy was plausible, and advancing it was objectively reasonable. But the linchpin of such a claim would be the attorney's 'other loyalties or interests,' not defendant's constitutional right to testify."

People v. Romero, 2015 COA 7. *Strickland* prejudice is not the same level of prejudice required to show reversible plain error. Plain error requires a greater finding of prejudice to reverse a conviction. Thus, a trial court errs when it denies a Crim.P. 35(c) IAC claim because the underlying issue was decided against defendant under plain error analysis. Defendant is not entitled to effective assistance of counsel from every attorney he consults on a case. The Sixth Amendment right only attaches to attorney who formally represents defendant in a criminal proceeding.

West v. People, 2015 CO 5. To prevail on an IAC claim based on a conflict of interest, defendant who did not object at trial must demonstrate: (1) a conflict of interest (2) that adversely affected counsel's performance. He need not show prejudice to the verdict. This standard, rather than the ordinary *Strickland* standard, applies not only to conflicts of interest created by defense counsel's concurrent representation of co-defendants, but also to counsel's representation of a victim or trial witness either before or during the trial. To establish an adverse effect, defendant must: (1) identify a plausible alternative defense strategy or tactic counsel did not pursue; (2) show that such was objectively reasonable under the circumstances; and (3) establish that counsel's failure to pursue this was linked to the conflict. This "link" can be proved either by showing the alternative strategy was inherently in conflict with counsel's other loyalties, or the alternative strategy was not undertaken due to the conflict.

People v. Sontay, 2014 COA 175. Plea counsel did not provide ineffective assistance: (1) while counsel did not research a potential suppression issue related to the IRCA regarding I-9 forms, defendant did not demonstrate that he would have proceeded to trial if that motion had been successful; (2) counsel's advice regarding the immigration consequences of defendant's plea was sufficient because it was "not truly clear" that defendant's conviction for criminal impersonation was a "crime involving moral turpitude"; thus, counsel was only required to advise that the plea carried a risk of adverse immigration consequences; (3) counsel was not ineffective for failing to obtain a K'iche, rather than Spanish, interpreter, because defendant spoke sufficient Spanish to engage in meaningful communications with counsel and to navigate the judicial system; (4) given that defendant spoke sufficient Spanish, he entered his plea knowingly, voluntarily, and intelligently.

People v. Newmiller, 2014 COA 84. Although *Arko* requires an attorney consult with defendant about whether to request jury instructions on lesser offenses, counsel's failure to do so is not per se unreasonable; the relevant inquiry is whether "counsel's assistance was reasonable considering all of the circumstances' or whether, 'in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.'" To establish IAC based on the failure to request lesser offense instructions, defendant must overcome the presumption that counsel's decision was a reasonable trial strategy. Defense counsel need not introduce expert testimony on defendant's behalf if he is able to effectively cross-examine prosecution's expert and elicit helpful testimony. Defendant cannot establish a conflict of interest

based on his attorney's failure to challenge a prior conviction where there is no evidence that there was any legal basis to collaterally attack the prior conviction.

Finney v. People, 2014 CO 38. Defendant expressly waived advisement as to possible penalties upon revocation of DJ&S; defendant was advised of potential penalties upon revocation of DJ&S; statutes requiring that defendant facing revocation of probation based on charge for new criminal offense be advised, prior to admission of new offense, of minimum and maximum penalties that defendant faced, did not apply to DJ&S context that did not constitute criminal offense; and due process did not require that defendant be advised of potential minimum and maximum penalties faced prior to defendant's admission to violation.

People v. Washington, 2014 COA 41. Under *Strickland's* prejudice, defendant need only show there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Defendant is not required to show that the deficient performance "more likely than not" altered the outcome of the case, i.e., the preponderance standard.

People v. Campos-Corona, 2013 COA 23. Plea counsel has a duty to advise a noncitizen defendant of the immigration consequences of a guilty plea when the relevant immigration statutes are "succinct, clear, and explicit." Even if plea counsel fails to give correct immigration advice, defendant must still satisfy *Strickland's* prejudice prong in order to be entitled to postconviction relief. *Here:* defendant's overriding goal was to avoid prison, and his plea advanced that goal; defendant failed to demonstrate prejudice.

Hagos v. People, 2012 CO 63; Villarreal v. People, 2012 CO 64. A determination on direct appeal that instructional error did not constitute plain error does not control a determination of *Strickland* prejudice because the two standards are not the same. The two claims serve different purposes, and each requires an independent, fact-specific analysis. For certain types of claims, including IAC, the effect of the error upon the proceedings is constitutionally material to the claim itself, requiring a showing of prejudice with respect to the trial as a whole. Defendant can succeed only by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. IAC involves greater protection for defendants than plain error review.

People v. Gross, 2012 CO 60M. Any strategic incompetence must be alleged under 35(c) and not on direct appeal.

People v. Stovall, 2012 COA 7M. A challenge to the adequacy of plea counsel's pre-plea investigation is insufficient where defendant fails to specifically identify how additional investigation would have affected his decision to plead guilty. *Here*: defendant identified no exculpatory evidence or witnesses that counsel could have discovered. Defendant's self-serving claim that he would not have pleaded guilty had he known of the minimal investigation done was insufficient to show prejudice under *Strickland*.

People v. Kazadi, 284 P.3d 70 (Colo. App. 2011). A trial court may not review defendant's IAC of plea counsel claim associated with a DJ&S, even if defendant is subject to removal (deportation) based on the DJ&S. The USSC in *Padilla v. Kentucky* reached the same conclusion that CSC reached in *People v. Pozo*. Accordingly, under both *Padilla and Pozo,* plea counsel has a duty to investigate relevant immigration law if they have reason to know that their client is an alien. Plea counsel must give "correct" advice to their clients if the terms of the relevant immigration statute are "succinct, clear, and explicit" in defining removal consequences, including advising their clients that they will be subject to "presumptive mandatory deportation."

People v. Vondra, 240 P.3d 493 (Colo. App. 2010). Where trial court conducted a full hearing into IAC allegations made defendant's Crim.P. 32(d) motion to withdraw his plea, (1) the issue should have been raised

in defendant's direct appeal, and (2) a subsequent Crim.P. 35(c) motion was successive and was properly denied.

People v. Brown, 250 P.3d 679 (Colo. App. 2010). In claiming IAC based on counsel's failure to perfect an appeal, the requisite prejudice differs from the prejudice required in most other IAC claims because defendant need only demonstrate that: (1) counsel's performance caused a forfeiture of defendant's right to appeal, and (2) defendant could have and would have pursued the appeal. Defendant need not establish any likelihood of success on appeal. Defendant cannot establish prejudice from appellate counsel's failure to perfect the appeal while defendant was a fugitive. Defendant's fugitive status forfeits his right to an appeal, and therefore, he cannot prove that he could have and would have pursued his appeal but for counsel's performance. *Here*: defendant fled the jurisdiction shortly after being granted bond pending appeal, and he remained a fugitive for nearly three years. Appellate counsel filed a notice of appeal but withdrew from the case without perfecting the appeal due to defendant's fugitive status. Defendant was not prejudiced because he forfeited his right to appeal by fleeing jurisdiction.

Carmichael v. People, 206 P.3d 800 (Colo. 2009). IAC standards set forth in *Strickland*, apply throughout plea negotiations. In the plea negotiation context, when defendant claims that he was denied effective assistance of counsel based on defense counsel's performance during the plea bargaining process, defendant must provide objective evidence to support his post-conviction claim, that, but for counsel's errors, he would have accepted the offer and not gone to trial.

People v. Miera, 183 P.3d 672 (Colo. App. 2008). Where defendant demonstrates that counsel labored under an actual conflict of interest that adversely affected counsel's performance, defendant is not required to demonstrate a probable prejudicial effect upon the outcome of the trial. Under the standard in Cuyler v. Sullivan, 446 U.S. 335 (1980), defendant need not establish *Strickland* prejudice in conflict of interest cases. The evil in conflict cases is in what the advocate finds himself compelled to refrain from doing -- at trial, as to possible pretrial plea negotiations, and in the sentencing process. In claims of conflict of interest that involve closely related concurrent and successive representation, the *Cuyler* standard, rather than the *Strickland* standard, should be applied.

Derivative Collateral Attacks

People v. Alexander, 797 P.2d 1250 (Colo. 1990). Such attacks can be brought to prevent the use of the conviction as substantive evidence-People v. Roybal, 618 P.2d 1121 (Colo. 1980), impeachment evidence-People v. Meyers, 617 P.2d 808 (Colo. 1980), or for sentence enhancement-People v. Padilla, 907 P.2d 601 (Colo. 1995).

People v. Wiedemer, 852 P.2d 424 (Colo. 1993); Robbins v. People, 107 P.3d 384 (Colo. 2005). The time limits of §16-5-402 apply to these collateral attacks.

People v. Gardner, 250 P.3d 1262 (Colo. App. 2010). General rule is that a valid guilty plea renders irrelevant all claims that defendant's constitutional rights have been violated. However, a collateral attack on a guilty plea is appropriate if the relief sought relates to either: (1) the voluntary and intelligent nature of the plea, or (2) the power of the court to enter the conviction or impose the sentence, or the state's power to prosecute in the first place. The latter exception is narrowly construed to balance the state's interest in the finality of plea-bargained convictions against defendant's ability to collaterally attack his sentence, and thus only applies to those claims which are based on the language of the statute or indictment itself and require no other evidentiary proof. An unconstitutional-as-applied claim is waived upon the entry of a guilty plea.

People v. Jones, 222 P.3d 377 (Colo. App. 2009). Defendant filed a post-conviction motion challenging his classification as a sex offender by DOC; COA agreed with the trial court that it did not have jurisdiction to address defendant's claims: the DOC has statutory authority and discretion to classify an inmate as a sex offender for treatment purposes; sex offender classification hearings are quasi-judicial proceedings subject to review under C.R.C.P. 106(a)(4); defendant's challenge to his classification as a sex offender must be brought as a civil action against the DOC and not under 35(c). Under C.R.C.P. 106(a)(4), a person alleging that a governmental body exceeded its jurisdiction or abused its discretion may commence an action for review by filing a complaint in the trial court. The complaint must be filed within 30 days of the agency's final decision. The 30 day requirement is jurisdictional and cannot be tolled or waived. If a complaint if filed more than 30 days after the date of the board's final action, the complaint must be dismissed for lack of subject matter jurisdiction.

People v. McDowell, 219 P.3d 332 (Colo. App. 2009). Defendant's postconviction outrageous conduct claim, in which he argued his confession was coerced and involuntary, was procedurally barred because it duplicated the *Miranda* issue he raised on direct appeal.

People v. Shepherd, 43 P.3d 693 (Colo. App. 2001). A defendant attacking prior convictions from another state is not excused from the 3-year time limitation in §16-5-402 even though he does not arrive in Colorado until after the expiration of the 3-year period.

DNA Testing

People v. Townsell, 21CA2068. In this UNPUBLISHED opinion, the COA found that defendant's IAC claims addressing the lack of a defense expert to challenge the DNA evidence were properly denied without a hearing or the appointment of counsel. But Judge Shultz wrote a dissent stating that defendant's pro se incarcerated status and the importance of the DNA issues in this case, alleged sufficient facts to justify the appointment of counsel to assist him in developing and pursuing his petition. Here: the jury heard evidence about a mixed DNA profile on the mask, and defendant did not explain how a defense expert's testimony on this point would have overcome the other evidence admitted showing that only his DNA was found on the shoes, pantyhose, and bandana. Many of those items 7 were seen on still shots from the surveillance video of the robbery. Defendant also didn't specify how further investigation of the DNA evidence would have changed "the result of the proceeding," nor did he allege that a DNA expert was available and willing to testify consistent with his allegations that his DNA may not have been on the other items recovered by the police. *[Cert Accepted (9/9/24) in case #23SC924: (1) Whether the standard for appointment of counsel under Criminal Rule of Procedure 35(c) differs from the standard for granting a hearing; (2) Whether an indigent pro se petitioner alleging ineffective assistance of counsel for failure to investigate DNA evidence must specify how exculpatory DNA evidence would undermine confidence in the conviction to sustain a Rule 35(c) motion; and (3) Whether petitioner is entitled to postconviction counsel and a hearing to develop his claim that trial counsel rendered ineffective assistance of counsel by failing to investigate DNA evidence (FAAG Erin Grundy)].*

People v. Young, 2014 COA 169. A postconviction motion for relief for destruction of DNA evidence presents a mixed question of law and fact. COA reviews the trial court's factual findings for clear error and its legal conclusions de novo. Under the law of the case doctrine, prior relevant rulings made in the same case are generally to be followed. However, a court may, in its discretion, reconsider and reverse a prior ruling it if determines that such ruling is no longer sound due to changed conditions, a legal or factual error, an intervening change in the law, or manifest injustice would result from the original ruling. A court that issues a ruling has the power to reconsider that ruling as long as the case remains within its jurisdiction. *Here:* because the postconviction court retained jurisdiction over defendant's motion for DNA testing, the court had the authority to reconsider earlier decisions that had been made with respect to that motion. The final postconviction court to

rule on defendant's DNA motions properly considered whether defendant had made the requisite showing for testing under §18-1-413, despite the fact that previous decisions by other postconviction courts had ordered testing, as the previous courts had never made findings under §18-1-413 justifying such testing. Under §18-1-1102(1)(b), 1103(2), a law enforcement agency that collects DNA evidence during a criminal investigation for a sexual offense that results in a conviction must preserve that evidence for the life of the convicted defendant. In order to establish grounds for relief for destruction of evidence subject to preservation under §18-1-1103, defendant must show that the destruction violated his due process rights, and if he does so, the court shall order an appropriate remedy. In order to show a due process violation under §18-1-1104(4), defendant must show that: (1) the evidence was suppressed or destroyed by the state; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and 3) the defendant was unable to obtain comparable evidence by other reasonably available means. Absent a showing of bad faith on the part of the police, the failure to preserve potentially useful evidence does not constitute a denial of due process: "negligent destruction" of evidence cannot constitute a due process violation; evidence that is "potentially useful" does not show that the evidence had "apparent exculpatory value" when it was destroyed; the due process clause does not require the state to preserve evidence which "might" be favorable to the accused where "no more can be said than it could have been subjected to tests." *Here:* trial court properly denied defendant's motion for relief based on the alleged destruction of DNA evidence because: (1) the evidence was subjected to testing in 2007 that yielded no exculpatory information; and (2) defendant's DNA expert acknowledged that even if touch DNA was found, there would be no way of knowing whether that DNA was deposited by the assailant or someone else who handled the evidence subsequent to the commission of the crime in 1988.

APPEALS

CONSTITUTIONAL ISSUES [12]

General Concepts

People v. Stone, 2020 COA 23. COA declines to consider the defendant's as applied challenge to the constitutionality of a statute because he did not raise that challenge below. The voluntary intoxication statute, §18-1-804(1) is not unconstitutional.

People v. Brandt, 2017 COA 150; People v. Iannicelli, 2017 COA 150. If a statute is ambiguous, and can be read in two reasonable ways, one of which raises constitutional infirmities, a reviewing court should adopt the interpretation which avoids such infirmities.

People v. Lente, 2017 CO 74. In interpreting a constitutional amendment, if words used by the amendment had a settled meaning under the existing law at the time of the amendment, a court presumes the electorate intended to adopt that meaning. *Here:* at the time Amendment 64 was passed, Colorado's criminal law criminalized both the "manufacture" and "process" of marijuana. While there was no statutory definition for "process," "manufacture" was defined as including processes that included extraction and chemical synthesis. Therefore, "process" included only those processes not involving extraction and chemical synthesis. Because hash oil is made using the process of extraction and chemical synthesis, Amendment 64 does not allow individuals to manufacture hash oil.

[12] This section will include those cases that discuss the general issues surrounding constitutional issues. For the constitutionality of specific criminal statutes please see the "Lookit Crimes Section."

People v. Valdez, 2017 COA 41. Katie's Law, which requires the collection of DNA as part of the booking process is constitutional as applied to a defendant charged with felony driving under restraint.

People v. Nozolino, 2014 COA 95. "[T]he party attacking the constitutionality of a statute has the burden of proving the statute is unconstitutional, as applied, beyond a reasonable doubt." "Whether a defendant has made a threshold showing that the First Amendment applies to his conduct is a question of law that [appellate courts] review de novo."

People v. Cisneros, 2014 COA 49. Colorado's special offender sentence enhancement statute, §18-18-407(1)(f), does not violate the right to bear arms in self-defense under the Federal or Colorado constitutions.

People v. Perez-Hernandez, 2013 COA 160. Direct file statute in effect when defendant was charged in 2007 was not unconstitutional on its face or as applied. Applicable statutes did not vest defendant with a liberty interest in being tried as a juvenile; due process did not require that defendant be notified and given an opportunity to be heard before the DA direct filed in district court.

People v. Houser, 2013 COA 11. Generally, a constitutional challenge to a statute should not be entertained for the first time on appeal. However, the COA "may, as a matter of discretion, take up an unpreserved challenge to the constitutionality of a statute, but only where doing so would clearly further judicial economy." Here: COA chose not to address defendant's unpreserved constitutional challenge to the child prostitution statute because doing so would not further judicial economy.

People v. Herdman, 2012 COA 89. Generally, a statute is unconstitutional on its face only if the complaining party can show that the law is unconstitutional in all of its applications. A facially constitutional statute may be unconstitutional as applied to an individual depending on the particular circumstances. Constitutionality is reviewed *de novo*.

People v. Bondurant, 2012 COA 50. When a defendant raises several of his constitutional claims in a cursory fashion at trial and on appeal, the reviewing court may refuse to address them. Generally, a statute is unconstitutional on its face only "if the complaining party can show that the law is unconstitutional in all its applications." A party challenging the constitutionality of a statute bears a heavy burden to demonstrate its unconstitutionality beyond a reasonable doubt. *Here:* although defendant asserted that he was making as-applied constitutional challenges, a reviewing court will refuse to review his claims when he did not articulate any basis for those challenges.

Townsend v. People, 252 P.3d 1108 (Colo. 2011). A constitutional challenge to a statute as facially vague does not preserve an as-applied challenge to the statute. A defendant may waive a constitutional challenge to a statute by implicitly conceding its constitutionality through a tendered jury instruction.

People v. Ford, 232 P.3d 260 (Colo. App. 2009). A guilty plea bars an "as applied" challenge to the constitutionality of a statute.

People v. Robb, 215 P.3d 1253 (Colo. App. 2009). Retroactive application of an unforeseeable interpretation of a statute may deprive a defendant of due process. An interpretation of a statute is not foreseeable if: (1) the statute is narrow and precise; and (2) the judicial construction of the statute is unexpected and indefensible. *Here*: the interpretation that a general partnership can constitute a security, as set forth in Feigin v. Digital Interactive Associates, Inc., 987 P.2d 876 (Colo. App. 1999), was foreseeable because: (1) the securities fraud statutes are broad, not narrow and precise; and (2) the interpretation was neither unexpected nor indefensible where it adopted the majority view reached in other jurisdictions.

People v. Stanley, 170 P.3d 782 (Colo. App. 2007). Statute that prohibits defendant from communicating threats to public officials, §18-8-306, is constitutional only to the extent that it proscribes "true threats," because such

speech is not protected by the First Amendment. Whether a statement constitutes a true threat is evaluated objectively. Thus, the prosecution need not demonstrate that the speaker subjectively intended to make a threat of unlawful violence in order to establish that the speech was not constitutionally protected.

People v. White, 179 P.3d 58 (Colo. App. 2007). The retroactive application of a supreme court's interpretation of a statute does not violate due process because it is an authoritative statement of what the statute meant before as well as after the decision. In addition, where the decision was "foreseeable," retroactive application is proper. Follows Bouie v. City of Columbia, 378 U.S. 347 (1964).

People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006). Attacks on the constitutionality of a statute may be addressed on appeal only if they were first made in the trial court.

Danielson v. Dennis, 139 P.3d 688 (Colo. 2006). A person who is serving a sentence of parole has not served his or her "full term of imprisonment" and is thus not entitled to vote. An incarcerated person's full voting rights are restored only upon completion of the entire duration of his or her sentence, or upon a pardon from the Governor.

People v. Canister, 110 P.3d 380 (Colo. 2005); People v. Hagos, 110 P.3d 1290 (Colo. 2005). Colo. Const. art. V, §25 prohibits the General Assembly from enacting special legislation in specific categories that applies to only a fixed class. In this case, legislation that allowed the empaneling of juries to make death penalty sentencing decisions concerning a defendant whose trial was underway when the USSC held that juries and not judges had to make the required sentencing findings of fact violated the special legislation prohibition.

People v. M.B., 90 P.3d 880 (Colo. 2004); People v. Vasquez, 84 P.3d 1019 (Colo. 2004). Statutes are presumed to be constitutional, and the party challenging a statute's validity has the burden of proving unconstitutionality beyond a reasonable doubt.

People v. Vasquez, 84 P.3d 1019 (Colo. 2004). A statute is facially unconstitutional only if there is no conceivable set of circumstances under which it may be applied in a constitutionally permissible manner.

People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003). Defendant's due process challenge to the frequency of parole review is premature where the defendant is not currently eligible for parole. A defendant lacks standing to raise an equal protection challenge to his sentence where he fails to demonstrate that he was treated any differently from any other defendant convicted under similar circumstances.

People v. Diaz, 985 P.2d 83 (Colo. App. 1999). While it is settled that a defendant cannot challenge the constitutionality of a statute on appeal when he failed to complain at trial, a defendant can raise his constitutional challenge for the first time in a Crim.P. 35(c) proceeding and obtain appellate review thereafter.

Vagueness

People v. Hickman, 988 P.2d 628 (Colo. 1999). A penal statute is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application. To satisfy due process, statutes must afford a practical guide for law-abiding behavior and be capable of application in an even-handed manner by those responsible for enforcing the law.

People v. Gross, 830 P.2d 933 (Colo. 1992); People v. Holmes, 959 P.2d 406 (Colo. 1998). When a defendant asserts that a criminal statute is unconstitutionally vague, the statute must be carefully scrutinized. Nevertheless, the statute is presumed to be constitutional unless defendant proves otherwise beyond a reasonable doubt.

People v. Plemmons, 2021 COA 10, rev'd other grounds, 2022 CO 45. A person commits second-degree assault under §18-3-203(1)(h), if he or causes a peace officer, firefighter, or emergency medical care provider to come into contact with bodily fluids or dangerous materials "with intent to infect, injure, or harm." The word "harm" includes psychological and emotional harm. Because the meaning of "harm" can be ascertained, the statute is not unconstitutionally vague.

People v. Lente, 2017 CO 74. A litigant who engages in conduct that is clearly proscribed by a statute cannot complain of the vagueness of the law as applied to others. *Here:* defendant's manufacture of marijuana was clearly proscribed by statute; the processing or manufacturing marijuana or marijuana concentrate statute was not vague as-applied to defendant's conduct of manufacturing hash oil.

People v. McCoy, 2015 COA 76M. §18-3-404(1)(g) (unlawful sexual contact) is neither facially overbroad or void for vagueness.

People v. Nerud, 2015 COA 27. The term "other apparatus or equipment" in the third degree burglary statute, §18-4-204(1), is not facially vague because under the doctrine of ejusdem generis the phrase is limited to containers with the same characteristics as the other items listed in the statute. COA rejected the argument that the doctrine does not apply to facial vagueness challenges. Nor was the statute vague as applied in this case, because the lockers in question were used to safeguard personal items, cash, and valuables.

People v. Cisneros, 2014 COA 49. Colorado's special offender sentence enhancement statute, §18-18-407(1)(f), is not unconstitutionally vague either facially or as applied where a defendant drug dealer possessed and fired his weapon when robbers came to his door.

People v. Allman, 2012 COA 212. Though the claim was not raised explicitly in the trial court, the COA exercised its discretion and reached defendant's unpreserved vagueness challenge to the sex offender registration act, finding that the act was not unconstitutionally vague.

People in the Interest of M.C., 2012 COA 64. Ambiguity alone does not make a statute unconstitutionally vague. "Only when legislation is so vague, indefinite, and uncertain that the courts are unable to determine, with reasonable certainty, what the legislature intended, or so incomplete and inconsistent in its provisions that it cannot be executed will it be struck down as unconstitutionally vague."

People v. Bondurant, 2012 COA 50. Because statutes generally contain broad terms to ensure their applicability to varied circumstances, neither scientific nor mathematical certainty is required. §16-8-107(b) was not vague as to meaning of term "cooperate" as would render it a violation of due process; person of ordinary intelligence would not have had to guess at common meaning of term.

People v. Boles, 280 P.3d 55 (Colo. App. 2011). The internet luring statute's, §18-3-306, "in connection with" language is not inconsistent with the statute's "for any purpose" language. The grammatical construction of the language is that the statement can be under the guise of "any purpose," so long as it is made "in connection with" the description of explicit sexual conduct. Thus, a person of common intelligence would comprehend what conduct is prohibited. The obscenity statute, §18-7-102(2.5)(a)(I), is not void for vagueness: (1) a person of common intelligence, when reading "promote" in the context of the rest of the statute and in light of the definition provided by the legislature, could readily understand its meaning and application; and (2) the general assembly may furnish its own definitions of words to guide and direct judicial determination of the intended purpose of the legislation, although such definitions may differ from ordinary usage.

People v. Lovato, 179 P.3d 208 (Colo. App. 2007). Negligent bodily injury to an at-risk adult, §18-6.5-103(2), is not vague. The statute's prohibition of *any* criminally negligent act or omission that results in bodily injury to an at-risk adult, although broad, is not so vague that persons of common intelligence must necessarily guess at its meaning.

Townsend v. People, 252 P.3d 1108 (Colo. 2011). A constitutional challenge to a statute as facially vague does not preserve an as-applied challenge to the statute.

People v. Devorss, 277 P.3d 829 (Colo. App. 2011). Defendant violated the "no contact with children" condition of his sex offender probation when he sat beside a child in a booth at a restaurant for the duration of a meal, but did not touch, look at, or speak to the child. A commonsense interpretation of the term "contact" provides sufficient notice that defendant's conduct would qualify as contact, thus the "no-contact with children" condition is not unconstitutionally vague as applied to defendant.

People v. Cross, 127 P.3d 71 (Colo. 2006). The "serious emotional distress" provision of the harassment by stalking statute, §18-9-111(4)(b)(III), is not void for vagueness. The statute does not criminalize innocuous behavior because a reasonable person could know that the only acts prohibited are those acts that would cause a reasonable person to suffer serious emotional distress and do in fact cause such distress.

People v. McIntier, 134 P.3d 467 (Colo. App. 2005). The retaliation against a witness statute, §18-8-706(1), was not vague or overbroad as applied to an inmate who sent a letter to the district attorney threatening to commit violent acts against a prosecution witness. Vagueness: That the threat must be "directed to" a witness is not vague as applied to threats delivered to third-party recipients. *Here:* the threat was "directed to" the witness because the inmate knew the district attorney would inform the witness, and the inmate's specific purpose was to retaliate against the witness for her participation in the trial.

People v. Harte, 131 P.3d 1180 (Colo. App. 2005). A court should uphold a facial challenge to a statute only when the enactment is impermissibly vague in all its applications. If the statute survives a facial challenge, a litigant may succeed on a vagueness claim only by demonstrating the statute is impermissibly vague as applied to him. *Here*: §18-18-415(1)(b) operates as an exception to the physician-patient privilege found at §13-90-107(1)(d). Determinations regarding the application of these statutes with regard to the admissibility of testimony in court proceedings rest with the trial court, not with the recipient of such communications, a prospective witness, or another health care provider, and §18-18-415(a)(b) is not unconstitutionally vague on its face. §18-18-415(1)(b) is not unconstitutional as applied to defendant, since it provides a clear standard for trial courts to apply, and in this case the trial court applied it properly and without violation of the defendant's due process rights.

People v. Couillard, 131 P.3d 1146 (Colo. App. 2005). The term "suspected of" in the accessory statute (making the offense a class 5 felony if the offender knows that the person being assisted is "suspected of" or wanted for a class 1 or 2 felony) is not unconstitutionally vague.

People v. Frantz, 114 P.3d 34 (Colo. App. 2004). Statute declaring any substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance" and which has "a stimulant effect on the central nervous system substantially similar to the stimulant effect" of a controlled substance to be a controlled substance analog is neither unconstitutionally vague nor overbroad. Statutory language excluding from the definition of a "controlled substance analog" any substance with an approved drug use except when it is not in its "intended and unconverted form" is also neither unconstitutionally vague nor overbroad.

People v. Yascavage, 80 P.3d 899 (Colo. App. 2003), aff'd other grounds, People v. Yascavage, 101 P.3d 1090 (Colo. 2004). The harassment by stalking statute employs an objective reasonable person standard to measure whether the emotional distress suffered by the victim was "serious emotional distress." As such, it provides sufficient notice of what conduct is prohibited.

People v. Perea, 74 P.3d 326 (Colo. App. 2002). A law is unconstitutionally vague only if it specifies no standard of conduct at all. The ISP escape statute, §17-27.5-104, is not void for vagueness because it specifies standards of conduct set out in the ISP statute, §17-27.5-102, and the DOC regulations governing ISP. The phrase, "extended limits on confinement" pertains to the limits imposed by ISP curfew directives, such as confinement to specific geographical limits. *Here*: the minimum standards for ISP set out in §17-27.5-102, and the curfew directives in the defendant's ISP agreement, gave the defendant notice of the applicable limits of confinement.

People v. Nix, 42 P.3d 41 (Colo. App. 2001). Principles of statutory construction apply to administrative regulations. A regulation is void for vagueness if it fails to apprise a person of ordinary intelligence of the particular conduct that will subject the person to liability. *Here:* regulation requiring that housing be a "principal residence" to qualify for benefits was void for vagueness when applied to a theft statute, §18-4-401(1). The local housing authority had not defined "principal residence," and a person of ordinary intelligence could not be expected to readily understand its application in these circumstances.

Overbreadth

People v. Hickman, 988 P.2d 628 (Colo. 1999). A statute is unconstitutionally overbroad if it includes within its proscriptions a substantial amount of constitutionally protected speech. If a statute meets this description, the statute must be invalidated unless the court can supply a limiting construction or partial invalidation that narrows the scope of the statute to constitutionally acceptable applications. The substantial overbreadth doctrine precludes a court from invalidating a statute on its face simply because of the possibility, however slight, that it might be applied in some unconstitutional manner. The substantial overbreadth doctrine applies to constitutional challenges of statutes that prohibit "pure speech" as well as "conduct plus speech."

People v. McCoy, 2015 COA 76. §18-3-404(1)(g) is neither facially overbroad or void for vagueness.

People v. Cisneros, 2014 COA 49. Colorado's special offender sentence enhancement statute, §18-18-407(1)(f), is not unconstitutionally overbroad because it only applies to drug offenders who are necessarily not law-abiding citizens using a weapon for lawful purposes.

People v. Allman, 2012 COA 212. Court declined to review challenge that sex offender registration act was constitutionally overbroad as the claim was not raised in the trial court.

People v. Cross, 127 P.3d 71 (Colo. 2006). The "serious emotional distress" provision of the harassment by stalking statute, §18-9-111(4)(b)(III), is not unconstitutionally overbroad. *Here*: defendant placed his victim under surveillance, approached her, and contacted her in a manner that would cause a reasonable person to

suffer serious emotional distress, and she suffered such distress. These acts were not harmless, are within the statute's proscription, and are not protected by the First Amendment.

People v. McIntier, 134 P.3d 467 (Colo. App. 2005). The retaliation against a witness statute, §18-8-706(1), was not vague or overbroad as applied to an inmate who sent a letter to the district attorney threatening to commit violent acts against a prosecution witness. Overbreadth: A threat made with the intent to retaliate against a witness is not protected political speech, and the inmate's explanation of his "political" intent and motivation for writing the letter was not credible.

People v. Frantz, 114 P.3d 34 (Colo. App. 2004). Statute declaring any substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance" and which has "a stimulant effect on the central nervous system substantially similar to the stimulant effect" of a controlled substance to be a controlled substance analog is neither unconstitutionally vague nor overbroad. Statutory language excluding from the definition of a "controlled substance analog" any substance with an approved drug use except when it is not in its "intended and unconverted form" is also neither unconstitutionally vague nor overbroad.

People v. Goldfuss, 98 P.3d 935 (Colo. App. 2004). The definition of "bodily injury" set forth in the third-degree assault statute, which includes "causing any impairment of mental condition," is not unconstitutionally overbroad. The definition of "bodily injury" can logically be interpreted narrowly so that it does not reach constitutionally protected speech.

People v. Shepard, 983 P.2d 1 (Colo. 1999). Using a hatchet, defendant cut the phone line while his daughter was trying to call 911. The wiretapping statute is not overbroad. Its reach into this situation is not real and substantial, compared to the wide range of easily identifiable conduct that the legislature can properly proscribe -- such as clandestine phone tapping and preventing others from reporting crimes. Moreover, a parent's right to discipline a child is not inviolate; it is subject to regulation and restriction. Therefore, the logical and natural operation of this statute is not likely to infringe on constitutionally protected rights to familial privacy.

Due Process

People v. Garlotte, 958 P.2d 469 (Colo. App. 1997). Due process protects individuals against two types of governmental action: (1) substantive due process prohibits the government from engaging in conduct that shocks the conscience or interferes with rights that are implicit in the concept of ordered liberty. It forbids government from infringing on certain fundamental liberty interests, no matter what process is afforded, unless the infringement is narrowly tailored to serve a compelling state interest; and (2) procedural due process involves the manner in which state action occurs and requires notice and a fair opportunity to be heard. Due process is a flexible standard that recognizes that not all situations calling for procedural safeguards require the same procedure.

People v. Beagle, 22CA594. In this UNPUBLISHED opinion, the COA held that because an SVP designation is not considered punishment, as found in Allen v. People, 2013 CO 44, it cannot, by definition, be cruel and unusual punishment. The COA acknowledged there was arguable tension between the rationales of People in Interest of T.B., 2021 CO 59 and *Allen*, but recognized that whether the *Allen* decision needs to be revisited in light of *T.B.* was not a decision for the COA to make–it is the CSC's sole prerogative to overrule its prior holdings. Accordingly, defendant's claim that the SVP designation violated his rights under the Eighth Amendment was rejected. *Here:* defendant was 49 years old *[Cert Accepted (11/18/24) in case #24SC154: (1) Whether the sexually violent predator designation, under §18-3-414.5(1)(a), C.R.S. (2024), is a criminal*

punishment under the Eighth Amendment to the United States Constitution; (2) Whether the sexually violent predator designation is cruel and unusual punishment as applied to Petitioner (AAG Jaycey DeHoyas)].

Sellers v. People, 2024 CO 64. In this petition, the CSC considers whether a life without the possibility of parole ("LWOP") sentence for felony murder is categorically unconstitutional or, alternatively, grossly disproportionate to the offense of felony murder following the General Assembly's 2021 reclassification of that offense. Based on objective indicia of societal standards and evolving standards of decency as expressed in legislative action and state practice, as well as the exercise of its independent judgment, the CSC concludes that an LWOP sentence for felony murder for an adult offender (19-years-old) is not categorically unconstitutional. The CSC also concludes that, even assuming without deciding that felony murder is not per se grave or serious, defendant's offense here was, in fact, grave and serious. Thus, defendant's LWOP sentence, although severe, does not run afoul of the Eighth Amendment or article II, section 20 of the Colorado Constitution and was not grossly disproportionate.

People v. Zoller, 2023 COA 117. COA considered the due process standards that apply when a defendant moves to modify a mandatory protection order that infringes on the fundamental constitutional right to parental association. Relying on federal and state law concerning conditions of probation, the COA concluded that when a defendant challenges such an infringement pursuant to §18-1-1001(6), the trial court may not deny the motion without first finding that: (1) the infringement is justified by compelling circumstances, and (2) the purpose of the infringement cannot be accomplished by less restrictive means. *Here:* the MPO prevented defendant from contacting or directly/indirectly communicating with his minor daughter, victim and witness of his DV crimes, until he completed his prison/parole sentences. The trial court found the order was justified for the daughter's safety and refused to modify it before defendant's sentence is complete. Because the trial court did not make the latter finding, the COA reversed the order denying modification and remands for additional findings. Note: Because *Brockelman* interpreted the parameters of a trial court's statutory discretion and authority to impose geographic conditions of probation, and didn't address any constitutional concerns, COA concluded it did not control the resolution in this case.

People v. Rhea, 2014 COA 60. Merely charging multiplicitous counts did not violate due process because the jury did not reach a compromise verdict and the same evidence would have been presented regardless of how the case was charged.

People v. Conyac, 2014 COA 8M. The Court agreed with the *Villa* court and found that the differences between §16-10-301 and §18-3-407 do not violate a defendant's due process and equal protection rights.

People v. LaRosa, 2013 CO 2. The Due Process right to fair warning is violated when a judicial alteration of a common law doctrine of criminal law was unexpected and indefensible.

People v. Alvarado-Juarez, 252 P.3d 1135 (Colo. App. 2010). Colorado's pattern jury instruction defining reasonable doubt is constitutional. Specifically, the language "would cause reasonable people to hesitate to act in matters of importance to themselves" accurately describes the standard.

People in the interest of J.P.L., 214 P.3d 1072 (Colo. App. 2009). Parents' due process rights at their child's adjudicative delinquency proceedings are limited to notice of the proceedings and the right to be present with the child at all critical stages of the proceedings. Even parents who are named parties in juvenile delinquency proceedings do not have a due process right to participate in the proceedings.

People v. Robb, 215 P.3d 1253 (Colo. App. 2009). Retroactive application of an unforeseeable interpretation of a statute may deprive a defendant of due process. An interpretation of a statute is not foreseeable if: (1) the statute is narrow and precise and (2) the judicial construction of the statute is unexpected and indefensible. *Here*: The interpretation that a general partnership can constitute a security, as set forth in Feigin v. Digital

Interactive Associates, Inc., 987 P.2d 876 (Colo. App. 1999), was foreseeable because (1) the securities fraud statutes are broad, not narrow and precise, and (2) the interpretation was neither unexpected nor indefensible where it adopted the majority view reached in other jurisdictions. Therefore, retroactive application of the interpretation did not deprive the defendant of due process.

People v. White, 179 P.3d 58 (Colo. App. 2007). The retroactive application of a supreme court's interpretation of a statute does not violate due process because it is an authoritative statement of what the statute meant before as well as after the decision. In addition, where the decision was "foreseeable," retroactive application is proper. Follows Bouie v. City of Columbia, 378 U.S. 347 (1964).

People v. Harper, 111 P.3d 482 (Colo. App. 2004). Irrational penal classifications may violate a defendant's rights to equal protection and due process, even where convicted persons are not "similarly situated" to each other. As relevant here, a statute may be constitutionally infirm if it imposes a harsher penalty for objectively less serious conduct. A rational basis for a particular sentence will necessarily be lacking if the sentence is based upon an arbitrary distinction from a crime carrying a different sentence. Classifications within an overall statutory framework must be based on differences that are real in fact and reasonably related to the general purposes of the criminal legislation. *Here*: COA rejected defendant's argument that a more serious offense necessarily must be punished more severely than a less serious offense and that mandatory parole differs from discretionary parole only in that mandatory parole is a more severe punishment. Regardless of whether sex offenses are more serious than non-sex offenses, or whether mandatory parole is more severe than discretionary parole, neither equal protection nor due process requires that a sentencing scheme meet such a rigid standard. Because a rational basis exists for subjecting sex offenders to discretionary, rather than mandatory, parole, that sentencing scheme is not arbitrary, and therefore §18-1.3-401(1) (a) (V) violates neither equal protection nor due process. Distinguishing People v. Walker, 75 P.3d 722 (Colo. App. 2002); People v. Friesen, 45 P.3d 784 (Colo. App. 2001).

People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003). Procedural due process involves the manner in which state action occurs and requires notice and a fair opportunity to be heard. Due process is a flexible standard, which recognizes that not all situations calling for procedural safeguards require the same procedure.

People v. Dalton, 70 P.3d 517 (Colo. App. 2002). Juvenile defendant argued that applying the amended 1997 direct-filing statute to him for offenses occurring in 1993 constituted an impermissible retroactive application. *Here*: no due process violation where the 1997 direct-filing statute did not define previously lawful behavior as criminal, but instead enumerated requirements for a juvenile to be tried as an adult. Further, the procedural changes did not impair defendant's substantial rights because there is no fundamental right to be treated as a juvenile in a criminal case.

People v. Stead, 66 P.3d 117 (Colo. App. 2002), overruled other grounds, Candelaria v. People, 2013 CO 47. The defendant was adjudicated a sexually violent predator under §18-3-414.5 based on the trial court's findings. As a consequence, he was subjected to the lifetime registration and Internet posting requirements of §18-3-412.5. He argued that the imposition of these requirements violated *Apprendi*. Because the lifetime registration and Internet posting requirements do not constitute additional punishment, *Apprendi's* holding that facts increasing punishment must be found by a jury beyond a reasonable doubt does not apply.

Equal Protection

Parrish v. Lamm, 758 P.2d 1356 (Colo. 1988); People v. Blankenship,119 P.3d 552 (Colo. App. 2005). Judicial scrutiny of a statute varies according to the type of classification involved and the nature of the right affected.

Classifications that affect a suspect class or a fundamental right are subject to strict scrutiny. Strict scrutiny requires the government to establish that the classification is necessarily related to a compelling state interest.

Classifications based on illegitimacy or alienage are subject to an intermediate level of scrutiny. Under this standard, the government must establish that the classification is substantially related to an important governmental objective. All other classifications are subject to a rational basis standard of review. Under this standard, classifications are presumed to be constitutional, and the party challenging the statute bears the burden of proving beyond a reasonable doubt that the classification is not rationally related to a legitimate state objective.

People v. Shannon, 2024 COA 41. Defendant's conviction for human trafficking under §18-3-504(2)(a)(trafficking for child servitude), doesn't violate his right to equal protection of the laws because that statute proscribes conduct—in which defendant engaged—that is not proscribed by the soliciting for child prostitution statute, §18-7-402, or by the inducement of child prostitution statute, §18-7-405.5.

People v. Vega-Dominguez, 2024 COA 32. In this as-applied constitutional challenge, the COA, extending the analysis in *Maloy*, holds as a matter of first impression that the crimes of attempted patronizing a prostituted child and attempted inducement of child prostitution prohibit the same conduct, yet the former carries a much harsher sentence. Defendant's conviction for the former offense violates equal protection. *[Cert Accepted (12/23/24) in case #24SC319: (1) Whether the court of appeals improperly held that Colorado's equal protection doctrine was plainly violated by respondent's conviction for attempted patronizing a prostituted child because it prohibited the same conduct as attempted inducement of child prostitution; (2) Whether the trial court reversibly erred by failing to instruct the jury on a required mental state for the crime of soliciting for child prostitution, and whether the required mental state for soliciting for child prostitution is intentional (SAAG Jessica Ross)]*

People v. Mitchell, 2024 COA 7. Selective prosecution is a claim that the prosecutor has brought a criminal charge for a forbidden reason, such as race or religion, that violates equal protection. Defendant has the burden of establishing that the selective prosecution had a discriminatory effect and was motivated by a discriminatory purpose. To obtain discovery on a selective prosecution claim, defendant must provide some credible evidence tending to show the existence of both discriminatory effect and discriminatory intent. Charging codefendants with the same offense does not, by itself make them similarly situated for purposes of a selective prosecution claim. Rather, the People may make different prosecutorial decisions with respect to codefendants who share a charge based on their different conduct. *Here:* defendant, who was black, argued that by continuing to prosecute him as an adult while treating the two non-black codefendants as juveniles, the People engaged in selective prosecution based on race because all four codefendants were similarly situated at the outset of the case because the People filed the same charges against all of them (felony murder). *[Cert Accepted (11/4/24) in case #24SC122: (1) Whether the court of appeals erred in affirming the trial court's denial of petitioner's motion to dismiss for selective prosecution in a case in which the petitioner, who is Black, and his three codefendants were all charged with felony murder but only the two non-Black defendants received a plea bargain offer that*

allowed them to be tried in juvenile court in exchange for their cooperation with law enforcement (AAG Brenna A. Brackett)].

People v Price, 2023 COA 96. As a matter of first impression, COA concludes there is no as-applied equal protection violation because the patronizing a child prostitute statute criminalizes different conduct than the pimping of a child statute. COA also holds the trial court erroneously instructed the jury on the definition of "enterprise" based on McDonald v. People, 2021 CO 64 and reverse the COCCA conviction. Because the prosecution presented sufficient evidence of an enterprise under the overruled definition, case remanded for a new trial on the COCCA charge.

People v. Grudznske, 2023 COA 36. The General Assembly has passed laws that criminalize DUI, including separate crimes for vehicular homicide (DUI) and attempted vehicular assault (DUI). The General Assembly has also passed laws that allow for the prosecution of persons that cause the death or attempt to assault another through conduct manifesting an extreme indifference to the value of human life generally. For the first time, COA must resolve whether a defendant may be prosecuted for both extreme indifference first degree murder and vehicular homicide (DUI), and similarly, attempted extreme indifference first degree assault instead of attempted vehicular assault (DUI).

People v. Tarr, 2022 COA 23. By enacting the vehicular homicide statute, the General Assembly did not intend to bar murder prosecutions of drivers who cause the death of another while behind the wheel; as applied to defendant, second degree murder statute and vehicular homicide (DUI) statute did not criminalize same conduct, and convictions under both did not violate equal protection; and there was sufficient evidence to find defendant acted knowingly when he sped into intersection, as required for his conviction for second degree murder. People v. Tarr, 2022 COA 23, rev'd other grounds, 2024 CO 37.

People v. Lee, 2020 CO 81. Under prevailing Colorado equal protection principles, defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon and strangulation subsections of §18-3-203. Because the deadly weapon subsection punishes that conduct more harshly than the strangulation subsection, the conduct must be charged under the strangulation subsection.

People v. Slaughter, 2019 COA 27. Charging a defendant with second degree assault by strangulation under §18-3-203(1)(i) with a crime of violence sentence enhancer under §18-1.3-406(2)(a)(I)(A), violates a defendant's equal protection rights under the Colorado Constitution.

Dean v. People, 2016 CO 14. For equal protection purposes, the determination whether one sentence is more harsh than another turns on the length of the sentence, not the date of parole eligibility. Here, therefore, the habitual criminal statute, § 18-1.3-801, does not violate equal protection as applied to the defendant, even though his sentence under subsection (2) places parole eligibility further away than if he had committed more serious prior offenses and consequently been sentenced to "life" under subsection (1).

People v. Wentling, 2015 COA 172. Defendant claimed that he was denied equal protection of the law when he was subjected to a harsher punishment for first degree criminal trespass with intent to commit motor vehicle theft than punishment under attempted motor vehicle theft. On the contrary, there was no equal protection violation because attempted motor vehicle theft and criminal trespass have different elements and penalties, thus, it is permissible for the legislature to prescribe different penalties for similar conduct.

People v. Diaz, 2015 CO 28. When a statute is subject to an equal protection challenge, one of three levels of review may apply: strict scrutiny, intermediate scrutiny, or rational basis review. A rational basis standard applies where no traditionally suspect class is present, no fundamental right is at issue, and no other classification warrants review under strict or intermediate scrutiny. Under this standard, the challenging party must prove beyond a reasonable doubt that the classification bears no rational relationship to a legitimate

legislative purpose or government objective, or that the classification is unreasonable, arbitrary, or capricious. Simply because a statutory classification creates a harsh result in one instance does not mean that the statute fails to meet constitutionality requirements under the rational basis standard.

People v. Trujillo, 2015 COA 22. For reasons different than those outlined in *Jauch*, the identity theft statute and the unauthorized use of a financial transaction device statute do not violate equal protection. While the statutes have similarities, "a reasonable distinction can be drawn between the conduct punished by the two statutes, because . . . the felony identity theft statute describes a theft perpetrated against the account holder of a financial device, while the misdemeanor statute describes fraudulent conduct committed against the provider of cash, property, or services in a financial transaction."

People v. Clanton, 2015 COA 8. A defendant who falsely obtains unemployment benefits can be charged with forgery under §18-5-102 or charged under §8-81-101(1)(a) of the Colorado Employment Security Act. The statutes do not proscribe identical conduct and do not violate equal protection.

People v. Firm, 2014 COA 32. Subsections (1)(b) and (1)(c) of §18-4-302, the aggravated robbery statute, proscribe different conduct and do not violate equal protection.

People v. Conyac, 2014 COA 8M. The Court agreed with the *Villa* court and found that the differences between §16-10-301 and §18-3-407 do not violate defendant's due process and equal protection rights.

People v. Jauch, 2013 COA 127. The fact that the identity theft statute imposes a harsher penalty than the statute prohibiting unauthorized use of a financial device does not violate equal protection. The elements for identity theft require proof of an element that unauthorized use of a financial device does not; identity theft requires proof that the financial device used belonged to another.

People v. Alvarado-Juarez, 252 P.3d 1135 (Colo. App. 2010). The extreme indifference murder statute does not prohibit the same conduct as the reckless manslaughter statute. Therefore, the fact that the murder statute carries a harsher penalty does not violate Colorado's equal protection.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). The definition of "enterprise" in the COCCA statute, §18-17-103(2), does not violate equal protection as it prohibits conduct that is different from the predicate acts necessary to prove a pattern of racketeering activity.

People v. Kendall, 174 P.3d 791 (Colo. App. 2007). The first and second degree kidnapping statutes (§18-3-301(1)(a) and §18-3-302(2)) do not prohibit the same conduct with disparate penalties and therefore do not violate equal protection. The second degree kidnapping statute deals with nonforcible takings and the use of deceit, whereas the first degree kidnapping statute requires the use of force. Also, §18-3-302(2) only applies to children.

People v. Watkins, 126 P.3d 309 (Colo. App. 2005). COA rejected defendant's equal protection claim that the conduct for which she was sentenced is also proscribed under the statutes addressing crimes against at-risk juveniles (§18-6.5-101 et seq.), and that those statutes prescribe a lesser penalty for the same conduct. COA found that the sentencing category "crimes against at-risk juveniles" in the crime of violence statute does not create a generic category consisting of any offense in which an at-risk juvenile is the victim – the offenses included in that reference are specifically defined and limited by §18-6.5-101 et seq.

People v. Prieto, 124 P.3d 842 (Colo. App. 2005). Defendant's conduct constituted both felony murder and vehicular homicide, including the penalty enhancement mandated by the fact that defendant was fleeing the commission of a felony at the time of the vehicular homicide, §18-1.3-401(8)(g). *Here*: conviction and sentencing under the more severe felony murder statute does not violate Colorado's equal protection doctrine because the felony murder statute and the vehicular homicide statute do not proscribe identical conduct. The

offenses are distinguished by the culpable mental state, the degree of causation, the predicate offenses involved, and the requirement that the actor operate a motor vehicle for vehicle homicide.

People v. Montoya, 104 P.3d 303 (Colo. App. 2004). Second-degree assault on a firefighter is rationally distinguishable from third-degree assault and does not violate equal protection.

People v. Valencia-Alvarez, 101 P.3d 1112 (Colo. App. 2004). When defendant seeks discovery to support a claim of selective enforcement of a law based on race, he must show some evidence of both discriminatory effect and discriminatory intent. To establish discriminatory effect, defendant must provide credible evidence that a similarly situated individual of another race or ethnicity could have been subjected to the same law enforcement action as the defendant but was not. *Here*: defendant failed to meet the threshold showing of discriminatory effect. Follows U.S. v. Armstrong, 517 U.S. 456 (1996).

People v. Sharp, 104 P.3d 252 (Colo. App. 2004). Defendant's equal protection rights were not violated when he was charged with Theft and not Defrauding an Innkeeper. Theft requires an intent to deprive a person of a thing of value; Defrauding an Innkeeper requires an intent to defraud. Reasonable distinctions can be drawn between the two crimes.

People v. Harper, 111 P.3d 482 (Colo. App. 2004). Irrational penal classifications may violate a defendant's rights to equal protection and due process, even where convicted persons are not "similarly situated" to each other. As relevant here, a statute may be constitutionally infirm if it imposes a harsher penalty for objectively less serious conduct. A rational basis for a particular sentence will necessarily be lacking if the sentence is based upon an arbitrary distinction from a crime carrying a different sentence. Classifications within an overall statutory framework must be based on differences that are real in fact and reasonably related to the general purposes of the criminal legislation. *Here:* COA rejected defendant's argument that a more serious offense necessarily must be punished more severely than a less serious offense and that mandatory parole differs from discretionary parole only in that mandatory parole is a more severe punishment. Regardless of whether sex offenses are more serious than non-sex offenses, or whether mandatory parole is more severe than discretionary parole, neither equal protection nor due process requires that a sentencing scheme meet such a rigid standard. Because a rational basis exists for subjecting sex offenders to discretionary, rather than mandatory, parole, that sentencing scheme is not arbitrary, and therefore §18-1.3-401(1) (a) (V) violates neither equal protection nor due process. Distinguishes People v. Walker, 75 P.3d 722 (Colo. App. 2002); People v. Friesen, 45 P.3d 784 (Colo. App. 2001).

People v. Campbell, 94 P.3d 1186 (Colo. App. 2004). Under §18-3-402(1) (e), a 15-year-old can legally consent to sex with a person not more than 10 years older than he or she is. In contrast, under the child sexual exploitation statute, §18-6-403(1), a person under 18 "is incapable of giving informed consent to the use of his or her body for a sexual purpose." *Here:* no equal protection violation as applied to defendant who was convicted of child sexual exploitation for photographing a 15-year-old engaged in consensual sexual activity with a 19-year-old. The legislature could rationally conclude that there is a harm connected with making sexually exploitative materials of minors that is independent of any harm occasioned by the particular sex act being photographed.

People v. Williams, 89 P.3d 492 (Colo. App. 2003). Reaffirms Colorado case law providing that the legislature may punish different crimes with the same penalty without violating equal protection guarantees. *Here*: fact that second degree kidnapping statute provides the same sentence enhancement, regardless of whether the underlying sexual assault charge is a misdemeanor or felony, does not violate the Equal Protection Clause.

People v. Goodale, 78 P.3d 1103 (Colo. 2003). The legislature has and can treat marijuana differently from other, allegedly more dangerous, drugs without violating equal protection. It chose to do so in §18-18-406.5,

prohibiting unlawful use of marijuana in a detention facility. That statute did not provide a treatment option whereas, under §18-18-404, users of more serious drugs could request treatment and, if granted, have proceedings suspended and dismissed if treatment was successful. It cannot be said that the legislature's choice was completely arbitrary or irrational.

People v. Fritschler, 87 P.3d 186 (Colo. App. 2003). An offender who is convicted of a non-sexual offense but with a factual basis that involves "unlawful sexual conduct" is subject only to discretionary, rather than mandatory, parole under §17-2-201(5) (a). A defendant who did not commit such unlawful sexual conduct is not similarly situated to one who did, and may, properly be subjected to mandatory parole.

People v. Stansberry, 83 P.3d 1188 (Colo. App. 2003). No equal protection violation where defendant was prosecuted for forgery rather than less serious offense of displaying an altered motor vehicle registration number plate.

Campbell v. People, 73 P.3d 11 (Colo. 2003). Under Colorado's equal protection guarantee, a person is denied equal protection when two criminal statutes proscribe different penalties for identical conduct and a person is convicted and sentenced under the statute with the harsher penalty, unless there are reasonable differences between the proscribed behavior and the differences are both real in fact and reasonably related to the general purposes of the legislation. *Here*: disparate penalties for possession (F4) and use (F5) of a controlled substance do not violate equal protection because they are based on differences that are real in fact and reasonably related to the general purpose of the legislation. In determining whether two statutes proscribe identical conduct for purposes of equal protection analysis, the court compares their statutory elements. *Here*: possession of a controlled substance under §18-18-405(1) (a) and use of a controlled substance under §18-18-404(1) do not contain identical statutory elements. Therefore, possession and use are not identical conduct for equal protection purposes, even when the drugs possessed and used are the same. The General Assembly may impose greater penalties for acts that it perceives to have graver social consequences, even if the difference is only a matter of degree. *Here*: Possession of a controlled substance (F4) may be punished more harshly than use of a controlled substance (F5) because one who possesses a controlled substance always has the capability to distribute or dispense it, whether or not the defendant actually does so or has the intent to do so.

People v. Walker, 75 P.3d 722 (Colo. App. 2002). Sex offenders and non-sex offenders convicted of the same class felony for offenses committed between 7/1/96, and 11/1/98, are subject to different parole laws and are not similarly situated for purposes of parole. Therefore, that sex offenders are exempt from mandatory parole does not raise an equal protection issue.

People v. Warren, 55 P.3d 809 (Colo. App. 2002). Under §18-18-405(1) (a), a defendant is punished more severely for *possession* of a controlled substance than for use of the same substance under §18-18-404. No equal protection violation. Possession may be punished more severely than use because one who has possession, but does not use it, has the capability of distributing or dispensing it to others.

People v. Garcia, 64 P.3d 857 (Colo. App. 2002). §17-27.5-106 allows some parolees, but not others, to be placed in an ISP program. No equal protection violation because the scheme is reasonably related to the legitimate government objective of supervising at-risk mandatory parolees.

People v. Martinez, 51 P.3d 1046 (Colo. App. 2001), rev'd other grounds, 74 P.3d 316 (Colo. 2003). The distinction of a "position of trust" in the child abuse statute is not nominal, and it sufficiently justifies the harsher penalty imposed under §18-6-401(7) (c). The age distinction in the first degree murder of a child statute, §18-3-102(1) (f), and the child abuse statute, §18-6-401, is real in fact and sufficiently justifies the more severe penalty under §18-6-401(7) (c).

People v. Friesen, 45 P.3d 784 (Colo. App. 2001). By enacting §18-1-105(1) (a), the General Assembly created six different classes of felonies and specified sentencing ranges for each, but it did not create six different classes of felony offenders for purposes of equal protection analysis. A person convicted of a class 4 felony offense committed between 7/1/96 and 11/1/98, is not similarly situated to one convicted of a class 4 felony sex offense committed during the same period. Therefore, that sex offenders are exempt from mandatory parole does not raise an equal protection issue.

People v. Becker, 55 P.3d 246 (Colo. App. 2001). A defendant does not have standing to challenge a statute on equal protection grounds based on a hypothetical assertion that disparities may occur.

People v. Ellis, 30 P.3d 774 (Colo. App. 2001). Attempted extreme indifference murder requires proof of conduct that poses a real and proximate risk of death to the victim. Extreme indifference assault requires an act that created a grave risk of death but merely caused serious bodily injury. Although the charges are similar, the heightened risk of actual death that accompanies attempted extreme indifference murder is sufficient to create a rational basis for distinguishing the two offenses.

People v. Whatley, 10 P.3d 668 (Colo. App. 2000). Second-degree assault on a peace officer is rationally distinguishable from resisting arrest and third-degree assault and therefore does not violate equal protection.

Separation of Powers

People v. Montgomery, 669 P.2d 1387 (Colo. 1983); People v. Pate, 878 P.2d 685 (Colo. 1994). Colo. Const. art. III provides for the orderly distribution of power among the three branches of state government. The principle applies with equal force to all three branches of government.

People v. Barth, 981 P.2d 1102 (Colo. App. 1999). The separation of powers doctrine does not require a complete division of authority among the three branches of government, and the powers exercised by different branches of government necessarily overlap.

People v. Feldman, 2024 COA 119. As a matter of first impression, the COA holds that, when the county coroner certifies the cause and manner of a victim's death as "undetermined," the prosecution may present other evidence regarding the cause and manner of the victim's death in a subsequent criminal proceeding, even if it conflicts with the coroner's determination. COA rejected defendant's argument that the prosecution's expert witness usurped the county coroner's sole authority to determine the cause and manner of the victim's death, thereby violating either the subdelegation doctrine or the separation of powers doctrine. There is no support for defendant's claim that the coroner is part of the legislative branch of government.

People v. Bondurant, 2012 COA 50. The doctrine of separation of powers generally prohibits one branch from exercising powers that the constitution exclusively vests in another branch. *Here*: §16-8-107(3)(b) (requiring defendant to undergo a psychiatric examination if he intends to introduce expert testimony on his or her mental condition) is a mixture of procedural and substantive law; though the statute affects procedure, it also advances the public policy of gaining full disclosure of a defendant's mental condition. As such, the statute does not amount to improper legislative rulemaking under the separation of powers doctrine.

Townsend v. People, 252 P.3d 1108 (Colo. 2011). A defendant may waive a constitutional challenge to a statute by implicitly conceding its constitutionality through a tendered jury instruction. *Here*: defendant waived his constitutional challenge to §17-27.5-104 on grounds that it violated the separation of powers and nondelegation doctrines by tendering a jury instruction defining "extended limits of confinement" to include "other established ISP directives… under [ISP]."

People v. Sa'ra, 117 P.3d 51 (Colo. App. 2004). The statutory provisions of section §17-27.5-104 sufficiently limit the parole board's authority to set the "extended limits" of a parolee's ISP confinement such that the statute does not violate the separation of powers and non-delegation doctrines of the Colorado Constitution.

People v. Jackson, 109 P.3d 1017 (Colo. App. 2004). §17-22.5-403(a)-(f) does not impermissibly encroach upon powers reserved exclusively to the judiciary. The statute provides additional means for reintegrating offenders into community and this function is one that may be allocated to a parole board.

People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003). The separation of powers doctrine prohibits the exercise by one branch of government of the powers that the constitution vests in another branch of government. With respect to sentencing, the General Assembly has the inherent power to prescribe punishment for crimes and to limit the court's sentencing authority. Once a sentence is imposed, the executive branch is responsible for carrying out the court's mandate.

People v. Baker, 45 P.3d 753 (Colo. App. 2001). §18-8-212(1) gives the district court authority to craft bail bond conditions that further the bond's purposes. §18-8-212(1) does not unconstitutionally delegate authority to the district court to define a criminal offense because §16-4-103(2) sufficiently limits the court's authority to impose conditions on bail. Thus, it does not violate the separation of powers doctrine.

Ex Post Fact

People v. Zapotocky, 869 P.2d 1234 (Colo. 1994); Woldt v. People, 64 P.3d 256 (Colo. 2003). Generally, changes in statutes are presumed to be prospective in application. The ex post facto clauses of the United States and Colorado Constitutions prohibit the General Assembly from retroactively altering the definition of crimes or increasing the punishment for criminal acts. However, a statute is not rendered unconstitutional merely because the facts on which it operates occurred before the adoption of the statute. Rather, two elements must be present before a criminal law will be stricken down as ex post facto: (1) the law must be retrospective; that is, it must apply to events occurring before its enactment; and (2) the law must disadvantage the person affected by it.

People v. LaRosa, 2013 CO 2. Ex post facto does not apply to judicial decision making.

People v. DeWitt, 275 P.3d 728 (Colo. App. 2011). A law is not retrospective merely because it might operate on a fact or status preexisting the effective date of the legislation, as long as its punitive features apply only to acts committed after the statutory proscription becomes effective. *Here*: POWPO statute was not applied retrospectively because the prohibited conduct, possession of a weapon, occurred after the statute was amended in 1994. It does not matter that defendant's predicate felonies occurred before the change in the law.

Woldt v. People, 64 P.3d 256 (Colo. 2003). Statute that provided for harmless error review or new sentencing hearing if death penalty sentencing procedures were held unconstitutional constituted ex post facto legislation in light of statute that required automatic resentencing to life imprisonment if the death penalty was found unconstitutional, and that there were only three identifiable targets of the legislation.

People v. Dalton, 70 P.3d 517 (Colo. App. 2002). The critical question in an ex post facto analysis is whether a statutory amendment changes the legal consequences of acts completed before the effective date of the relevant statute. *Here*: the 1997 direct-filing statute merely applied a procedural mechanism to some facts occurring before its adoption. Since the pattern of sexual abuse alleged was not completed until after the effective date of the 1997 amendment, there was no ex post facto violation.

People v. Stead, 66 P.3d 117 (Colo. App. 2002), overruled other grounds, Candelaria v. People, 2013 CO 47. In determining whether a requirement constitutes additional criminal punishment in violation of ex post facto, the following factors are relevant: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment -- retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable to it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Here*: because defendant's adjudication as a sexually violent predator under §18-3-414.5 did not subject him to additional punishment, it did not violate ex post facto laws.

People v. Lowe, 60 P.3d 753 (Colo. App. 2002). The Restitution Act applies to all convictions entered on or after 9/1/00 but applies to convictions entered before that date only if sums assessed at the time of sentencing remain unpaid, i.e., if payment is delinquent as of that date. Provides for payment of interest and attorney fees for orders of restitution made pursuant to the Act, but does not so apply when the money being withheld from the defendant's account is to pay fees and costs he was ordered to pay in 1992. Provides for additional collection mechanisms, but does not increase the face amount of restitution, costs, or other charges that were part of the original sentence. Thus, there was no ex post facto violation in applying the Act to a defendant whose conviction was entered before the effective date of the Act.

People v. Garcia, 55 P.3d 243 (Colo. App. 2002). A statute is not rendered unconstitutional merely because some of the facts upon which it operates occurred before the adoption of the statute. *Here*: under the plain language of §16-18.5-103, the triggering event of the statute is the entry of the order of the conviction, which occurred here after the effective date of the statute. Trial court did not violate ex post facto in imposing the statutory interest rate on a restitution order under §16-18.5-103 for an offense that was completed before the effective date of the statute. Imposing prospective interest at a reasonable rate on an order of restitution does not, by itself, make the punishment more onerous.

People v. Woodward, 11 P.3d 1090 (Colo. 2000). The trial court's retroactive application of an amended statute that permitted restitution not only to the direct victim of the crime, but also to insurance companies, did not constitute an *ex post facto* violation. Because the trial court had ordered the defendant to make full restitution to the direct victim from the beginning, application of the amended statute to include insurance companies merely redirected the defendant's payment obligation and did not increase it.

Gallegos v. People, 2 P.3d 716 (Colo. 2000). COA held that applying the parole statutes to the defendant did not violate the Constitutional prohibition against ex post facto laws. CSC, evenly divided, affirmed the decision by operation of law.

People v. Gholston, 26 P.3d 1 (Colo. App. 2000). The "pattern of abuse" enhancer was changed on 7/1/95. Earlier, acts constituting the pattern of abuse must have been committed "*within ten years of*" the charged offense. Later, the acts must have been committed "*within ten years prior to*" the charged offense. *Here:* defendant committed his assaults before 1995, and he complained about the application of the new statute. No violation of ex post facto, because the new statute does not impose a retroactive punishment. Indeed, the '95 amendment only provided an additional defense: i.e., pattern acts were not committed "within ten years *prior to*" the charged offense. For abuse that occurred between 6/1/1990 and 6/1/1991, defendant was charged with SAOC-POT. But the prosecution charged under a statute (§18-3-405.3) that did not become effective until 7/1/1990. And the jury was not instructed that defendant's conviction had to be based on an act that occurred after the effective date of the statute. This was a violation of ex post facto, because the verdict could have been based on events that occurred before the effective date of the statute, the defendant was disadvantaged. He

could have been charged under the earlier version of the statute (§18-3-405(1), with a "position of trust" enhancer), but his conviction would then merge with the conviction for second-degree sexual assault.

Confrontation Clause

People v. Marciano, 2014 COA 92. When defendant raises a Confrontation Clause challenge under the Colorado Constitution to nontestimonial hearsay evidence, and defendant has not had a prior opportunity of cross-examination, the declarant must be unavailable, and the statement must bear sufficient indicia of reliability. The prosecution can establish unavailability by showing a good faith, reasonable effort has been made to produce the witness without success.

Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. 2007). The primary purpose of the Confrontation Clause is to secure for defendant the opportunity of cross-examination, and the right to confrontation can be waived. Where defendant chooses not to take advantage of the opportunity to cross-examine a witness, the defendant has not been denied his right to confrontation. Since §16-3-309(5) does not deny a defendant the opportunity to cross-examine the lab technician, but simply requires the defendant to make a decision about cross-examination prior to trial, the statute is facially constitutional.

STATUTORY CONSTRUCTION

Pineda-Liberato v. People, 2017 CO 95. Questions of statutory interpretation are subject to de novo review. When interpreting statutes, the primary purpose is to ascertain and give effect to the General Assembly's intent. To do so, courts begin with the language of the statute. If the statute is unambiguous, courts need look no further. Courts give words their plain and ordinary meaning, read them in context, and apply the rules of grammar and common usage. They also read the statutory scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts and avoiding constructions that would render any words or phrases superfluous or lead to illogical or absurd results.

Montes-Rodriguez v. People, 241 P.3d 924 (Colo. 2010). Issues of statutory construction and application are reviewed de novo. In construing a statute, a court's primary purpose is to effectuate the legislature's intent. The court first considers the plain language of the statute. If the statutory language is ambiguous, the court employs several canons of interpretation to resolve the ambiguity. The court attempts to interpret the statute in a manner that gives consistent, harmonious, and sensible effect to all of its parts. Interpretations that would render words or phrases superfluous or would lead to illogical or absurd results are avoided.

People v. Flippo, 159 P.3d 100 (Colo. 2007). Construing the meaning and scope of the words in a statute requires a court to determine and give effect to the intent of the legislature. The analysis begins with the plain and ordinary meaning of the statutory language. Where a word is not defined statutorily, we may look to the statutory scheme for understanding. When examining the statutory scheme, it is sometimes useful to take into account the title of a statute. However, when the meaning and scope of a particular phrase is ambiguous, a court will examine the language in its overall textual context as well as examining legislative history to determine legislative intent.

People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003). Statutes are presumed to be constitutional, and a party challenging the statute's validity bears the burden of establishing unconstitutionality beyond a reasonable doubt.

Linnebur v. People, 2020 CO 79M. The legislature intended to treat felony driving under the influence (DUI) as a distinct offense that included prior convictions as elements to be tried to a jury and found beyond a reasonable doubt, rather than as a sentencing enhancer to be found by the court.

People v. Harrison, 2020 CO 57. Good faith reporting of emergency drug or alcohol overdose event, as affirmative defense to possession charge, requires good faith based on subjective perception plus objective reasonable belief, and evidence was sufficient to disprove affirmative defense of good faith reporting of emergency drug or alcohol overdose event.

People v. Knox, 2019 COA 152. Even a baseless threat to file a lawsuit did not constitute an "unlawful act," and therefore, defendant could not be convicted of criminal extortion; the "unit of prosecution" for attempt to influence a public servant is governed by distinct acts of deceit/threats such that defendant was properly convicted of three counts for making false representations to three public servants in distinct conversations.

People v. McEntee, 2019 COA 139. The phrase "another person" as used in §18-3-404(1.5), C.R.S. (which concerns unlawful sexual contact on a child) does not require the participation of an additional person beyond the victim and the defendant.

People v. Hamm, 2019 COA 90. The 2013 amendments to the Controlled Substances Act do not apply retrospectively because the Act's effective date clause is expressly prospective.

People In the Interest of T.B., 2019 CO 53. Before the legislature added age-specific provisions in 2017, the sexual exploitation statute, §18-6-403, applied to all perpetrators regardless of their age. Because the pre-amendment version applied, the juvenile court properly adjudicated juvenile delinquent for possessing images of other juveniles exchanged through "sexting."

People v. Coleman, 2018 COA 67. § 42-4-1307 requires a trial court to sentence defendant convicted of ADARP to probation or DOC. The General Assembly enacted subsection (15) to prevent merger of a DUI conviction into an ADARP conviction by requiring separate convictions and sentences, but subsection (6) operates as a limitation on a DUI sentence, prohibiting a probationary sentence where a defendant is also sentenced to the custody of the DOC, regardless of the particular felony that caused the DOC sentence.

People v. Brandt, 2017 COA 150; People v. Iannicelli, 2017 COA 150. The definite article "the" particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of "a" or "an." If a statute is ambiguous, and can be read in two reasonable ways, one of which raises constitutional infirmities, a reviewing court should adopt the interpretation which avoids such infirmities.

People v. Lente, 2017 CO 74. A reviewing court's goal in interpreting a citizen's initiative is to give effect to the electorate's intent. It does so by looking at the language used and giving the words their plain and ordinary meaning. If the language is plain, it must be enforced as written. If the language is ambiguous, the court must construe the amendment in light of the objective sought to be achieved and the mischief intended to be avoided.

People v. Henley, 2017 COA 76. The "erotic nudity" provision in Colorado's sexual exploitation of a child statute (§18-6-403), considers whether the charged images, viewed objectively, "taken" or "created" for sexual purposes. *Here:* there was insufficient evidence that the charged images, depicting nude children in non-sexual settings, objectively constituted "erotic nudity" of a child.

People v. Crouse, 2017 CO 5. Under the Supremacy Clause of the U.S. Constitution, the Constitution and laws of the U.S. shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Under this principle, Congress has the power to preempt state law.

People v. Sena, 2016 COA 161. Police officers are "public servants" for the purposes of the attempt to influence a public servant statute, §18-8-306.

People v. Shores, 2016 COA 129. §16-5-401(8)(a.5) provides that there is "no limit on the period of time during which a person may be prosecuted after the commission of [an] offense" if "the identity of the defendant . . . is

determined, in whole or in part, by patterned chemical structure of genetic information, and . . . the offense has been reported to a law enforcement agency . . . within ten years after [its] commission." The language of the relevant portion of the statute — that "the offense has been reported to a law enforcement agency" — does not require that the victim be the person who reported the offense; it only requires that the offense has been reported.

People v. Garcia, 2016 COA 124. §18-1.3-407(2)(a)(I) provides: "The court may award an offender sentenced to the [YOS] credit for presentence confinement; except that such credit shall not reduce the offender's actual time served in the [YOS] to fewer than two years." The word "may" does not mandate that a court award PSCC when it sentences a defendant to the YOS. Instead, it gives the court discretion in determining whether to award PSCC based on the circumstances of each case.

People v. Yoder 2016 COA 50. Defendant argued the trial court lacked the statutory authority to impose conditions in a mandatory protection order prohibiting him from possessing or using drugs, or driving without a valid driver's license. COA disagreed, and interpreting the language of §18-1-1001 to allow for such conditions, reasoning that: the first two sentences of §18-1-1001(3) provide broad authority for trial courts to modify protection orders and apply generally to every MPO issued in a Title 18 case; and the specific conditions pertaining to domestic violence cases and certain Victims' Rights Act cases are referenced in subsection (3), not as a restriction of the broad authority of the trial court, but rather to set out what conditions are subject to special procedural requirements of §18-1-1001(5) and (6).

People v. Alaniz, 2016 COA 101. Statutory interpretation is a question of law that is reviewed de novo. The primary purpose in interpreting a statute is to ascertain and give effect to the intent of the general assembly. Courts first look to the language of the statute, giving words and phrases their plain and ordinary meaning. However, the general assembly may furnish its own definitions of words and phrases in order to guide and direct judicial determination of the intent of the legislation. If the general assembly has defined a statutory term, courts must apply that definition. If a statute is unambiguous, courts apply it as written. If it is ambiguous, courts may consider prior law, legislative history, the consequences of a given construction, and the underlying purpose or policy of the statute. Definitions set forth in the criminal code apply "wherever the term is used in the same sense in another section of this title unless the definition is specifically limited or the context indicates that it is inapplicable."

People v. McCoy, 2015 COA 76M. §18-3-404(1)(g) is clear and unambiguous in that it is not limited to medical professionals or those who claim to be medical professionals, and unlawful sexual contact (medical exam) applies regardless of whether a physician/patient relationship exists.

People v. Diaz, 2015 CO 28. Statutory interpretation is a question of law reviewed de novo. If the language is clear and unambiguous, the statute is construed as a whole, words and phrases are read in context and construed according to grammar rules and common usage, and the court does not add words to the statute or subtract words from it. The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole. If the statutory language is ambiguous, the legislative purpose can support a particular construction.

People v. Stroud, 2014 COA 58. The General Assembly has not adopted the last antecedent rule.

People v. Smith, 2014 CO 10. In interpreting a statute, the court first considers its plain language and construes words and phrases according to rules of grammar and common usage. When the language of a statue is clear, the court applies the statute as written. The court does not add words to the statute.

Marquez v. People, 2013 CO 58. The fact that a term can be defined many ways does not mean the legislature intended them all to apply. A dictionary may not reflect which of several definitions reflects the most common

intended meaning of a term. When that is the case, common usage, historical context, and legislative purpose may be better indicators of which meaning the legislature intended.

People v. Vigil, 2013 COA 102. The Habitual Domestic Violence Offender statute, §18-6-801(7) provides that a defendant who is convicted of an offense that would otherwise be a misdemeanor *shall* be convicted of a class 5 felony where the underlying offense includes an act of domestic violence and defendant has 3 prior domestic violence convictions. The plain language of the HDVO statute demonstrates the legislature's intent to create a class 5 felony offense, punishable as such. Because the statute elevates a misdemeanor to a felony, defendant charged with HDVO must be provided with felony procedural protections, including trial by a jury of 12.

People v. Fair, 2013 COA 41. The interpretation of a Sex Offender Management Board (SOMB) regulation, like a statute, is reviewed *de novo*. Review begins with the regulation's plain language and applies the usual canons of statutory construction. *Here*: an SOMB regulation provides that an offender who denies committing any criminal offense (a risk level 3) but receives a community-based sentence such as probation or community corrections, shall be placed in a "Denier Intervention" program as a precursor to Sex Offense Specific Treatment (SOST). Defendant pled guilty to sexual assault and was sentenced to probation, at which time he was determined to be at a lower risk level 2; after beginning probation and SOST, he was reclassified as risk level 3. He was subsequently discharged unsuccessfully from SOST, triggering the revocation of probation. Revocation upheld. The SOMB regulation requiring Denier Intervention applies only to offenders who are at risk level 3 *at the time they receive a community-based sentence*. The regulation does *not* apply to offenders who are reclassified at risk level 3 after being placed in the community.

People v. Chase, 2013 COA 27. The evidence was sufficient to establish a "credible threat" under §18-9-111(4)(b)(II) where: one of the victims testified that she feared for her and her family's safety, she did not go to work for three days, and she pulled her child out of school; and the other victim testified that he feared for his family's safety and bought a gun when he returned to Colorado. The evidence was sufficient to establish repeated conduct in connection with a credible threat where defendant sent the victims six separate emails over the course of two days; nothing in §18-9-111(4)(b)(II) indicates that defendant should be relieved of criminal liability simply because the victims read the emails in one sitting and did not retrieve each of the emails the moment they were delivered. The evidence was sufficient to establish conduct "in connection with" a credible threat—that is, that the emails shared a continuity of purpose—where: four of the emails referred specifically to defendant's demand that an eviction notice be removed from his door; two of the emails referred to the victims by name; and all six emails referred to a specific or implicit intended retaliation.

People v. Van De Weghe, 2012 COA 204. The offense of criminal impersonation punishes those who assume a fictitious identity with intent to receive a benefit. The offense of attempting to influence a public servant can occur without an assumption of a false identity. Accordingly, the enactment of the criminal impersonation statute does not prevent prosecution under the attempt-to-influence statute.

People v. Carbajal, 2012 COA 107. When interpreting a statute, the court's fundamental responsibility is to give effect to the General Assembly's purpose and intent in enacting it. If the plain language of the statute clearly expresses the legislative intent, then the court must give effect to the ordinary meaning of the statutory language. A statute must be read as a whole, construing each provision consistently and in harmony with the overall statutory design, if possible.

People v. Herdman, 2012 COA 89. When defendant gives notice of an intent to introduce mental-condition evidence for some purpose other than to establish legal insanity, §16-8-107(3)(b) authorizes a court-ordered mental exam and allows the prosecution to admit evidence of defendant's communications during such exam to rebut a defense expert's opinion on defendant's mental condition. As used in this statute, "mental condition" is

broadly interpreted to include learning disabilities, clinical depression, anxiety disorder, and involuntary intoxication.

People in the Interest of M.C., 2012 COA 64. An appellate court's "fundamental responsibility in interpreting a statute is to give effect to the General Assembly's purpose and intent in enacting the statute." It will construe words and phrases according to the rules of grammar and common usage, unless the legislature has given them a technical meaning, and will avoid construing a statute to render any of its words superfluous or to lead to an absurd result.

People v. Laeke, 2012 CO 13. It is presumed that the legislature is aware of existing case law precedent when it enacts or amends statutes. Consequently, it is unreasonable to assume that the legislature made a change to existing law without stating as much in its statement of legislative intent.

Lewis v. People, 261 P.3d 480 (Colo. 2011). §18-1-408 describes a statutory merger doctrine, which precludes conviction of a greater and lesser included offense. When comparing two offenses for statutory merger, this section requires a comparison of the elements of offenses, not facts affecting only the sentence for particular crimes. Although this "strict elements" test parallels federal double jeopardy analysis, it is not a codification of that analysis; rather, it is a rule for interpreting the legislature's intent regarding multiple punishments imposed in a single proceeding. Under §18-1-408, as interpreted by Colorado courts, sexual assault and second degree kidnapping (enhanced by sexual assault) are separate offenses, such that sexual assault is not included within second degree kidnapping (enhanced by sexual assault). Because Colorado statutes, as interpreted by Colorado courts, specifically authorize separate convictions and punishments for kidnapping (enhanced by sexual assault) and sexual assault, such punishments can "never run afoul of constitutional jeopardy protections," even if those offenses would be the "same" for federal double jeopardy purposes. Thus, even if the USSC eventually concludes that sentence enhancers are elements of offenses for double jeopardy purposes, such a determination should not affect sentencing for multiple offenses in Colorado.

People v. White, 242 P.3d 1121 (Colo. 2010). Where statutory language is susceptible to more than one reasonable interpretation, and is therefore ambiguous, a body of accepted intrinsic and extrinsic aids to construction may be applied to determine the particular reasonable interpretation embodying legislative intent. Although a term may have a number of different meanings in the abstract, or standing alone, its intended meaning in a specific context will often become apparent from the context, or the greater statutory scheme, in which it is used. Similarly, the historical development of a statutory scheme can often shed light on the purposes behind specific amendments.

People v. Perry, 252 P.3d 45 (Colo. App. 2010). A trial court's decisions concerning issues of statutory construction are reviewed de novo. When interpreting a statute: a court's responsibility is to give effect to the general assembly's purpose and intent in enacting it; if the plain language of the statute clearly expresses the legislative intent, then a court must give effect to the ordinary meaning of the statutory language; and the statute must be read as a whole, construing each provision consistently and in harmony with the overall statutory design, if possible.

People v. Trujillo, 251 P.3d 477 (Colo. App. 2010). Where statutory language is clear, courts do not look beyond the plain meaning of the words or resort to other rules of statutory construction. A statute is considered ambiguous if it is reasonably susceptible to multiple interpretations, and courts analyzing it will apply principles of statutory interpretation. *Here:* the "less than 15 years of age" age limitation contained in §13-25-129(1) was found to be ambiguous. The court considered legislative history and other rules of statutory construction and held that the age limitation applies only when defendant is charged with incest (not any other sexual offense, including aggravated incest). Provisions introduced by an amendatory act should be read together with the pre-

amendment statute, as if both the original and the amendment had been originally enacted as one section, giving effect to each part, and avoiding conflicts between them.

People v. Gallegos, 260 P.3d 15 (Colo. App. 2010). When a statute does not define its terms, but the words used are terms of common usage, we may refer to dictionary definitions to determine the plain and ordinary meaning of those words. If there is no dictionary definition, we look to other statutory and constitutional provisions for guidance. *Here:* in the context of embezzlement of public property, "public property" is defined as "state- or community-owned property not restricted to any individual's use or possession." "Public moneys" are "all moneys under the control or in the custody of governmental units," and a public officer commits a felony involving public money when he directly or indirectly makes a profit "out of state, county, city, town or school district money."

Clark v. People, 221 P.3d 447 (Colo. App. 2009). Where a statute establishes a general rule subject to exceptions, a court should interpret the exceptions narrowly to preserve the general rule's primary operation. However, though an exception should not be applied beyond the reach of its clear terms, it should be applied to the full reach of its clear terms, even if those terms call for a broad application. We will not reduce the scope of the exception by adding exceptions, limitations, or qualifiers thereto that are not suggested by the plain language of the statute.

People v. Clendenin, 232 P.3d 210 (Colo. App. 2009). In interpreting a constitutional amendment, reviewing court affords the language its ordinary and common meaning to give effect to every word and term contained therein. When the language is plain, its meaning clear, and no absurdity is involved, constitutional provisions must be enforced as written. The rule of lenity is a rule of last resort and does not apply to cases where the applicable provision is unambiguous.

People v. Scoggins, 240 P.3d 331 (Colo. App. 2009). The word "where" within the statutory language of §18-1.3-701(1)(a), permitting the prosecution to seek costs "[w]here any person…is convicted," does not convey a time requirement. Giving effect to the plain and ordinary meaning of the word "where," as provided in a dictionary definition, the statutory language means "under conditions or in circumstances in which a person is convicted of an offense."

People v. Mantos, 250 P.3d 586 (Colo. App. 2009). Downloading and saving sexually exploitative material in a share-capable computer file does not constitute the felony offense of sexual exploitation of a child as defined in §18-6-403(3)(b). The trial court misconstrued the statutory terms and legislative intent of the terms "prepares" and "arranges for."

People v. Summers, 208 P.3d 251 (Colo. 2009). A 2002 amendment to the sexual assault on a child statute extended the statute of limitations for prosecutions of this offense to ten years after the victim reaches the age of 18. Although the text of the statute indicated that this change was to apply to all cases that could have been prosecuted at the time of the change, the enacting clause in the new law limited its applicability to offenses committed on or after the date the bill became law. The Supreme Court held that, where a statute contains conflicting statutes of limitations and the court cannot determine the legislative intent behind the statute, the rule of lenity applies. The statute of limitations in effect at the time the offense was committed controls. Overruled People v. Boston, 214 P.3d 507 (Colo. App. 2009).

People v. Corral, 174 P.3d 837 (Colo. App. 2007). Construing the plain language of §18-8-209, consecutive sentences are not mandated where defendant was not actually serving a sentence at the time he escaped from custody. *Here:* defendant had pled guilty, but sentence had not yet been imposed when he escaped; §18-8-209 does not mandate consecutive sentencing.

People v. Stephenson, 165 P.3d 860 (Colo. App. 2007). Where a state criminal rule of procedure is similar a federal criminal rule of procedure, state courts may look to federal cases that have addressed the federal rule.

People v. Manzo, 144 P.3d 551 (Colo. 2006). Plain language of statute prohibiting leaving the scene of an accident neither required nor implied culpable mental state, and, thus it was a strict liability offense, and lack of culpable mental state implied in offense did not offend due process, as it was a constitutionally permissible strict liability public welfare offense.

Riley v. People, 104 P.3d 218 (Colo. 2004). There is a presumption that the word "shall" is mandatory when used in a statute. Where a statute contains a single exception, that exception is generally construed as excluding other exceptions.

People v. Frantz, 114 P.3d 34 (Colo. App. 2004). Subsequent passage of a statute directly intended to criminalize particular conduct does not compel the conclusion that such conduct was not previously criminal under more general statutes.

People v. Taylor, 104 P.3d 269 (Colo. App. 2004), overruled other grounds, People v. Subjack, 2021 CO 10. The words of a statute or rule must be interpreted according to their plain and ordinary meaning, and a reviewing court must strive to construe a statutory scheme in a manner that gives harmonious and sensible effect to all its parts. These rules of statutory construction apply with equal force to the interpretation of rules of procedure.

Chism v. People, 80 P.3d 293 (Colo. 2003). Statutory language allowing action under certain conditions may, but need not always, imply a prohibition against that action except under those conditions. Constructions that work a repeal by implication are not favored unless unavoidable. Constructions that render statutory provision superfluous or insignificant should be avoided wherever possible, but such nullifying construction may be unavoidable if a provision is an obvious mistake or error.

People v. Miller, 97 P.3d 171 (Colo. App. 2003). Where plain language of the statute is ambiguous, the court looks to legislative history to ascertain the intent. In so doing, the court accords substantial weight to the sponsor's statements concerning the bill's purpose.

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). In interpreting a statute, a reviewing court must give effect to the intent of the General Assembly, which is vested with the power to define criminal conduct and to establish the legal components of criminal liability. Generally, to subject a person to criminal liability a person to criminal liability, there must be a concurrence of the *actus reus*, and unlawful act, and the *mens rea*, a culpable mental state. Legislative silence on the element of intent in a criminal statute is not to be construed as an indication that no culpable mental is required. A requisite mental state may be inferred from the statute. Not all offenses have a culpable mental state. Where the plain language of the statute reflects the General Assembly's intent to make the offense a strict liability crime, no mental state need be proved. *Here:* public indecency statute, §18-7-301(1), employs an objective standard and is applicable to the performance of sexual acts "in a public place or where the conduct may reasonably be expected to be viewed by members of the public." Because this objective standard depends not on what a particular defendant actually knew, but rather on what a reasonable person should have known, the crime of public indecency is a strict liability offense.

People v. Manzanares, 85 P.3d 604 (Colo. App. 2003). Courts should promote the spirit of a statute and not merely the letter of the law.

People v. Stovall, 75 P.3d 1165 (Colo. App. 2003). Under plain language of the statute, restitution may be denied only after a finding that the victim has not suffered pecuniary loss.

People v. Borghesi, 66 P.3d 93 (Colo. 2003). Because both the old and the revised robbery statutes track the basic elements of common law robbery, and because there is no indication that the legislature has departed from the usual and customary meaning of any of the common law terms, a reviewing court seeks guidance from the common law in construing the robbery statutes. Arrangement of statutes by article or title, such as the statutory designation of whether a crime is an offense against property or an offense against the person, is generally left to the revisor of statutes. Because the revisor of statutes does not have authority to make substantive statutory changes, a reviewing court may draw no implications or presumptions of legislative intent from statutory designations chosen by the revisor.

People in the Interest of C.C.V., 56 P.3d 1216 (Colo. App. 2002). In determining the meaning of a statute, the court should give effect to the intent of the General Assembly. An interpretation that defeats the obvious intent of the legislature should be avoided. If the plain language of the statute clearly expresses the legislative intent, effect must be given to the ordinary meaning of that language. A statute must be read as a whole and interpreted to give consistent, harmonious, and sensible effect to all its parts. A statute should not be construed in a manner that would render a provision meaningless in contravention of §2-4-201(1) (b). The interpretation of a statute is a matter of law subject to de novo review.

People v. Covington, 19 P.3d 15 (Colo. 2001). The presumption that the legislature intends to change the law when it amends a statute may be rebutted with a showing that the legislature only intended to clarify an ambiguity with the amendment.

Bagby Issues: Specific v. General Statutes

People v. Bagby, 734 P.2d 1059 (Colo. 1987); People v. Johnson, 30 P.3d 718 (Colo. App. 2000). Enactment of a specific criminal statute precludes prosecution under a general criminal statute when the legislature has demonstrated its intent to limit prosecution to the special statute.

People v. Stansberry, 83 P.3d 1188 (Colo. App. 2003). Enactment by the General Assembly of a specific criminal statute does not preclude prosecution under a general criminal statute unless a legislative intent to limit prosecution to the specific statute it shown. To determine whether by enacting a specific statute the General Assembly intended to preclude prosecution under a general statute, the focus is upon: (1) whether the specific statute invokes the full extent of the state's police powers; (2) whether the specific statute is part of an act creating a comprehensive and thorough regulatory scheme to control all aspects of a substantive area; and (3) whether the act carefully defines different types of offenses in detail. *Here*: no problem where defendant was prosecuted for forgery rather than less serious offense of displaying an altered motor vehicle registration number plate because (1) the legislative declaration does not contain a broad invocation of police powers, (2) is part of an act creating a comprehensive and thorough regulatory scheme which contains carefully defined criminal offenses relating to the evasion of motor vehicle taxes but was not intended to control all aspects of that substantive area, and (3) does not contain a complete and exclusive list of offenses and sanctions flowing from acts committed in the course of unlawfully evading motor vehicle taxes.

People v. Rojas, 2019 CO 86M. Reversing the COA's application of *Bagby* abrogation because the theft statute, §18-4-401, is the proper statute for charging those who steal food stamp benefits. The more specific statute, §26-2-305(1)(a), does not define a separate crime.

People v. Montante, 2015 COA 40. The General Assembly's enactment of the misdemeanor offense of medical marijuana registry fraud did not preclude a marijuana doctor's prosecution for felony attempt to influence a public servant.

People v. Clanton, 2015 COA 8. The General Assembly did not intend to preclude prosecution for forgery where the conduct underlying the charge also arguably violates §8-81-101(1)(a) of the Colorado Employment Security Act.

People v. Blue, 253 P.3d 1273 (Colo. App. 2011). Trial court erred in reducing charge from attempt to influence a public servant to false reporting to authorities because defendant's conduct in giving police a false name could have been prosecuted under either statute, and there was no language in the criminal code indicating an intent to limit prosecution of such conduct to a specific statute.

People v. Davis, 218 P.3d 718 (Colo. App. 2008). 1997 amendment to Liquor Code in response to People v. O'Donnell, 926 P.2d 114 (Colo. App. 1996), demonstrates the General Assembly's intent that providing alcohol to underage persons could be punishable under the Criminal Code (as felony contributing to the delinquency of a minor").

People v. Prieto, 124 P.3d 842 (Colo. App. 2005). Defendant's conduct constituted both felony murder and vehicular homicide, including the penalty enhancement mandated by the fact that the defendant was fleeing the commission of a felony at the time of the vehicular homicide, §18-1.3-401(8) (g). The legislature has not precluded conviction and punishment under the felony murder statute by enacting the allegedly more specific fleeing-from-a-felony penalty enhancer for vehicular homicide, i.e., §18-1.3-401(8) (g). This penalty provision bears none of the indicia of a specific statute intended to preempt prosecution under a more general statute.

People v. Sharp, 104 P.3d 252 (Colo. App. 2004). In case where defendant failed to pay for use of hotel room, prosecutor could charge Theft under §18-4-401 and was not required to charge Defrauding an Innkeeper under §12-44-102. Article 44 of Title 12, concerning hotels and food service establishments, is not a comprehensive regulatory scheme that would preclude prosecution for Theft.

APPELLATE ISSUES

APPEALS GENERALLY

Peterson v. People, 113 P.3d 706 (Colo. 2005). A timely notice of appeal is a jurisdictional requirement.

People v. Wells, 776 P.2d 386 (Colo. 1989). The appropriate record must be designated and transmitted. If material portions are omitted, it is presumed that those support the trial court's judgment.

People v. Czemerynski, 786 P.2d 1100 (Colo. 1990). Appellate courts will not consider claims that are not raised in the opening brief.

People v. Abdul, 935 P.2d 4 (Colo. 1997). Courts will address a moot issue only if it is capable of repetition but evades review.

People v. Saint-Veltri, 945 P.2d 1339 (Colo. 1997). Courts will not resolve hypothetical questions.

People v. Aarness, 150 P.3d 1271 (Colo. 2006). A party may defend the trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court, and the reviewing court may affirm the trial court's denial of a suppression motion on different grounds than those relied upon by the trial court.

People v. Graybeal, 155 P.3d 614 (Colo. App. 2007). The court will not search through briefs to discover what errors are relied on, and then search through the record for supporting evidence.

People v. Bottenfield, 159 P.3d 643 (Colo. App. 2006). Defendant may waive the right to appeal a conviction as part of a negotiated plea agreement provided the waiver is made knowingly, voluntarily, and intelligently.

People v Phipps, 2016 COA 190. Defendant may not incorporate arguments made in the district court into his arguments on appeal simply by reference.

People v. Sanders, 2023 CO 62. Where a trial court orders evidence suppressed on the separate bases of custody and voluntariness, an appellant challenging that order must address both bases for suppression to prevail on appeal. In doing so, it is the appellant's responsibility to set forth the grounds upon which its argument relies, with citations to the relevant authorities and parts of the record. *Here:* the DA challenged the trial court's custody determination but failed to address the voluntariness determination, which established an independent basis for suppression. The suppression order is affirmed.

People In the Interest of A.P.H., 2020 COA 159. Pursuant to §19-1-108(1) and (5.5), a juvenile must petition the district court for review of a magistrate's order revoking probation before the juvenile may pursue review by the court of appeals. And this is so despite the differentiation in Rule 7 of the Colorado Rules of Magistrates that distinguishes between cases in which consent of the parties is required – which may be appealed directly to the court of appeals – and those in which consent of the parties is not required – which must be appealed to the district court. Because the procedure is provided by statute in the Children's Code, the provisions of Rule 7 are inapplicable, and a juvenile must seek review of a magistrate's order revoking probation in the district court. Since that review did not occur here, the appeal was dismissed.

People v. Figueroa-Lemus, 2020 CO 59. Defendant was without any immediate right to appeal the denial of his motion to withdraw his guilty plea to possession of a schedule II controlled substance and driving under the influence (DUI), pursuant to a DJ&S; a guilty plea taken pursuant to DJ&S would not have become a

final, appealable judgment unless and until it was revoked, sentence was actually imposed, and judgment of conviction entered.

People v. Vargas-Reyes, 2018 COA 181. COA lacked jurisdiction over the appeal of the post-conviction motion because the case was not bound over to district court before defendant's pleas were accepted by the court. *Here:* DA commenced a felony case in county court; before it was bound over to district court, defendant pled guilty to 2 misdemeanors; defendant then sought post-conviction relief under Crim P. 35(c).

People v. Duran, 2015 COA 141. In appeal from summary denial of postconviction motion, COA held that defendant could not overcome presumption of regularity applied to the trial proceedings because he did not include the transcripts in the appellate record and did not cite to where the alleged errors occurred.

People v. Dobler, 2015 COA 25. Defendant is precluded from challenging the propriety of his sentence on appeal under §18-1-409(1). A signed "petition to enter a plea agreement" is the same thing as a plea agreement for purposes of this statute. *Here:* statute governing appellate review of felony sentences precluded review of defendant's maximum and consecutive aggravated sentences for vehicular homicide/leaving the scene of an accident involving death, which sentence was within the limits for which he bargained in plea agreement.

People v. Notyce, 2014 COA 52. Claims of error as to a jury trial may not be raised on appeal following a remand from the COA for resentencing because such claims are outside the limited scope of the remand.

LePage v. People, 2014 CO 13. A presumption of regularity attaches to judicial proceedings; any alleged error must affirmatively appear in the record.

People v. Henson, 2013 COA 36. COA will not consider documents attached to the opening brief that are not part of the record on appeal.

Wood v. People, 255 P.3d 1136 (Colo. 2011). A pre-trial denial of a motion to dismiss based on "make my day" immunity is not a final order subject to immediate appeal. Defendant may seek immediate review of such a ruling only by invoking the supreme court's original jurisdiction under C.A.R. 21.

Martinez v. People, 244 P.3d 135 (Colo. 2010). Appellate courts should not reach Colorado Constitutional arguments raised for the first time on appeal. To preserve a Colorado Constitutional argument for appeal, defendant must make an objection sufficiently specific to call the trial court's attention to the potential Colorado Constitutional error.

People v. Brown, 250 P.3d 718 (Colo. App. 2010). Under the fugitive disentitlement doctrine, an appellate court may dismiss appeal of defendant who is a fugitive from justice during the pendency of his appeal. *Here*: after sentencing, defendant was granted bond pending appeal; he fled the jurisdiction shortly after counsel filed a notice of appeal, thereby forfeiting his right to appeal.

People v. Brown, 250 P.3d 679 (Colo. App. 2010). In claiming IAC based on counsel's failure to perfect an appeal, the requisite prejudice differs from the prejudice required in most other ineffectiveness claims because a defendant need only demonstrate that (1) counsel's performance caused a forfeiture of defendant's right to appeal, and (2) defendant could have and would have pursued the appeal. Defendant need not establish any likelihood of success on appeal. Defendant cannot establish prejudice from appellate counsel's failure to perfect the appeal while defendant was a fugitive. Defendant's fugitive status forfeits his right to an appeal, and therefore, he cannot prove that he could have and would have pursued his appeal but for counsel's performance. *Here*: defendant fled the jurisdiction shortly after being granted bond pending appeal, and he remained a fugitive for nearly three years. Appellate counsel filed a notice of appeal but withdrew without perfecting the appeal due to defendant's fugitive status. Defendant was not prejudiced because he forfeited his right to an appeal by fleeing the jurisdiction.

People v. Guatney, 214 P.3d 1049 (Colo. 2009). Because an order declining to revoke probation is not a final judgment within C.A.R. 1, the COA lacked jurisdiction to entertain a prosecution appeal challenging trial court's decision not to revoke defendant's SOISP.

People ex rel. K.W.S., 192 P.3d 579 (Colo. App. 2008). A juvenile cannot directly appeal the stipulated conditions of his DJ&S unless the DJ&S is revoked and conviction enters.

Sanoff v. People, 187 P.3d 576 (Colo. 2008). The filing of valid notice of appeal does not divest trail court of jurisdiction to set an amount of restitution during the course of an appeal.

People v. Hernandez-Clavel, 186 P.,3d 96 (Colo. App. 2008). Notwithstanding §18-1.3-104(1)(a), defendant may properly appeal the denial of probation if the claim involves the sentencing court's consideration of factors not statutorily/constitutionally authorized.

People v. Sisson, 179 P.3d 193 (Colo. App. 2007). A notice of appeal mailed via prison's internal mail system within the 45-day time for filing an appeal was timely.

People v. Washington, 179 P.3d 153 (Colo. App. 2007), aff'd other grounds, 186 P.3d 594 (Colo. 2008). Where defendant makes a bald legal allegation on appeal as one of the bases for a claim, without presenting argument in support of it, the appellate court will not consider the allegation on appeal.

People v. Wallin, 167 P.3d 183 (Colo. App. 2007). Defendant is not entitled, under *Anders*, to advance a concededly meritless claim in a brief that contains another claim which is purported to have merit. *Here:* COA refused to consider 7 perfunctory and conclusory claims raised in appendix to defendant's opening (*Anders*) brief.

Paul v. People, 105 P.3d 628 (Colo. 2005). In interpreting the requirement of a "final appealable order" in C.A.R. 1(a), the federal collateral order doctrine does not govern the appealability of orders denying pre-trial motions to dismiss on double jeopardy grounds.

People v. Baker, 104 P.3d 893 (Colo. 2005). COA abused its discretion in denying defendant's notice of appeal as untimely where there existed factors constituting good cause under C.A.R. 26(b) for accepting the appeal 2 years after the expiration of the 45-day deadline required by C.A.R. 4. Asking defendant to pursue a Crim.P. 35(c) motion would not serve the interests of substantial justice and judicial economy because: (1) trial counsel clearly rendered IAC by not perfecting defendant's appeal; (2) trial court did not correctly advise defendant that he had the right to be appointed counsel for purposes of appeal; and (3) further delay in hearing the merits of defendant's appeal would not serve the interests of finality.

People v. Zedack, 93 P.3d 629 (Colo. App. 2004). Although defendant's right to a new trial was conditional (contingent on rulings after remand), §18-1-405(2) requires that a new trial commence within 6 months after issuance of the mandate. *Here:* trial court's summary denial of defendant's suppression motion was reversed on appeal, and on remand defendant was entitled to an evidentiary hearing; the conditional remand stated that defendant was entitled to a new trial only if the suppression motion were granted after the hearing; the suppression hearing was set more than 6 months after the mandate issued. Trial court's dismissal of case on defendant's motion was proper because trial could not be conducted within 6 months from mandate.

People v. Bonilla-Garcia, 51 P.3d 1035 (Colo. App. 2001). COA has no authority to recall the mandate after the supreme court denies certiorari.

People v. Pineda, 40 P.3d 60 (Colo. App. 2001). Absent a showing of prejudice, trial court's failure to record some of the bench conferences does not amount to reversible error; the record provides a sufficient basis on which to evaluate the trial court's ruling on the substantive objections.

People v. Boyd, 23 P.3d 1242 (Colo. App. 2001). Trial court did not err in failing to rule on defendant's motion to proceed *in forma pauperis* in his postconviction appeal. Under C.A.R. 12(b), because the trial court permitted defendant to proceed *in forma pauperis* on his earlier direct appeal, defendant was not required to reapply to the trial court; he could have simply attached a copy of the trial court's earlier order to the postconviction notice of appeal.

STANDARDS OF REVIEW

St. James v. People, 948 P.2d 1028 (Colo. 1997). **Questions of Law =** De novo review Appellate courts are not bound by a trial court's conclusions of law but apply a *de novo* standard of review to legal issues.

People v. Platt, 81 P.3d 1060 (Colo. 2004); People v. Pitts, 13 P.3d 1218 (Colo. 2000), **Questions of Fact =** Clearly erroneous. A trial court's findings of historical fact are entitled to the reviewing court's deference and will not be overturned if supported by competent evidence in the record.

People v. Ibarra, 849 P.2d 33 (Colo. 1993). **Judgment calls =** Abuse of discretion. When the trial court must choose from various possible alternatives, its decision is reviewed only for abuse of discretion. To constitute an abuse of discretion, the trial court's ruling must be manifestly arbitrary, unreasonable, or unfair.

Rail v. People, 2019 CO 99**. Waiver** the intentional relinquishment of a known right. *Here:* Although the COA found that defendant waived his right to challenge any inconsistency between the jury's verdict and the special interrogatory when his counsel failed to request further juror polling, because nothing in the record indicated that counsel was aware of the inconsistency, counsel's failure to poll the jury further forfeited, rather than waived, the claim.

People v. Rowell, 2019 CO 104. Appellate courts review de novo questions of law generally, and questions of statutory interpretation.

People v. Romero, 2024 CO 62. The COA misapplied the clear error standard of review by failing to afford any deference to the trial court's ultimate ruling at step three of the *Batson* analysis. Relying on People v. Beauvais, 2017 CO 34, the COA determined that the trial court's decision to credit the prosecutor's race-neutral reason - that a prospective juror appeared disinterested - was clear error because that reason was neither accompanied by a specific factual justification (such as identification of the actual observed behavior on which it was based) nor supported by objective evidence confirming that it was true or accurate. But *Beauvais* doesn't support that proposition. Instead, *Beauvais* says that, to withstand clear error review at step three, the record both must reflect that the trial court considered all the relevant circumstances and must support (including possibly through implicit demeanor and credibility findings) the trial court's ultimate ruling regarding whether the objecting party has met the burden of showing purposeful racial discrimination. The COA compounded its misapprehension of *Beauvais* by misconstruing the record. Contrary to the division's conclusion, the record is not devoid of support for the trial court's decision to credit the prosecutor's race-neutral reason. Rather, the record reflects that the trial court implicitly found the prosecutor credible and her race-neutral reason sincere. Going a step further still, the division concluded that a comment by the trial court actually undermined the prosecutor's race-neutral reason. But the comment in question cannot be fairly characterized as an "explicit finding" (or any type of finding) undermining the prosecutor's race-neutral reason. Inasmuch as the record both reflects that the trial court considered all the relevant circumstances and supports the ultimate *Batson* ruling at step three, the division incorrectly held that the trial court committed clear error. The COA is reversed.

People v. Garcia, 2023 COA 58. The first issue is whether, pursuant to Stackhouse v. People, 2015 CO 48, defendant waived his right to a public trial by failing to object to a known closure. The second issue is whether,

pursuant to People v. Rediger, 2018 CO 32, defendant waived his right to be tried in conformity with the charging instrument by failing to object to a constructive amendment. Reconciling *Stackhouse* and *Rediger*, the division concludes defendant waived the first right and forfeited the second. While several published COA opinions have negotiated the guidance in *Stackhouse* and *Rediger*, this appears to be the first published opinion to simultaneously resolve waiver issues in each context.

Williams v. People, 2019 CO 108. Where the issue presents a mixed question of fact and law, the appellate court defers to the trial court's factual findings where they are supported by competent evidence in the record but reviews its legal conclusions de novo.

Fransua v. People, 2019 CO 96. There is no preservation requirement for a Rule 35(a) claim, including claims that a sentence was imposed in an illegal manner raised on direct appeal.

Brooks v. People, 2019 CO 75M; People v. Beauvais, 2017 CO 34. Reviewing courts defer to the trial court's factual findings unless they are unsupported by the record. A trial court's factual findings are only set aside when they are so clearly erroneous as to find no support in the record.

People v. Brown, 2019 CO 50. A trial court's denial of a protective order is reviewed for an abuse of discretion.

McCoy v. People, 2019 CO 44; Maestas v. People, 2019 CO 45. CSC resolved the split in the COA about whether unpreserved sufficiency of the evidence claims should be reviewed for plain error. It held they should not: "[S]ufficiency of the evidence claims may be raised for the first time on appeal and are not subject to plain error review. Accordingly, appellate courts should review unpreserved insufficiency claims de novo (i.e., in the same manner as if the claims were preserved), and not under a plain error standard of review."

People v. Threlkel, 2019 CO 18. Review of a trial court's order addressing a defendant's motion to suppress involves a mixed question of law and fact. The reviewing court defers to the trial court's factual findings and does not disturb them if they are supported by competent evidence in the record - the trial court's legal conclusions are subject to de novo review.

People v. Burlingame, 2019 COA 17. A trial court's dismissal of a case based on a finding of outrageous government conduct is reviewed for an abuse of discretion. However, outrageous government conduct has always been recognized as a violation of due process. And an appellate court reviews due process violations de novo. *Here:* majority opinion finds it unnecessary to resolve the conflict between these standards in this case.

People v. Ramirez, 2019 COA 16. Defense counsel's statement that "I believe this to be a correct statement of the law, so I don't have any objection," which concerned an erroneous jury instruction on the application of deadly force to self-defense as an affirmative defense, constituted a forfeiture, not a waiver, because there is "no indication in the record that defense counsel recognized the error," and "[t]here would be no rational, strategic reason for the defense to want to such an erroneous instruction to be given." Counsel's statement "shows that he failed to notice that it was an *incorrect* statement of the law *as applied"* in this case.

People v. Bohl, 2018 COA 152. The trial court's ruling on a motion for juror contact information is reviewed for abuse of discretion.

People v. Jackson, 2018 COA 79. A trial court's decision whether the residual hearsay exception applies is reviewed for an abuse of discretion.

People v. Ehrnstein, 2018 CO 40. A trial court's decision to appoint a special prosecutor is reviewed for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. This standard is satisfied when, among other things, the court misapplies or misconstrues the law.

People v. Kessler, 2018 COA 60. Former defense counsel "did more than generally acquiesce or fail to object" and "explicitly agreed that the specific evidence at issue was admissible."

Pineda-Liberato v. People, 2017 CO 95. Questions of statutory interpretation are subject to de novo review.

People v. Ahuero, 2017 CO 90. To say that a court has discretion in resolving an issue means that it has the power to choose between two or more courses of action and is therefore not bound in all cases to select one over the other. A court abuses its discretion only when, based on the particular circumstances confronting it, its ruling on the motion is manifestly arbitrary, unreasonable, or unfair.

Reyna-Abarca v. People, 2017 CO 15. Unpreserved double jeopardy claims are reviewed for plain error; double jeopardy violations do not amount to structural error.

People v. Springsted, 2016 COA 188. Where an interrogation is video or audio recorded and there are no disputed facts outside the recording pertinent to a suppression ruling, the appellate court is in the same position as the trial court in deciding whether statements should have been suppressed.

People v. Moore, 2014 CO 8. Defendant need not make a contemporaneous objection to the trial court's *Curtis* advisement. Whether defendant's waiver of the right to testify was knowing, voluntary, and intelligent is a question of law subject to *de novo* review. Plain error review is inapplicable to claims of an invalid waiver of the right to testify.

People v. Ujaama, 2012 COA 36. An issue is unpreserved for review when: (1) no objection or request was made in the trial court, or (2) an objection or request was made in the trial court, but on grounds different from those raised on appeal or on unspecified grounds which would not have alerted the trial court to the issue on which defendant now seeks review.

People v. Davis, 2012 COA 1, rev'd other grounds, 2015 CO 36M. The grant or denial of defendant's request to proceed pro se lies within the discretion of the trial court; trial court's decisions in determining whether defendant is mentally competent to represent himself at trial is reviewed for abuse of discretion.

People v. Carr, 205 P.3d 471 (Colo. App. 2008). Where a trial court's ruling on a motion to dismiss charges due to a violation of UMDDA is based on the application of UMDDA to undisputed facts, trial court's ruling presents only a question of law, and is reviewed de novo.

People v. Barton, 174 P.3d 786 (Colo. 2008). Interpretation of a plea agreement is strictly a question of law that focuses on the meaning a reasonable person would have attached to the agreement at the time the agreement was entered into.

STANDARDS OF REVERSAL

People v. Crabtree, 2024 CO 40. Recognizing that it erred in the remedy it meted out in *Linnebur*, the CSC now holds that a trial court's error in failing to present the element of the defendant's relevant convictions to the jury in a felony DUI case is not structural and is, instead, a trial error. Therefore, it does not warrant automatic reversal; rather, it is subject to an appropriate case-specific, outcome-determinative standard of reversal. To qualify for relief under Crim. P. 52(b), an error must be **plain error at the time-of-trial** (i.e., obvious or clear-cut). The CSC declines to adopt the time-of-appeal rule ushered in *Johnson v. People*, 520 U.S. 461 (1997), and *Henderson v. United States*, 568 U.S. 266 (2013). The CSC did carefully consider replacing Colorado's plain error standard in its entirety with the federal plain error standard. In the end, the court heeds the wisdom of the aphorism "if it ain't broke, don't fix it." Colorado's plain error standard has served this state's courts well, and neither the parties in this case nor the wider bar have expressed interest in the federal approach, much less identified deficiencies justifying a complete rebuild of the applicable methodology. Such an overhaul would inevitably be terribly disruptive—unnecessarily so given the postconviction remedy available under Crim. P. 35(c)(1) when a "significant change in the law" occurs while a direct appeal is pending. *Here:* the COA incorrectly found plain error based on the plainness of the error at the time of appeal, even though it is undisputed that the error was not plain at the time of trial. Because the error was not plain at the time of trial, defendant is not entitled to relief under Crim. P. 52(b). COA judgment is reversed, and the case is remanded to the COA with instructions to return it to the trial court for reinstatement of defendant's felony DUI conviction and sentence.

People v. Baker, 2021 CO 29; Hagos v. People, 2012 CO 63. Preserved non-constitutional errors are reviewed for **harmless error**. Under this standard, the appellate court will reverse only if the error affected the substantial rights of the parties - if the error 'substantially influenced the verdict or affected the fairness of the trial proceedings. To determine if that occurred, the reviewing court looks to whether the People have shown that there is no reasonable possibility that [the error] contributed to the defendant's conviction.

Hagos v. People, 2012 CO 63. Appellate courts review all other errors, constitutional and non-constitutional, that were not preserved by objection for **plain error**. Plain error is obvious and substantial. Reversal is warranted only if the error so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction. Because this standard was formulated to permit an appellate court to correct particularly egregious errors, the error must impair the reliability of the judgment of conviction to a greater degree than under harmless error to warrant reversal.

Howard-Walker v. People, 2019 CO 69. **Cumulative error** is a standard of reversal. Reversal is required under cumulative error "when numerous errors in the aggregate show the absence of a fair trial, even if individually the errors were harmless or did not affect the defendant's substantial rights."

James v. People, 2018 CO 72. Errors in the trial process can require reversal in the absence of some determination of their likely impact on the outcome of the particular proceedings at issue only if they can be categorized as **structural error**, a limited class of errors described by the Court as including errors concerning rights protecting some interest other than the defendant's interest in not being erroneously convicted; errors the effects of which are too hard to measure, in the sense of being necessarily unquantifiable and indeterminate; and errors that can be said to always result in fundamental unfairness.

Bock v. People, 24 CO 61. Constructive amendments are reviewed for plain error not structural error. Here: defendant charged with thefts between November 2014 and November 2016, under a provision that punishes single acts of theft. Although proof of aggregation is only required under a different portion of the theft statute,

the trial court instructed the jury that defendant could not be convicted of four of those counts unless the prosecution proved that multiple acts of theft had been committed within six months of each other. Defendant argued this was a constructive amendment creating structural error and requiring reversal. CSC disagreed and found the error was not plain because it did not undermine the trial's fundamental fairness.

Deleon v. People, 2019 CO 85. A trial court must instruct the jury that it cannot consider defendant's refusal to testify in reaching a verdict, also known as a no-adverse-inference jury instruction, when requested to do so by defendant. Defendant adequately preserves for appellate review his claim that the trial court erred when it failed to provide a no-adverse-inference jury instruction where defendant exercised his Fifth Amendment right against self-incrimination and chose not to testify, even though defendant failed to object to the trial court's omission of the instruction, where defendant tendered a proposed no-adverse-inference instruction. *Here:* the trial court's introductory remarks regarding defendant's right not to testify did not constitute an effective no-adverse-inference jury instruction; the court's initial comment indicating defendant had no obligation to testify occurred during voir dire, the purpose of the comment was to determine whether potential jurors could act impartially and not to explain the law, and the trial court told the jury that it would eventually explain the law that the jury must apply, but then failed to instruct the jury on the law regarding the right to remain silent. The failure to provide a no-adverse-inference jury instruction was not harmless error; there was no physical evidence against defendant, so the outcome of the case rested on the credibility of the alleged victim versus defendant's theory that the victim fabricated the allegations, and there was no guarantee that the jury did not hold defendant's decision not to testify against him.

Howard-Walker v. People, 2019 CO 69. In determining whether there was plain error, preserved errors should be considered as a group under harmless-error review. If, cumulatively, they are not harmless, reversal is required. If however, they are harmless, a court should consider whether those preserved errors, when considered in conjunction with the unpreserved errors are sufficient to overcome the hurdles necessary to establish plain error. *Here:* cumulative effect of errors and prosecutorial misconduct violated defendant's right to fair trial, even though individually they were harmless or failed to affect defendant's substantial rights, in prosecution for first degree burglary and conspiracy to commit first degree burglary; detective's improper testimony about whether gun used in burglary was real, and whether defendant would have used the gun had he "engaged" the homeowner during the burglary helped establish defendant's guilt and thus undermined the fairness of the trial, prosecutor's decision to ask detective to .pine on defendant's veracity was highly prejudicial, and by drawing attention to the fact that stolen goods were still missing and suggesting only defendant knew where they were, the prosecutor suggested defendant chose not to testify because he was guilty, which penalized defendant for exercising his right to remain silent.

Garcia v. People 2019 CO 64. Pattern jury instructions are not a safe harbor that insulates instructional error from reversal or obviousness under plain error.

People v. Wambolt, 2018 COA 88. Applying the "stricter" version of the plain error standard of review articulated in Scott v. People, 2017 CO 16, instead of the version announced in Reyna-Abarca v. People, 2017 CO 15, the division found that because the error was not plain because it was not obvious, merger of the multiplicitous convictions was not required.

People v. Thompson, 2018 COA 83. Plain error is error that is obvious. Obvious errors must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law. Because plain error requires that the error be obvious and any legal principles be well settled, the reviewing court only considers the status of the law at the time of trial. An erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial. At the time of trial, no Colorado case law directly addressed the issue of whether "any note" is a security. Accordingly, at the time of the defendant's trial, the law was not well settled;

and any error in the jury instruction defining "security," which included "any note," would not have been obvious or plain. Whether merger applies to criminal offenses is subject to de novo review. An unpreserved double jeopardy claim is subject to plain error review. The admission of other act evidence is reviewed for an abuse of discretion. Defendant will not be disturbed unless it was arbitrary, unreasonable, or unfair. *Here:* there was no plain error in failing to merge the defendant's two securities fraud convictions; although the counts were multiplicitous, no Colorado case, well-settled legal principle, or statutory command addressed the proper unit of prosecution under Colorado securities law. Therefore, in the absence of an objection, it cannot be concluded that this would have been obvious to the trial court.

People v. Rediger, 2018 CO 32. The doctrine of invited error prevents a party from complaining on appeal of an error that he or she has invited or injected into the case; the party must abide the consequences of his or her acts. Invited error is a narrow doctrine and applies to errors in trial strategy but not to errors that result from oversight.

People v. Buell, 2017 COA 148. Where evidence has been improperly admitted at trial, the proper inquiry in determining a harmless error question is not whether there was sufficient evidence to support the verdict without the improperly admitted evidence, but, rather, whether the error substantially influenced the verdict or affected the fairness of the trial proceedings.

People v. Tardif, 2017 COA 136. Instructions that improperly lower the prosecution's burden of proof cannot be deemed harmless and require reversal.

People v. Rock, 2017 CO 84. Where defendant concedes committing a lesser offense and denies committing the greater on the basis of her subjective intent alone, erroneously denying instruction on the lesser offense is not harmless.

People Roman, 2017 CO 70. Any error in failing to give the instruction on reckless second assault was harmless for two reasons: (1) jury did not merely convict defendant of the charged offense because it had no other option - it rejected a comparable lesser included offense in favor of the charged offense; and (2) it was never defendant's theory of the case that he committed reckless second degree assault - he steadfastly asserted that he did not cause the victim's injuries.

Scott v. People, 2017 CO 16. To qualify as plain error, an error must generally be so obvious that a trial judge should be able to avoid it without the benefit of an objection. For an error to be this obvious, the action challenged on appeal ordinarily must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law. Conversely, an error is generally not obvious when nothing in Colorado statutory or prior case law would have alerted the trial court to the error. Accordingly, an error will not ordinarily be deemed obvious when either the CSC or COA has previously rejected an argument being advanced by a subsequent party who is asserting plain error.

People v. Springsted, 2016 COA 188. Evidence was not overwhelming, and not harmless beyond a reasonable doubt, where defendant effectively cross-examined witnesses that supported the defendant's guilt.

People v. Marko, 2015 COA 139. Comments by the prosecutor during voir dire and closing argument comparing the concept of "after deliberation" with the decisions whether to throw a football or pick up a pen were improper but did not constitute plain error where they were not "flagrant or glaringly or tremendously improper." The use of analogies during voir dire comparing the prosecution's burden of proving the offense beyond a reasonable doubt to "mundane, everyday decisions," even if error, was not plain error, as the comments were a very small part of a lengthy voir dire and trial, and the jury was properly instructed on the definition of reasonable doubt. Comments by the prosecutor asking the jurors to consider the wishes of the community, appealing to the jurors' sympathy for the victim, and suggesting that a guilty verdict was necessary

to do justice for the community and the victim were improper, but did not constitute plain error as they were a small part of the prosecutor's closing argument. Comments by the prosecutor that there was no evidence that the victim consented to sexual contact were a proper statement on the evidence, and did not explicitly shift the burden of proof to the defense, and even if construed as burden-shifting, the statements were not plain error as the defense argued there was no evidence of lack of consent and the jury was otherwise instructed on the burden of proof.

People v. Harris, 2015 COA 53. Error in the admission of other act evidence in a child abuse case was not harmless because there was a "sharp dispute" among the testifying experts regarding the victim's cause of death, and the eyewitness testimony from the defendant's young child was not clearly reliable.

People v. Novotny, 2014 CO 18. Structural error encompasses a "limited class of error" applying "only [to] those defects affecting the framework within which the trial proceeds—errors that infect the entire trial process and necessarily render a trial fundamentally unfair—rather than simply errors in the trial process itself."

People v. Herdman, 2012 COA 89; People v. Ujaama, 2012 COA 36. An objection on grounds different from those argued on appeal triggers only plain error review. An issue is unpreserved for review when an objection or request was made in the trial court, but on grounds different from those raised on appeal, or on unspecific grounds which would not have alerted the trial court to the issue of which the defendant now seeks review

The plain error rule reflects a careful balancing of the need to encourage all trial participants to seek a fair and accurate trial the first time around against the courts' insistence that obvious injustice be promptly redressed. At best, plain error is strong medicine. It should provide a basis for relief only on rare occasions because it is difficult to fault a court for failing to rule on an issue that has not been presented to it, and an accused should not be able to withhold his objections until completion of his trial and later complain of matters which, if he had made a timely objection, would have allowed the trial court to take corrective action.

Yusem v. People, 210 P.3d 458 (Colo. 2009). Regular harmless error standard of review applies to preserved claims of improperly admitted 404(b) evidence – reversal is required unless the error does not affect the substantial rights of the accused.

People v. Miller, 113 P.3d 743 (Colo. 2005). Where defendant fails to object at trial, the plain error standard of review applies, even where the error is of constitutional magnitude. Harmless beyond a reasonable doubt review is reserved only for constitutional errors that the defendant preserved for appeal. Defendant must demonstrate that there was error that is both obvious and substantial, that the error affected a substantial right, and that the record reveals a reasonable possibility that the error contributed to his conviction.

People v. Fry, 92 P.2d 970 (Colo. 2004); People v. Geisendorfer, 991 P.2d 308 (Colo. App. 1999). Structural errors are the consequences of a defect in the trial that is necessarily unquantifiable and indeterminate, rendering the entire trial fundamentally unfair and warranting automatic reversal. Examples include the complete absence of defense counsel, a biased judge, racial discrimination in the selection of the grand jury, and denial of the right to public trial.

RECORD ISSUES

People ex rel. M.C., 2012 COA 64. The appellate record need not be all-inclusive; rather, it will be deemed adequate if it contains sufficient information to enable the court to resolve the issues presented. *Here*: because defendant did not challenge the sufficiency of evidence, a transcript of the testimony was unnecessary.

People v. Ray, 2012 COA 32. This case provides comprehensive guidance on the process of supplementing and correcting the record on appeal under C.A.R. 10.

People v. Portillo, 251 P.3d 483 (Colo. App. 2010). A sufficiency of the evidence claim rests on an assertion that the *entirety* of the evidence is insufficient. When defendant only provides a portion of the trial transcripts, appellate court must presume that the full record supports the jury's verdicts. Defendant who asserts a trial court's ruling was incorrect must provide that ruling in the record on appeal.

People v. Jowell, 199 P.3d 38 (Colo. App. 2008). To preserve the right to an independent appellate review, defendant must make certain that the record contains a complete set of the materials received in discovery; if counsel fails to do so, the issue is forfeited.

People v. Ellis, 148 P.3d 205 (Colo. App. 2006). To obtain reversal for an incomplete record, defendant must demonstrate specific prejudice resulting from the state of that record.

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). Appellate court presumes the regularity of exhibits not included in the record.

People v. Rodriguez, 43 P.3d 641 (Colo. App. 2001). Where COA was unable to ascertain the extent of the loss of trial transcripts, the appropriate remedy was to remand the case to the trial court to determine whether it was possible to reconstruct the record.

SPEEDY APPEAL

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). The following factors are relevant to defendant's claim of appellate delay: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of the right; and (4) any prejudice to defendant resulting from the delay. Prejudice is an essential element, and no relief will be granted unless defendant can demonstrate prejudice. *Here:* delay was excessive and inordinate, the reason for the delay (delay in the preparation of transcripts) was attributable to the government, and defendant asserted his right to a speedy appeal. Defendant also established prejudice as a result of the appellate delay because, due to the passage of time, a lost exhibit could not be reconstructed which deprived him of the right to present a potentially meritorious substantive contention on appeal.

People v. Foster, 2013 COA 85. Any delay in State's filing of answer brief to defendant's appeal did not prejudice defendant and was not denial of due process right to speedy appeal, where, on appeal, court affirmed judgment and sentence and thus concluded that defendant was properly incarcerated, and defendant did not argue any reason why more prompt resolution of appeal would have yielded different outcome.

People v. Carmichael, 179 P.3d 47 (Colo. App. 2007), rev'd other grounds, 206 P.3d 800 (Colo. 2009). Defendant who claims that inordinate delay in his appeal violated his right to due process must show that the delay impaired his ability to present or the court's ability to review his substantive claims, or that a prompt resolution of the appeal would have yielded a different result.

INTERLOCUTORY APPEALS: §16-12-102; CAR 4.1

People v. Thompson, 2021 CO 15. §16-12-102(2) and C.A.R. 4.1 provide that the DA may file an interlocutory appeal of a suppression order if they certify the appeal is not taken for purposes of delay and the suppressed evidence is "a substantial part of the proof of the charge pending against defendant." CSC signaled in this opinion that it may start requiring more than just a facially compliant certification; it may start evaluating whether the record and appellate briefs, in fact, support the certification. Therefore, in DA's interlocutory appeal opening, it may be wise to include at least a short explanation of why the suppressed evidence is important to the prosecution's case.

People v. N.T.B., 2019 COA 150. §16-12-102(1) allows the prosecution to appeal a "final order" in a criminal

case "upon any question of law; an order that dismisses one or more counts of a charging document before trial constitutes a final order.

People v. Ball, 2017 CO 108. Where the suppression court resolved the question of articulable suspicion for the stop in favor of the prosecution, that issue could not be reconsidered in an interlocutory appeal under C.A.R. 4.1.

People v. Kendrick, 2017 CO 82. Motions to disqualify DAs are appealable under §16-12-102, rather than C.A.R. 4.1.

People v. Quintero-Amador, 2015 CO 59. On retrial, defendant claimed he only testified during his first trial because his counsel was ineffective; trial court suppressed those statements, finding that defendant's waiver of his Fifth Amendment right was not knowing, voluntary, and intelligent due to counsel's poor performance. This was a proper appeal under C.A.R. 4.1(a), as it was grounded in Crim.P. 41(g) -- notwithstanding that the defense did not cite to that rule.

Hunsaker v. People, 2015 CO 46. DA is authorized to appeal a post-conviction court's ruling on Rule 35(a) motion when it challenges the legal basis for the range the post-conviction court used to impose the sentence.

People v. Steen, 2014 CO 9. §16-2-114(6) and Crim.P. 37(f) require that a county court, upon request, grant a stay of execution of a defendant's sentence pending appeal of a misdemeanor conviction to the district court. These provisions control over the general provisions in titles 16 and 18 making a stay of probation discretionary.

People v. Wilburn, 2013 COA 135. Trial court's order dismissing charges against defendant after it declined to revoke defendant's DJ&S is a final order that can be appealed by the People. Where the trial court's dismissal of charges at the completion of the DJ&S time period was based on an erroneous legal ruling, charges could not be reinstated after that ruling was disapproved, as jeopardy attached upon entry of defendant's DJ&S guilty plea.

People v. Simpson, 2012 COA 156. The trial court dismissed two felony theft counts after the People: (1) argued that the value of the property at issue was a sentence enhancer, not an element of the offense; and (2) chose not to present evidence on those counts at the defendant's preliminary hearing, The prosecution could either file an interlocutory appeal under §16-12-102(1) or appeal the challenged decision after trial.

People v. S.X.G., 2012 CO 5. Under §19-1-108(5.5), a juvenile magistrate's order suppressing a juvenile's statements must first be reviewed by the district court before the prosecution can appeal the order to the CSC.

People v. Ray, 252 P.3d 1042 (Colo. 2011). In the context of a witness-murder case, the prosecution could appeal pursuant to C.A.R. 21 a trial court order requiring it to disclose to postconviction counsel the addresses of trial witnesses who did not want to be interviewed by the defense.

People v. Suttmiller, 240 P.3d 504 (Colo. App. 2010). The People may, without filing a cross-appeal, defend the trial court's judgment on any ground supported by the record, so long as the People's rights would not be increased under the judgment.

People v. Pena, 250 P.3d 592 (Colo. App. 2009). When a trial court's order dismisses all of the charges, the People's appeal of the case is governed by the procedures set forth in C.A.R. 4(b)(2), not C.A.R. 4(b)(3), and the notice of appeal must be filed within 45 days of the order.

People v. Guatney, 214 P.3d 1049 (Colo. 2009); People v. Lewis, 214 P.3d 1059 (Colo. 2009). Because an order declining to revoke probation is not a final judgment within the meaning of C.A.R. 1, COA lacked

jurisdiction to entertain a prosecution appeal challenging trial court's decision not to revoke defendant's sex offender intensive supervision probation.

People v. Gabriesheski, 205 P.3d 441 (Colo. App. 2008), aff'd in part/rev'd in part, 262 P.3d 653 (Colo. 2011). Although prosecution appeals of non-Crim.P. 41 evidentiary issues are generally filed under C.A.R. 21, §16-12-102(1) authorizes a prosecution appeal of a trial court order dismissing all or part of a charging document prior to trial. *Here*: where trial court's evidentiary ruling precipitated the court's dismissal of charges, the prosecution had grounds to appeal under the statute.

People v. Gilmore, 97 P.3d 123 (Colo. App. 2003). CAR 4(b)(2) requires the DA to file a notice of appeal within 45 days of the entry of judgment and does not permit sequential filing; the excusable neglect portion of CAR 4(b)(1) does not pertain to DA appeals.

People v. Casias, 59 P.3d 853 (Colo. 2002). Rule, providing for appellate interlocutory jurisdiction of appeals from district court's orders in criminal cases, did not apply to district court's grant of sanctions against state based on destruction of evidence, and thus CSC did not have interlocutory jurisdiction over prosecutor's appeal, despite prosecution's contention that appeal fell under rule governing suppression of involuntary confessions and admissions; appeal did not arise from motion to suppress, and interlocutory rule could not be used to piggy back issues not embraced by rule to obtain review of pre-trial evidentiary decisions.

Dike v. People, 30 P.3d 197 (Colo. 2001). Under Crim.P. 37(a), DA has 30 days to appeal questions of law from the county court to the district court; county court retains jurisdiction to set aside its order dismissing charges prior to the expiration of the 30-day period.

People v. Hall, 999 P.2d 207 (Colo. 2000). Under Crim.P. 5(a)(4)(IV), the People may appeal a county court's PH finding of "no probable cause." If the district court affirms, the People may seek certiorari review under §13-6-310.

MISCELLANEOUS ON APPEALS

People v. Hernandez-Escajeda, 2024 COA 111. A trial court generally has the inherent authority to resentence on a defendant's remaining convictions on remand following the vacatur of a conviction that resulted in a reduced aggregate sentence. The trial court also has the authority to take actions on remand that are not specifically directed by the appellate mandate but do not contravene the mandate.

People v. Jamison, 2018 COA 121. When the trial court sustains defense counsel's objection and defense counsel does not request additional relief, the court of appeals will not consider the alleged errors.

People v. Liggett, 2018 COA 94M. Where defendant was found legally incompetent after the notice of appeal was filed, the direct appeal would proceed through counsel. However, defendant would be permitted to raise in a postconviction motion any matter not raised on direct appeal due to his incompetence. The COA would bifurcate the appeal and grant a partial remand to restore defendant to competence. The direct appeal would continue through counsel.

DA APPEALS

PUBLIC HEALTH – PANDEMIC

People v. Burdette, 2024 COA 38. The CSC added subsection (c)(4) to Crim.P. 24 which provided guidance on when a trial court may declare a mistrial due to a public health crisis. At the time of defendant's mistrials in this case, no clear statutory command, settled legal principle, or Colorado case law suggested Crim.P. 18 24(c)(4) violated the separation of powers doctrine. To the contrary, the legislature approved legislation that bolstered

Crim. P. 24(c)(4)'s objective by authorizing trial courts to exclude an additional period from the speedy trial calculation to account for any "restriction, procedure, or protocol" related to the COVID-19 pandemic. Crim.P. 24(c)(4) authorizes the trial court to declare a mistrial if a fair jury pool cannot be safely assembled due to a public health crisis like the COVID-19 pandemic. *Here:* the trial court made findings that the second and third mistrials were caused solely by the COVID-19 pandemic; the court was unable to safely assemble a jury due to social distancing requirements imposed by public health officials. Such requirements constituted a "limitation brought about" by the COVID-19 pandemic. *[Cert Accepted (11/12/24) in case #24SC388: (1) Whether it violates "anew" the right to counsel to transform a misdemeanor into a felony based on a prior conviction obtained in violation of the right to counsel. (AAG Brenna Brackett)]*

People v. Kirby, 2024 COA 20. No speedy trial violation where defendant's trial extended past speedy trial due to COVID-19 issues. *Here:* DA argued a continuance was warranted under §18-1-405(6)(g) because (1) an expert witness couldn't travel to Colorado because Illinois had a stay-at-home order in effect; and (2) the COVID-19 virus, and the measures imposed to address it, constituted exceptional circumstances precluding effective administration of the trial. The trial court agreed and viewed proceeding with the as irresponsible considering the rising rate of infections, serious illness, and deaths; heightened public concern over the spread of COVID-19; and the court's inability to ensure social distancing within the courtroom and compliance with other restrictive measures. These concerns applied equally to both parties.

People v. Eason, 2022 COA 54. Rule adopted by CSC that allowed trial court to declare mistrial on ground that fair jury pool could not be safely assembled due to public health crisis was procedural rule that did not run afoul of separation of powers. *Here:* despite defendant's contention the specific findings did not concern his particular case; trial court made specific findings regarding the governor declaring a disaster emergency due to theCOVID-19 pandemic and the various requirements and limitations imposed on the courthouse, and defendant did not explain why the limitations imposed by the COVID-19 pandemic and the various public safety orders did not apply to his case. Trial court's decision to limit the courthouse to one jury trial per week due to COVID-19 pandemic did not demonstrate that the circumstances that gave rise to defendant's mistrial were not outside the court's control after trial court declared a mistrial under CSC rule that allowed a court to declare a mistrial in a case on ground that a fair jury pool could not be safely assembled due to a public health crisis; mistrial was not declared because of docket congestion but because of the COVID-19 pandemic and related public health orders, which imposed limitations on the use of the courthouse, which were matters beyond the court's control.

People v. Sherwood, 2021 CO 61. Interpreting Crim.P. 24(c)(4)--which allows the court to grant a mistrial based on a public health crisis like COVID-19--the CSC holds that a mistrial triggers a tolling, not an extension, of the speedy trial period. It further holds that when a trial court declares a mistrial, §18-1-405(6)(e) requires only reasonable delays attributable to the mistrial, not to exceed 3 months, to be excluded from the computation of time within which defendant must be brought to trial. *Here:* trial court believed that its March 1, 2021 mistrial declaration pursuant to Rule 24(c)(4) automatically *extended* the 6-month statutory speedy trial period by 3 months from the date of the mistrial, until June 1st. CSC concludes the mistrial merely tolled the 6-month speedy trial period for up to 3 months from the mistrial date. Because the delay between the date of the mistrial (March 1) and the new trial date (April 26) was reasonable, attributable to the mistrial, and not in excess of 3 months, it must be excluded in its entirety from the speedy trial period-tolled between March 1st and April 26th. Since there were 8 days left in the speedy trial period on March 1st, there would have been 8 days left in the speedy trial period on April 26th, which would have made the new speedy trial deadline May 4th (April 26th + 8 days). Because the April 26th trial date landed within the speedy trial period, the rule to show cause issued in response to the People's C.A.R. 21 petition is discharged.

People v. Hernandez, 2021 CO 45. As a matter of first impression, the use of video conferencing technology at a "make my day" immunity hearing, due to public health concerns related to the COVID-19 pandemic, did not violate defendant's confrontation rights; spirit of criminal procedure rule, which outlined when a defendant's presence at criminal proceedings was required, when it was not, and when his or her presence may be waived, was not violated by the court allowing a prosecution witness to appear, over a defendant's objection, by use of video teleconferencing technology; and the trial court's order allowing prosecution to appear, and its witnesses to testify, in "make my day" immunity hearing live via video conference technology was rationally related to concerns regarding the spread of COVID-19.

People v. Nunez, 2021 CO 31. Defendant filed petition to show cause for trial court's decision, made after speedy trial deadline had passed, to declare mistrial retroactive to period before expiration of the deadline, for trial that was delayed due to COVID-19 pandemic. CSC held that: (1) trial court did not declare a mistrial at hearing that occurred before expiration of the speedy trial deadline; and (2) trial court may not declare retroactive mistrial in order to get around mandatory deadlines set by speedy trial statute.

People v. Barnett, 2020 COA 167. Findings of fact about COVID-19 pandemic and the health risks that could affect a defendant were not required when ruling on motion for reduction of sentence that requested modification from an eight-year sentence to probation; trial court was well familiar with defendant's case, same judge presided over sentencing, court reviewed motion and provided basic reasons in support of its ruling, and rule describing postconviction remedies did not require hearing on motion.

People v. Lucy, 2020 CO 68. CSC would exercise its original jurisdiction over the State's claim that County Court erred in continuing criminal cases due to the COVID-19 pandemic, without resolving the State's requests to toll speedy trial deadlines, and to make findings related to speedy trial, and in a matter of first impression, the trial court was authorized to grant the prosecution a continuance with a tolling of the speedy trial period for up to six months, if the prosecution established that (1) as a result of a public health crisis, evidence material to its case was unavailable, (2) it had exercised due diligence to obtain that evidence, and (3) there were reasonable grounds to believe that the unavailable evidence would be available on the new trial date.

People v. Bryce, 2020 COA 57. While direct appeal from defendant's conviction was pending, trial court could not consider defendant's emergency motion for reduction of sentence, seeking immediate release due to health risk arising from COVID-19 pandemic, COA denied defendant's motion for limited remand of appeal to file such motion because more than 126 days had passed since defendant's sentencing so motion for sentence reduction was untimely under rule, and COA had not issued mandate on defendant's appeal, as required to trigger alternative deadline to file reconsideration motion under rule.

MISCELLANEOUS PROCEEDINGS

CONTEMPT: §18-1-1002; C.R.C.P. 107

People v. Aleem, 149 P.3d 765 (Colo. 2007). A court may hold a person in direct contempt only when the court has either given prior warning that a person's behavior, if repeated, will constitute contempt and the contemnor persists in such behavior; or when the person's conduct is "so extreme that no warning is necessary." *Here:* contempt finding and sentence reversed for lack of proper notice to defendant that his conduct would be considered contemptuous.

People v. Holmes, 967 P.2d 192 (Colo. App. 1998). Summary contempt power is that which is necessary to ensure and preserve decorum in the courtroom. Such power is not designed to protect a judge's own dignity, but rather to protect the rights of litigants and the public. It should be invoked only when the judicial process has been seriously affronted or disrupted. A finding of contempt is within the sound discretion of the trial court, and a reviewing court may not disturb such a finding absent a clear abuse of discretion.

People v. Ray (Re: Lindecrantz), 2018 COA 36. In death penalty postconviction proceeding concerning the effectiveness of trial counsel's pretrial investigation, PD's investigator refused to testify in response to a prosecution subpoena, on the ground that she was opposed to the death penalty on religious grounds, and her testimony could be used to prove that trial counsel's representation was effective. *Here:* it does not matter that this was a death penalty case; state has a compelling interest in ascertaining the truth and rendering a just judgment in accordance with the law; the witness had to testify under the subpoena.

People v. McGlotten, 134 P.3d 487 (Colo. App. 2005). The exercise of contempt powers is discretionary, although a court must exercise its contempt powers with caution and self-restraint. Before imposing remedial contempt sanctions, a trial court must find that the contemnor has the present ability to perform the acts required to purge the contempt.

People v. Kriho, 996 P.2d 158 (Colo. App. 1999). Contempt can be imposed when a juror conceals relevant information about her background; there is no need to show disruptive behavior. It is improper to consider juror's actions during deliberations as support for a contempt citation. *Here:* because jurors were only asked generally about their "hobbies and interests," a juror cannot be faulted for failing to mention her involvement in the Boulder Hemp Initiative Movement. However, other misleading statements — such as failing to disclose an arrest and deferred judgment for possession of LSD — might support contempt. There is no right to a jury in a contempt case when the DA agrees defendant will not receive more than a 6-month sentence.

FORFEITURE: §16-13-301 ET SEQ.

People v. $11,200 U.S. Currency, 2013 CO 64. §16-13-307(1.6) of the public nuisance statute, which is a specialized proceeding governing civil forfeiture actions, provides for the dismissal of a forfeiture claim and the return of seized property only when the underlying criminal charge is dismissed by a trial court; it does not apply where the underlying criminal case is dismissed following a reversal of the related criminal conviction on appeal when a judgment of forfeiture has already entered.

People v. Gentry & Hawk, 107 P.3d 1094 (Colo. App. 2004). State's interest in real property subject to forfeiture relates back to the date of seizure. State's interest is superior to any interests the owner attempts to convey even if the state's title to the property does not vest until after the owner's attempts to convey interests in the property.

People v. $33,212.00, 83 P.3d 1206 (Colo. App. 2003). The word "control," in the forfeiture statute provision that currency could be seized from possession or control of a person engaged in certain drug-related acts constituting a public nuisance, encompasses any currency that is legally the property of the defendant, as well as any currency that the defendant has the authority or the power to manage or direct, even if such currency is not in the defendant's actual physical possession when it is seized; the plain language of the statute reveals the General Assembly's intention that any currency seized from the control of a defendant who engaged in a drug-related public nuisance is presumptively forfeitable. *Here:* currency was in defendant's "control," even though currency was not found in defendant's possession, and therefore state was entitled to rebuttable presumption of forfeiture, where currency was in defendant's safe in his house, and defendant had power to direct or manage currency.

People v. Davenport, 998 P.2d 473 (Colo. App. 2000). Trial court abused its discretion in striking claimant's response merely for the failure to pay the docket fee. §16-13-505(8) requires the court to enter default judgment if the claimant fails to appear *and* fails to file a response.

People v. Grell, 950 P.2d 660 (Colo. App. 1997). The public nuisance forfeiture statute requires "any person" who would contest the forfeiture to first establish her standing as a true owner of the subject property. This question of standing is properly determined before other procedural matters, such as whether the action was timely filed within 60 days. The 60-day filing limit is not jurisdictional.

People v. Cobb, 944 P.2d 574 (Colo. App. 1996). Defendant has no constitutional right to counsel in civil forfeiture proceedings. So there is no effective assistance guarantee; ineffective assistance of counsel is no basis for overturning a judgment of forfeiture.

People v. Ferrel, 929 P.2d 65 (Colo. App. 1996). Forfeiture of item under public nuisance statute would not bar subsequent criminal proceeding; it does not impose "punishment" for purposes of invoking double jeopardy protections.

People v. Frank, 943 P.2d 28 (Colo. App. 1996). Public nuisance forfeiture, brought after criminal conviction, withstands double jeopardy attack. *Here:* forfeiture of $3,750 cash (to prevent its use for drug-related criminal activity) served a remedial purpose.

People ex rel. Sandstrom v. District Court, 884 P.2d 707 (Colo. 1994). Forfeiture action not dependent on conviction in underlying criminal case.

People v. Milton, 732 P.2d 1199 (Colo. 1987). A forfeiture action under §16-13-301 is essentially civil in nature and its primary purpose is to abate public nuisances; nothing in the statutory scheme is so punitive in either purpose or effect as to negate the General Assembly's expressed intent to treat an action to abate a public nuisance as a civil proceeding. Rather, its sanctions are primarily directed toward achieving the salutary goal of preventing and terminating the harmful use of the property.

EXONERATION PERSONS: §13-65-101

Coyle v. State, 2021 COA 54. Exoneration Act did not foreclose state's motion to dismiss compensation petition on basis that petitioner's conviction for attempted child sexual assault had been reversed for reasons unrelated to actual innocence; state did not challenge petitioner's eligibility for compensation, state challenged his eligibility to file a petition in the first place, rules of civil procedure applied to Exoneration Act except as otherwise provided for, and, unlike with a challenge to eligibility for compensation, Exoneration Act did not prescribe a procedure for challenging a petitioner's eligibility to file a petition. A district court may resolve a person's eligibility to file a petition for compensation under Exoneration Act via a motion to dismiss for failure to state a claim. Appellate court reviews de novo a district court's order granting a motion to dismiss.

Abu-Nantambu-El v. People, 2018 COA 30. Petitioner was not eligible under the Compensation for Certain Exonerated Persons statute, §13-65-101, where, although his felony convictions were vacated, his misdemeanor conviction in that same case remained valid. As a preliminary matter, before a petitioner is entitled to compensation, all convictions in petitioner's case, not just his felony ones, must be vacated or reversed.

Nelson v. Colorado, 137 S.Ct. 1249 (2017). The USSC held that Colorado statutes violated due process by requiring defendants whose convictions have been reversed or vacated to prove their innocence by clear and convincing evidence in order to obtain the refund of costs, fees, and restitution paid pursuant to the invalid conviction. Overruled People v. Madden, 2015 CO 69; People v. Nelson, 2015 CO 68.

SEALING OF RECORDS: §24-72-701 ET SEQ.

R.J.Z. v. People, 104 P.3d 278 (Colo. App. 2004). A trial court's decision regarding sealing will not be overturned absent an abuse of discretion. In determining whether defendant's criminal records should be sealed, a trial court must balance competing interests. Factors to be considered in balancing the individual harm against the public interest are: the severity of the offense; the subsequent criminal history of the petitioner; the need for the government agency to retain the records; the strength of the government's case against the petitioner; the petitioner's age and employment history; the specific adverse consequences the petitioner may suffer if the records are not sealed, for example, the social stigma involved in an arrest record; the likelihood of increased police scrutiny in later investigations, the use of records by judges in making decisions regarding sentencing, granting bail, or release pending appeal; and the effect of an arrest record in seeking employment.

People v. Prendergast, 2024 COA 127. §24-72-706(2)(a)(VI)(J), which prohibits the sealing of records for convictions subject to sentencing for an F1, F2, or F3 or a level 1 drug felony pursuant to any section of title 18, prohibits the sealing of records of all F1, F2, and F3s, including those established by statutes outside title 18, and all level 1 drug felonies under title 18. *Here:* defendant's F3 felony securities fraud convictions under §11-51-501(1)(b)-(c) are not eligible for sealing. Defendant's F3 theft conviction is not eligible for sealing either, even though that offense was reclassified to a F4 or F5 after defendant's conviction became final.

People v. C.H., 2023 COA 86. §24-72-706(2)(b) allows a court to seal the records of a misdemeanor offense that would otherwise be ineligible for sealing under §24-72-706(2)(a) if the court finds, by clear and convincing evidence, that defendant's need for sealing is significant and substantial, the passage of time is such that the defendant is no longer a threat to public safety, and disclosure of the record is no longer necessary to protect or inform the public. Because the trial court didn't apply this standard when it denied defendant's motion to seal her criminal records, the COA reverses the order and remands the case for the trial court to consider the request under the applicable standard. §24-72- 705(1)(a)(IV) does not allow a court to seal the records of a successfully completed DJ&S if defendant was convicted of an offense in the same case as the DJ&S. COA affirms the trial court's order to the extent that it denied defendant's request to seal a successfully completed DJ&S entered in the same case as a conviction. Lastly, COA concludes that a successfully completed DJ&S is not a "conviction" under the sealing statutes. §24-72-703(12)(a)(I) — which permits the sealing of "conviction" records only if "every conviction of defendant" in the case may be sealed — doesn't prevent the records of a conviction from potentially being sealed simply because of the existence of a successfully completed DJ&S in the same case.

People v. Di Asio, 2022 COA 140. As a matter of first impression, COA interprets the 2019 amendment to §24-72-703(11), which prohibits requiring a defendant to waive future sealing of records as part of a plea agreement

and holds that it applies prospectively from its effective date of 8/2/19. The amendment does not apply to defendant's 2008 plea and the court's order denying sealing is affirmed.

Huffman v. City & Cty. of Denver, 2020 COA 59. As matter of first impression, the COA held that sealing of records of municipal convictions involving DV is not categorically barred by provision excluding DV convictions from exception to general rule that sealing is precluded by new offenses charged or convicted in the 3 years following final disposition or release of a defendant.

Robertson v. People, 2017 COA 143M. Even if the parties agreed to waive the statutory 10-year waiting period for sealing records in a case that was "completely dismissed" under §24-72-702(1)(a)(I), the court could not enforce that agreement; the parties could not grant the court the authority to seal a criminal record where the statute denies the court that authority.

In re Harte, 2012 COA 183. Successfully completed DJ&S constituted a "conviction" within meaning of statute prohibiting the sealing of records pertaining to a conviction involving alcohol-related driving offense, such that records pertaining to DJ&S could not be sealed.

M.T. v. People, 2012 CO 11. DJ&S constituted a "conviction" within meaning of statute prohibiting the sealing of records pertaining to a conviction involving unlawful sexual behavior, such that records pertaining to deferred judgment could not be sealed.

F.M. v. People, 298 P.3d 991 (Colo. App. 2011). Common law doctrine of claim preclusion (res judicata) bars a second action to seal a criminal record under §24-72-308 where four conditions exist: (1) finality of the first judgment; (2) identity of subject matter; (3) identity of claims for relief; and (4) identity of or privity between parties to the actions.

Clark v. People, 221 P.3d 447 (Colo. App. 2009). Arrest and criminal records pertaining to M1 or M2 traffic offenses may not be sealed under §24-72-308(3). Both "pertaining to" and "relating to" are sweeping terms that should be interpreted broadly. The term "pertaining to" in §24-72-308(3) has broad application. In excepting M1 or M2 traffic offenses from the provisions permitting the sealing of records under §24-72-308(3), the legislature did not intend to exclude from this exception charges that are allegedly "mistaken, erroneous, or otherwise improper." It appears that the purpose of the exception is to avoid inundating the courts with petitions to seal relating to minor traffic offenses. To permit parties to allege that the circumstances of the offense should render the exception inapplicable would require courts to engage in the same time-consuming inquiries the exception seeks to preclude. Nothing in the statute providing for the sealing of records permits partial sealing of records where part of the record pertains to a traffic offense that cannot be sealed and another part pertains to a charge that could otherwise be sealed.

People v. Chamberlin, 74 P.3d 489 (Colo. App. 2003). Under §24-72-308(1)(a)(I), a person in interest may seek to have criminal records sealed in a case in which he was not charged, in any case which was completely dismissed, or in any case in which he was acquitted. *Here*: defendant could not seek to have his criminal record sealed as to a burglary conviction that was dismissed after he served a DJ&S; he had also pled guilty to misdemeanor theft in that case, and that conviction remained in force.

People v. Ward-Garrison, 72 P.3d 423 (Colo. App. 2003). Public policy favors the enforcement of defendant's express waiver of a statutory right to request sealing of the record. *Here*: trial court improperly sealed defendant's record where her plea agreement waived any right to have the record sealed by court order. The 1996 amendments to §24-72-308(1)(a)(II) reflect a broad public policy against the sealing of criminal records in situations involving a favorable disposition to the defendant under a plea agreement.

II. LOOKIT CRIMES SECTION

AGGRAVATED INCEST

People v. Perez-Rodriguez, 2017 COA 77. The aggravated incest statute can be constitutionally applied to step-parent relationships that are based on a common law marriage.

AGGRAVATED MOTOR VEHICLE THEFT (AMVT): §18-4-409

Meads v. People, 78 P.3d 290 (Colo. 2003). Second degree aggravated motor vehicle theft is not a lesser-included offense of theft because the elements of each offense require proof of a fact that the other does not.

ANIMAL CRUELTY: §18-9-202

People v. Gillespie, 2024 COA 98. Interpreting the terms "tortures" and "needlessly kills" in §18-9-202(1.5)(b), the COA holds that the evidence was sufficient to support defendant's conviction for aggravated animal cruelty under the theory that she "[k]nowingly tortured" her dog, but it was insufficient to support defendant's conviction under the theory that she "[k]nowingly . . . needlessly killed" it.

Caswell v. People, 2023 CO 50. CSC holds that the legislature intended to designate the recidivist provision of the cruelty-to-animals statute, §18-9-202(2)(b)(I), a sentence enhancer, which may be proved to a judge by a preponderance of the evidence, not an element of the offense, which must be proved to a jury beyond a reasonable doubt. The court further holds that where, as here, a cruelty-to-animals (second or subsequent offense) case (1) includes notice in the charging document of the prior conviction for cruelty to animals and (2) is treated as a felony throughout the proceedings - including in terms of its prosecution in district court (not county court), the right to a preliminary hearing (if eligible), the number of peremptory challenges, and the number of jurors - the Sixth Amendment doesn't require that the misdemeanor felony transforming fact in subsection (2)(b)(I) be proved to a jury beyond a reasonable doubt. Lastly, the court holds that, even assuming defendant's state constitutional challenge was forfeited and not waived, no plain error occurred.

People v. Harris, 2016 COA 159. Determination of the proper unit of prosecution turns on whether the statute is designed primarily to protect property interests or primarily to protect the animals themselves. Unit of prosecution in an animal cruelty case is "an animal"; a person commits a separate offense for each animal that is mistreated or neglected, deprived of adequate sustenance, or killed. An animal protection agent who is an employee of the Humane Society is not authorized under the Animal Protection Act to obtain a search warrant to investigate the suspected mistreatment of horses.

ARSON: §18-4-102, ET SEQ.

People v. Perkins, 2023 COA 38. The standards set by the National Fire Protection Association (NFPA) and specifically NFPA 921, the Guide for Fire and Explosion Investigations, constitute a reliable basis for an expert's opinion, under *Shreck* and no hearing was required. As a matter of first impression, COA further holds that strict compliance with NFPA 921 is not required for an expert's testimony to be admissible under CRE 702, and that deviations from NFPA 921 go to the weight of the expert's opinion and not the opinion's admissibility.

People v. Vasquez, 2022 COA 100. A defendant can be convicted of fourth degree arson for lighting another person's clothing on fire while that person is wearing the clothing and such an act can serve as the predicate felony for felony murder.

Magana v. People, 2022 CO 25. CSC holds that (1) the unit of prosecution under the first, second, and fourth degree arson statutes is, respectively, each building or occupied structure damaged or destroyed, each person's property (other than a building or occupied structure) damaged or destroyed, and each person endangered; and

(2) the legislature didn't mean for all first degree arsons by fire to be crimes of violence, and therefore fire alone is not a deadly weapon for the purpose of prosecuting first degree arson as a crime of violence.

People v. Strickler, 2022 COA 1. Fire qualified as statutory definition of deadly weapon, as supported crime of violence sentence enhancer in connection with conviction for attempted extreme indifference murder; weapon had been defined as instrument of offensive or defense combat, something used in destroying defeating or physically injuring enemy, and fire fell under "substance" definition of object as deadly weapon, which was matter of definite or known chemical composition. Trial court's failure to merge conviction for attempted criminal mischief into conviction for attempted first degree arson warranted vacatur of conviction for attempted criminal mischief, where attempted criminal mischief was lesser included offense of attempted first degree arson.

People v. Welborne, 2018 COA 127. Under *Page* and *Rock*, criminal mischief is a lesser included offense of first-degree arson where both offenses are based on same conduct. Trial court's erroneous failure to merge convictions for first degree arson and criminal mischief was plain error.

People v. Palmer, 2018 COA 38. Amendment to information, to designate first-degree arson charge as crime of violence, was one of substance and thus could not be made after trial had begun; amendment changed defendant's sentencing range so that a prison sentence was mandatory and maximum and minimum terms of incarceration were higher than before amendment, and amendment changed charge so that it required proof of additional element of use of a deadly weapon.

People v. Sullivan, 53 P.3d 1181 (Colo. App. 2002). Under §18-4-101(3), property is that of another if any person other than defendant has possessory/proprietary interest in such property. *Here:* court rejected defendant's argument that his wife's clothes were jointly-owned marital property and not property of another.

Copeland v. People, 2 P.3d 1283 (Colo. 2000). Knowingly or recklessly mens rea requirement for fourth degree arson applies only to the conduct of starting or maintaining a fire, not to the result of the conduct - endangering property or persons.

People v. Meyer, 952 P.2d 774 (Colo. App. 1997). Arson is not a particularized version of criminal mischief, because the elements of these offenses are distinct.

ASSAULT OFFENSES: §18-3-201, ET SEQ.

People v. Plotner. 2024 COA 77. Section 18-3-203(1)(f) provides that a sentence for second degree assault while lawfully confined/in custody "shall run consecutively with any sentences being served by the offender." The phrase "being served," as used in §18-3-203(1)(f) means that when a defendant is serving multiple consecutive sentences, those sentences must be treated as one single sentence, such that they are both "being served" for the purposes of a later sentence imposed under §18-3-203(1)(f).

People v. Wade, 2024 COA 13. Applying the tests for lesser included offenses articulated in §18-1-408(5)(a), (5)(c), harassment (§18-9-111(1)(a)) is not a lesser included offense of second-degree assault (§18-3-203(1)(i)), or third-degree assault (§18-3-204(1)(a)). Third degree assault is a lesser included offense of child abuse (§18-6-401(1)(a), (7)(a)(V)). *Here:* because defendant's convictions for third-degree assault and child abuse arise from two separate acts, the division concludes that none of the convictions merge.

People v. Cline, 2022 COA 135. COA clarifies that defendant who has been charged with assaulting a police officer must make the showing required by People v. Spykstra, 234 P.3d 662 (Colo. 2010), when requesting an in camera review of the police officer's subpoenaed personnel files. Because defendant failed to make the requisite showing, the trial court need not have conducted an in-camera review before quashing a subpoena for the file. COA also declines to follow the People v. Zukowski, 260 P.3d 339 (Colo. App. 2010) interpretation of

the term "unlawful entry" in the context of the force-against-intruders statute, §18-1-704.5(2). Instead, this division followed the CSC's definition as set forth in People v. McNeese, 892 P.2d 304 (Colo. 1995). Because no credible evidence supported an unlawful entry under the *McNeese* definition, the division rejected the defendant's contention that a force-against-intruders instruction should have been given to the jury.

Plemmons v. People, 2022 CO 45. Defendant spit on a police officer. CSC holds that "harm" as used in §18-1-203(1)(f.5)(1) and (h) encompasses more than just physical harm-statute criminalizes as 2nd degree assault defendant's conduct exposing an officer to bodily fluids with the intent to cause prolonged psychological or emotional harm that stems from the possibility that the officer has been infected by or could become a vector for disease. Because the jury instruction related to the charges under §18-3-203(1)(h) didn't confine the jurors' deliberation to this definition of "harm," the jury may have relied on considerations outside the scope of the proscribed conduct. Therefore, the instructional error was not harmless beyond a reasonable doubt and defendant is entitled to a new trial on those two charges. Defendant's conviction under §18-3-203(1)(f.5) is affirmed, her two convictions under §18-3-203(1)(h) are vacated, and the case is remanded for a new trial on those charges.

People v. Rodriguez, 2021 COA 38. Because victim's pregnancy and defendant's knowledge of it increased the penalty beyond the statutory maximum (sentence enhancer), those facts had to be found by a jury based on proof beyond a reasonable doubt.

People v. Snider, 2021 COA 19. Resisting arrest under §18-8-103(1)(a), is a lesser included offense of second degree assault on a peace officer under §18-3-203(1)(c).

People v. Lee, 2020 CO 81. Under prevailing Colorado equal protection principles, defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon and strangulation subsections of §18-3-203. Because the deadly weapon subsection punishes that conduct more harshly than the strangulation subsection, the conduct must be charged under the strangulation subsection.

People v. Slaughter, 2019 COA 27. Charging defendant with second degree assault by strangulation under §18-3-203(1)(i) with COV sentence enhancer under §18-1.3-406(2)(a)(I)(A) violates equal protection.

People v. Denhartog, 2019 COA 23. During traffic stop, defendant suddenly and without warning backed his car into police officer's motorcycle, injuring officer. He was convicted of first degree assault of a peace officer, which requires proof that defendant "threatened" peace officer with deadly weapon. On appeal, defendant argued evidence insufficient because prosecution failed to prove he "threatened" the officer. COA agreed, concluding that "threaten" means to express a purpose or intent to cause harm or injury and the act of suddenly hitting the officer's motorcycle, without more, did not constitute a threat. First degree assault of peace officer charge was vacated.

People v. Margerum, 2018 COA 52. Single physical act supporting an assault conviction, with no additional physical action or verbal threat, can be sufficient to also support menacing conviction.

People v. Griego, 2018 CO 5. Attempted reckless manslaughter and attempted second degree assault, which are both crimes against persons, require a showing of a risk to an actual, discernible person and a risk to the general public is not sufficient. *Here:* defendant had 7 prior DUIs and drove drunk and in an extremely reckless manner on a two-lane road at approximately 9pm. Because officer testified defendant's driving did not jeopardize any oncoming traffic, no one was in any imminent danger, and oncoming traffic was 100-150 feet away, there were insufficient facts to support guilty verdicts for attempted reckless manslaughter/attempted second degree assault.

People v. Roman, 2017 CO 70. There was no reasonable probability that trial court, in declining to give defendant's requested instruction on reckless second degree assault, contributed to his conviction of first degree

assault, and any error was harmless, in light of both the jury's rejection of the lesser included offense of which it had the option to convict and defendant's testimony and theory of the case instruction, that unequivocally and unwavering asserted that he never undertook any voluntary action to either threaten or stab the victim.

People v. Anderson, 2016 COA 47, rev'd other grounds, 2019 CO 34. §18-3-202 proscribes a single offense of first-degree assault and subsections (1)(a),(1)(c), and (1)(e) are alternative means of committing that offense. *Here*: prosecutor conceded that all of defendant's actions constituted one continuous course of conduct that factually supported all the charges; so 2 or 3 convictions for first-degree assault must merge.

People v. Miranda, 2014 COA 102. Even though one victim recanted at trial and suggested that defendant did not try to assault her, evidence was sufficient to support an attempt charge.

People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011). Before an object can be found to be a deadly weapon as defined in §18-1-901(3)(e), it must have been "used in connection with assaultive conduct directed toward an intended opponent or adversary." *Here:* defendant could not be convicted of second degree assault (recklessly causing SBI by means of a deadly weapon) or third degree assault (negligently causing BI by means of a deadly weapon), where at conclusion of long automobile chase with police, he crashed his vehicle into another person's car, injuring the other car's driver and his own passenger.

People v. Daniels, 240 P.3d 409 (Colo. App. 2009). Any break or fracture, regardless of severity, is sufficient to establish SBI. *Here:* victim's broken rib satisfied the "breaks, fractures or burns of the second or third degree" part of the SBI definition. COA concluded that the phrase "of the second or third degree" modified only the word "burns," and prosecution was not required to prove that a bone fracture was "of the second or third degree."

People v. Benavidez, 222 P.3d 391 (Colo. App. 2009). Second degree assault on a peace officer while lawfully confined or in custody, §18-3-203(1)(f), requires that the sentence be served in DOC and that it run "consecutively with any sentences being served by the offender." Phrase "any sentences being served by the offender" does not mean "any sentences being served . . . *at the time of the assault*." *Here*: because defendant was in custody awaiting disposition of other charges when he assaulted officer, sentencing court was required to make his sentence for second degree assault consecutive to sentences he received upon conviction for other charges.

People v. Baker, 178 P.3d 1225 (Colo. App. 2007). Conviction under §18-3-202(1)(c) for first-degree extreme-indifference assault does not require People prove "universal malice," unlike a conviction for first-degree extreme-indifference murder. Where defendant's conduct is directed against a single individual, he may still be convicted of extreme-indifference assault. *Here:* evidence that victim was choked both manually and with a rope, lost consciousness at least once, and had bruises on her neck and around her eyes and hemorrhaging on the white part of her eyes, as well as expert's opinion that she suffered SBI, was sufficient to establish victim suffered SBI.

People v. Grant, 174 P.3d 798 (Colo. App. 2007). Even in case where defendant cannot claim he was insane due to self-induced intoxication, if evidence shows his level of intoxication led him to believe that he was killing or assaulting demons, dragons, or the devil—as opposed to killing or assaulting humans—then the evidence is insufficient.

People v. Torres, 141 P.3D 931 (Colo. App. 2006). Third degree assault is not a COV; it is an extraordinary risk misdemeanor; presumptive maximum is increased to 24 months. §18-1.3-501(3).

People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006). To be deemed "in custody" for second degree assault against a peace officer, a person need not be subject to a formal arrest. *Here*: it is irrelevant to an assessment of sufficiency of the evidence that trial court, in addressing the suppression motion, made an alternative finding

that the initial portion of interaction between defendant and officers was a consensual encounter and defendant was not in custody.

People v. Delgado-Elizarras, 131 P.3d 1110 (Colo. App. 2005). Reckless endangerment is not a lesser included offense of first degree assault on a peace officer because reckless endangerment requires proof that the defendant engaged in conduct that created a substantial risk of SBI while the offense of first degree assault on a peace officer does not.

People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005). Reckless endangerment is a lesser-included offense of first-degree assault-intent to cause SBI.

People v. Delci, 109 P.3d 1035 (Colo. App. 2004). Where a conviction of first-degree burglary is predicated on second degree assault, assault conviction merges into the burglary conviction. That owner of dwelling is named in the information and is different from victim of the assault does not establish separate victims so as to avoid application of the merger doctrine.

People v. Montoya, 104 P.3d 303 (Colo. App. 2004). §18-3-203(1)(c), which defines second-degree assault on a firefighter, applies to protect a firefighter who is acting solely in his capacity as a paramedic.

People v. Petschow, 119 P.3d 495 (Colo. App. 2004). Trial court did not err in refusing to merge convictions for attempted first degree assault and attempted first degree murder of same victim, since the use of a deadly weapon is an element of attempted first degree assault but not attempted first degree murder.

People v. Goldfuss, 98 P.3d 935 (Colo. App. 2004). The definition of "bodily injury" set forth in the third-degree assault statute, which includes "causing any impairment of mental condition," is not unconstitutionally vague. The definition of "bodily injury" is not void for vagueness because it can be interpreted to exclude trifling injuries or minor effects such as fright or shock.

People v. Summitt, 104 P.3d 232 (Colo. App. 2004), rev'd other grounds, 132 P.3d 320 (Colo. 2006). Second degree assault statute is not unconstitutionally vague on its face or as applied to defendant, nor does it deny defendant equal protection. SBI definition is not vague on its face, and as applied to defendant, the meaning is clear. Concepts of SBI and BI are rationally distinguished.

People v. Rawson, 97 P.3d 315 (Colo. App. 2004). Evidence was sufficient to support 2 assault on a peace officer while in custody convictions. Crime required that defendant be in "custody" and that he "knowingly and violently applied physical force against the officer." Evidence that officers had to use stop sticks to stop defendant's car, that officer approaching defendant's car drew his weapon and ordered defendant to turn around with his hand on the back of his head because he was under arrest, and that officer grabbed defendant's arm and repeated numerous times that he was under arrest was sufficient to show that the officers applied a sufficient level of physical control so as to reasonably ensure that defendant did not leave, and therefore was in custody. Defendant's corroborated admissions of assaulting the officers established that he knowingly applied violent physical force against the officers.

People v. Miller, 97 P.3d 171 (Colo. App. 2003). Even though plain language of statute does not make clear that an individual under arrest in a police vehicle is a person "lawfully confined in a detention facility," legislative history of §18-3-203(1)(f.5)(I) makes clear that it does; legislative intent was that the statute apply to an individual lawfully confined in a vehicle who is lawfully held in custody and whose victim is law enforcement officer.

People v. Saleh, 45 P.3d 1272 (Colo. 2002). An object used in a manner capable of causing death or SBI is a deadly weapon under §18-1-901(3)(e). Objects which are not inherently deadly, such as feet/hands, can become deadly weapons when used to start an unbroken, foreseeable chain of events capable of producing SBI or death.

Here: defendant kicked victim down a flight of steps, causing SBI.

People v. Dotson, 55 P.3d 175 (Colo. App. 2002). Second-degree assault is not a lesser-included offense of aggravated robbery because it requires proof of actual bodily injury and specific intent, while aggravated robbery does not.

People v. Skinner, 53 P.3d 720 (Colo. App. 2002). First-degree assault is not a lesser-included offense of attempted first-degree murder.

People v. Ellis, 30 P.3d 774 (Colo. App. 2001). In extreme indifference assault case, evidence that defendant fired a gun through a closed front door, knowing that victims were behind the door but also knowing that as many as 35 adults and children were in vicinity, was sufficient to establish circumstances manifesting extreme indifference to the value of human life.

People v. Laurson, 15 P.3d 791 (Colo. App. 2000). Attempted second-degree murder is not a lesser-included offense of first-degree assault, because proof of first-degree assault does not prove "awareness that death is practically certain to result."

People v. Martinez, 1 P.3d 192 (Colo. App. 2000). Because the elements required to convict defendant as a complicitor to an assault are not identical to elements of first-degree assault as a principal, convictions did not merge, and consecutive sentencing was mandated under COV statute.

People v. Whatley, 10 P.3d 668 (Colo. App. 2000). Second-degree assault on a peace officer is rationally distinguishable from resisting arrest and third-degree assault and does not violate equal protection.

People v. Webster, 987 P.2d 836 (Colo. App. 1998). First-degree assault is not a lesser-included offense of attempted first-degree murder, so defendant can sustain separate convictions, and maybe even consecutive sentences, for both offenses.

People v. Marquez-Lopez, 952 P.2d 788 (Colo. App. 1997). If an individual is charged with assaulting a police officer while in lawful custody, it is reversible error to instruct that a "reasonable suspicion" standard applies; by statute, the standard is "probable cause." Also, courts should give definition of "gravely disabled" contained in §27-10-102(5)(a).

People v. Dixon, 950 P.2d 686 (Colo. App. 1997). Under the elements test, obstructing a peace officer is distinct from third-degree assault.

AT-RISK OFFENSES: §18-6.5-103

Thomas v. People, 2021 CO 84. Even if bodily injury to an at-risk person was not a lesser included offense of third-degree assault, defendant's convictions for bodily injury to an at-risk person and third-degree assault, with at-risk sentence enhancer, were nevertheless required to merge pursuant to rule of lenity, where convictions were based on single criminal act, namely grabbing victim by neck and slamming her against a car, against single at-risk victim. Conviction for bodily injury to an at-risk person was the conviction that should remain, after determination that rule of lenity required merger of defendant's convictions for that offense and the offense of third-degree assault with at-risk sentence enhancer, even though conviction for bodily injury required the less culpable mens rea, where that conviction was the only one that qualified as felony and permitted a prison sentence without the aid of sentence enhancer.

People In Int. of B.D., 2020 CO 87. At-risk victim statute, imposing greater penalties when a theft happens in presence of an at-risk victim, is a sentence enhancer rather than an element of offense.

People v. Nardine, 2016 COA 85. A defendant need not know that the victim is "at-risk" in order to be convicted of unlawful sexual contact on an at-risk juvenile. Classifications of felony unlawful sexual contact on

an at-risk juvenile and misdemeanor unlawful sexual conduct on non-at-risk victims were based on differences that were real in fact and reasonably related to the purposes of statutes, and thus felony punishment for at-risk juvenile offense that was harsher than the same conduct as described in misdemeanor statute did not violate equal protection; legislature identified victim's status as the differentiating factor to support a more severe penalty because at-risk victims were more vulnerable to and disproportionately damaged by crime than non-at-risk victims, were less able to protect themselves against offenders, and were far more susceptible than the general population to the adverse long-term effects of crimes committed against them.

People v. Lovato, 179 P.3d 208 (Colo. App. 2007). Negligent bodily injury to an at-risk adult, §18-6.5-103(2), is a separate substantive offense, not a sentence enhancer. Robbery of an at-risk adult merges with a conviction for aggravated robbery. Based on the reasoning of *McKinney*, robbery of an at-risk adult is a penalty enhancer, not a substantive element, and cannot be considered when applying the strict elements test. Because simple robbery is a lesser included offense of aggravated robbery, robbery of an at-risk adult is a lesser included offense of aggravated robbery.

People v. McKinney, 99 P.3d 1038 (Colo. 2004). Statute providing for more severe punishment for theft against at-risk adults as compared to theft against other victims does not apply unless a defendant's conduct constitutes theft under the general theft statute. Theft from at-risk adult is a penalty-enhanced form of general theft and not a separate offense; at-risk statute specifically provides that its purpose is to prescribe greater penalties for theft against at-risk adult and does not define crime and list its elements but, rather, refers to general theft statute's definition of the crime, and, proof of factors in at-risk statute need not be met for a defendant to be found guilty of general theft, but a jury finding of the additional at-risk factors enhances the penalty for the general theft crime. Discovery tolling provision of statute of limitations, which tolls running of limitation period until victim discovers the crime, applies to theft against at-risk adults; discovery tolling provision clearly applies to general theft, and theft from at-risk adult is penalty-enhanced form of general theft and not separate offense.

People v. Klausner, 74 P.3d 421 (Colo. App. 2003). Evidence was sufficient to support conclusion that victim was "physically helpless," as necessary to support conviction for first degree sexual assault on an at-risk adult; victim, who was elderly and suffered from Alzheimer's disease, was virtually unable to converse and required total care, she needed assistance in everything she did, she was physically incapable of protecting herself against attack, and she was in locked facility for her own protection, because she would otherwise wander away.

ATTEMPT TO INFLUENCE PUBLIC SERVANT: §18-8-306

People v. Hupke, 2024 COA 73. As a matter of first impression, the phrase "by means of deceit" in the statute attempt to influence a public servant, §18-8-306, does not require defendant to commit the deception themself, but instead, requires defendant use some sort of plan or method to deceive the public servant. *Here:* evidence that defendant asked his mother to lie to his parole officer in an effort to persuade the parole officer to lift a hold was sufficient to sustain the conviction for attempt to influence a public servant. *[Cert Accepted (12/23/24) in case #24SC513: (1) Whether the court of appeals incorrectly held that a violation of §18-8-306, C.R.S. (2024) can be accomplished through a third party's deceit (SAAG William Kozeliski)]*

People v. Tee, 2018 COA 84. Insufficient evidence supported one of the attempt to influence a public servant counts because defendant merely filled out a computer form; no evidence showed he specifically intended to influence any public employee who may have reviewed it.

People v. Sena, 2016 COA 161. Defendant was properly convicted of attempt to influence a public servant where he provided a false name to police officers at a traffic stop with the intent to avoid arrest on an outstanding warrant.

People v. Riley, 2015 COA 152. Term "attempt" in attempt to influence a public servant maintains its common meaning; courts should not provide definitional instructions based on the inchoate crime of attempt. Statutory criminal attempt, requiring proof of a substantial step toward the commission of an underlying offense, did not apply to offense of attempt to influence a public servant; there was no criminal offense of simply influencing a public servant.

People v. Beck, 187 P.3d 1125 (Colo. App. 2008). Attempt-to-influence-a-public- servant prohibits a person from attempting to influence a public servant using deceit with the intent of altering the public servant's action; actual influence is not required. *Here:* providing false information to a traffic officer amounts to an attempt by defendant to influence officer's actions.

People v. Taylor, 159 P.3d 730 (Colo. App. 2006). Sufficient evidence for attempt to influence a public servant where evidence showed that defendant caused a false instrument – a useful public service form – to be delivered to the caseworker overseeing the conditions of his DJ&S; there is no requirement that the evidence demonstrate defendant prepared the false instruments or that she mailed the forms to the caseworker or directed someone to mail them.

People v. Schupper, 140 P.3d 293 (Colo. App. 2006). By signing fraudulent application for court-appointed counsel, defendant attempted to influence a public servant by means of deceit and offered a false instrument for recording.

ATTEMPT GENERALLY: §18-2-101 [13]

People v. Johnson, 2024 CO 32. The CSC rejects the COA reading of the word "attempt" in the enticement of a child statute, §18-3-305(1), as referring to the inchoate crime of "attempt" defined in §18-2-101(1). Instead, trial courts should interpret "attempt" under §18-3-305(1) in accordance with its plain meaning. *Here:* defendant uttered sexually tinged words to a child standing on a sidewalk while defendant was in a vehicle; defendant's words and actions, taken together and viewed in the light most favorable to the prosecution, constituted sufficient evidence for a reasonable person to conclude that defendant attempted to invite or persuade the victim to enter his vehicle with the intent to commit unlawful sexual contact upon her.

People v. Snider, 2021 COA 19. When the elements of a crime include the term "attempt," the definition of the inchoate offense of criminal attempt may not apply.

People v. Griego, 2018 CO 5. The inchoate offense of criminal attempt is established when a person, "acting with the kind of culpability otherwise required for commission of an offense, ... engages in conduct constituting a substantial step toward the commission of the offense." "A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense."

People v. Duran, 272 P.3d 1084 (Colo. App. 2011). Impossibility is not a defense to an attempt crime.

People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010). A "substantial step," for purposes of attempt, requires an overt act beyond mere preparation; it need not constitute the last proximate act necessary to completion of the substantive crime.

People v. Buerge, 240 P.3d 363 (Colo. App. 2009). In attempt crimes, there may be no victim because defendant has only taken a substantial step toward, but has not completed, the crime.

[13] To see attempt cases for a particular crime, please see the Lookit Crime Section.

People v. Lehnert, 163 P.3d 1111 (Colo. 2007). Attempt statute defines a "substantial step" as "any conduct … which is strongly corroborative of the firmness of the actor's purpose." It need not further enumerate the particular circumstances that satisfy that definition.

People v. Thomas, 729 P.2d 972 (Colo. 1986). In order to be guilty of criminal attempt, defendant must act with the kind of culpability otherwise required for commission of the underlying offense and must engage in the conduct which constitutes the substantial step with the further intent to perform acts which, if completed, would constitute the underlying offense. Intoxication not a defense to attempt crime.

BURGLARY: §18-4-201, ET SEQ.

People v. Miller, 2024 COA 66. This case was previously published (2024 COA 45) to hold that a person "contacts" a victim within the meaning of the stalking statute, §18-3-602(1)(c), by phoning the victim, even if the victim does not answer the calls. This new opinion, following a petition for rehearing after the CSC issued Whiteaker v People, 2024 CO 25, also holds that first-degree criminal trespass is a lesser included offense of first-degree burglary.

People v. Wright, 2021 COA 106. Harassment is a "crime against another person," as predicate offense for second degree burglary, even though crime of harassment is not statutorily categorized as an "offense against the person"; statute criminalizing harassment requires, as an essential element, subjecting another person to physical contact, and there is no factual scenario that would constitute harassment that would not also constitute a crime against another person. *Here:* evidence established defendant's specific intent to commit harassment, as predicate crime against another person, in prosecution for second degree burglary; victim testified that when he opened his apartment door to tell defendant, who was searching for his daughter, to leave, defendant immediately attempted to "bum rush" him and tried to grab him by his throat, which a reasonable jury could infer involved forcibly shoving him or striking him on her way into his apartment, and victim further testified that immediately after defendant had forcibly entered his apartment, a lengthy physical altercation ensued. Disagrees with People v. Poindexter, 2013 COA 93.

People v. Session, 2020 COA 158. Second-degree burglary and attempted second-degree burglary are not per se grave or serious crimes when conducting an abbreviated proportionality review.

People v. Joosten, 2018 COA 115. Evidence reflected that defendant unlawfully entered into victim's apartment because he did not have a possessory interest since he had moved out and kicked down the door to gain entry.

People v. Murray, 2018 COA 102. Despite evidence defendant stayed at his ex-girlfriend's residence in the past, absent landlord-tenant agreement, he was not a tenant with license to enter/remain in her residence; she could revoke permission for him to be on premises at any time.

People v. Rock, 2017 CO 84. Second-degree trespass is a lesser included offense of second-degree burglary.

People v. Vigil, 2015 COA 88. Where prosecution aggregated the entries into several buildings on the same property into a single transaction and presented a single theory of burglary, jurors were not required to unanimously agree on which building was burglarized; they needed to agree only that defendant burglarized a building on the charged date at the charged place. Prosecutor did not need to elect among the acts, and trial court did not need to give modified unanimity instruction.

People v. Nerud, 2015 COA 27. The term "other apparatus or equipment" in third degree burglary statute is not facially vague because under doctrine of ejusdem generis the phrase is limited to containers with same characteristics as the other items listed in the statute. COA rejected the argument that the doctrine does not apply to facial vagueness challenges. *Here:* statute was not vague as applied because the lockers were used to safeguard personal items, cash, and valuables. Trial court correctly defined "other apparatus or equipment when

it instructed: other apparatus or equipment regarding 3rd degree burglary may include a gym locker if that locker is locked or secured or has other readily ascertainable features to suggest that the locker is employed for safekeeping of money or valuables.

People v. Poindexter, 2013 COA 93. Determining whether a particular crime qualifies as predicate for second-degree burglary – whether the crime is "against another person" – involves a case-by-case examination of the underlying elements of the offense as charged and proved; for an offense to qualify as a crime against another person, its proof must show the use or threatened use of force or violence against another person; a person commits obstructing a peace officer when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority. *Here:* defendant was convicted of second-degree burglary for an unlawful entry into an apartment building with intent to commit obstruction of a peace officer. Where defendant obstructs a peace officer by breaking into an apartment building and hiding therein but does not use or threaten the use of force or violence against any officer, the crime of obstructing a peace officer is not a crime against "another person," and does not qualify as a predicate for second-degree burglary of the apartment building.

People v. Ridgeway, 2013 COA 17. Elemental instruction for possession of burglary tools must include the mental requirement that defendant intended to use the tools in the commission of a burglary, and not for some other innocent use.

Lucero v. People, 2012 CO 7; Montez v. People, 2012 CO 6. First degree burglary may be supported with proof that burglar is or becomes "armed with … a deadly weapon" during unlawful entry, while remaining on the burgled premises, or during immediate flight from the burglary. Because firearms are not per se deadly weapons, burglar who steals a gun during a burglary does not, without more, become armed with a deadly weapon for purposes of first-degree burglary. Where the evidence of first degree burglary is insufficient only because defendant was not armed with a deadly weapon during the crime, COA should enter conviction for second degree burglary.

People v. Wartena, 2012 COA 12. §18-4-203(1) permits the intent element of second degree burglary to be formed while remaining unlawfully inside a building even if that intent was not present at entry.

People v. Morales, 2012 COA 2. Dwelling as defined in §18-1-901(3)(g), encompasses homes under renovation that are intended to be used for future habitation.

Oram v. People, 255 P.3d 1032 (Colo. 2011); Weinstein v. People, 255 P.3d 1057 (Colo. 2011). Evidence was sufficient to sustain burglary conviction where defendant's ruse to gain entry into victims' home demonstrated that he knew his entry was unlawful. Knowingly mental state applies to each element so prosecution must prove defendant knew his entry was unlawful. Under §18-1-505(1), consent to an entry must come from the named victim to relieve defendant from criminal liability for burglary. Common law bonding agent's privilege to enter the principal's residence was abrogated by statute and does not exist in Colorado.

People v. Fuentes, 258 P.3d 320 (Colo. App. 2011). Double jeopardy precludes entering 2 convictions for first degree burglary where there was a single unlawful entry culminating in two incidents of assault. Gravamen of burglary offenses is the crime against the property-the unlawful entry. There is no meaningful difference between "in the immediate flight," as used in first degree burglary, and "in the course of immediate flight" used in felony murder. Immediate flight standard of first degree burglary requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building/occupied structure. A person commits an assault in immediate flight from a building where assault is part of a continuous integrated attempt

to get away from the building. Concept of immediate flight is broad enough to encompass acts performed after intervening events temporarily interrupt flight.

People v. Medina, 260 P.3d 42 (Colo. App. 2010). Pattern burglary instruction covering a building or occupied structure was not required to also specify that the building must be a dwelling; whether that building is also a dwelling is relevant only to the potential penalty classification of second degree burglary.

People v. Mondragon, 217 P.3d 936 (Colo. App. 2009). Sufficient evidence that defendant's entry into victim's apartment was unlawful, despite evidence that resident of victim's apartment building allowed defendant to enter building, because victim had a possessory interest in his apartment and defendant entered apartment without permission; sufficient evidence to support burglary.

People v. Gonyea, 195 P.3d 1171 (Colo. App. 2008). Given the evidentiary dispute concerning whether there was an entry into the premises, an instruction informing jury that the intrusion of any body part into the prohibited premises is sufficient to constitute entry, was appropriate.; the instruction was a correct statement of the law.

Winter v. People, 126 P.3d 192 (Colo. 2006). The class of items listed in third degree burglary statute are almost always used to contain money or valuables exclusively. Whether any given container falls under this statute depends on whether its design falls within the class of items listed and whether that design or use is evident. Unlocked, unsecured employee lockers used to hold personal property, rather than money and valuables exclusively, were not among the class of items in third degree burglary statute.

People v. Delci, 109 P.3d 1035 (Colo. App. 2004). Where a conviction of first-degree burglary is predicated on second degree assault, assault conviction merges into the burglary conviction. That owner of dwelling is named in the information and is different from victim of the assault does not establish separate victims so as to avoid application of the merger doctrine.

People v. Larkins, 109 P.3d 1003 (Colo. App. 2004). *Cooper* holding that for burglary, intent to commit underlying offense must coexist with point of unlawful entry, was legislatively overruled for burglaries committed after 7/1/99. For burglaries committed after 7/1/99, involving unlawful entry, defendant must have formed intent to commit underlying offense at the time of unlawful entry, or after unlawful entry but while still unlawfully remaining.

People v. Ford, 100 P.3d 540 (Colo. App. 2004). Under §13-90-107(1)(a), the marital privilege is unavailable in prosecution for F3 and defendant charged with second-degree burglary of a dwelling cannot invoke privilege. *Here:* defendant argued that "dwelling" is an enhancer, not an element, and his offense should be considered a F4 for purpose of the privilege. Distinction between sentence enhancer and an element is irrelevant when the factor is specifically alleged in charging document.

People v. White, 64 P.3d 864 (Colo. App. 2002). Defendant may not be convicted of both felony murder and second-degree burglary because the burglary offense, as a predicate felony, is a lesser-included offense of felony murder.

People v. Waddell, 24 P.3d 3 (Colo. App. 2000). Homeowners let handyman defendant into their homes' crawl spaces to make repairs, and he instead bored holes into bathroom walls and installed surveillance devices. There was insufficient evidence of unlawful entry/remaining unlawfully element because (1) defendant entered the houses lawfully, and (2) homeowners never withdrew that permission.

People v. Ramirez, 18 P.3d 822 (Colo. App. 2000). Pattern burglary jury instruction, COLJI 14:01, properly instructs jury on the elements of intent to commit a crime and trespass; court distinguished Cooper v. People,

973 P.2d 1234 (Colo. 1999) where the trial court instructed jury that the intent to commit a crime could be formed either before or after entry into the dwelling.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). There was sufficient evidence to identify defendant as the burglar of victim's home: his fingerprints on glass and frame of victim's broken basement window were probably placed at the time of crime, and items used in the burglary/murder were found in a culvert midway between victim's home and nearby home of defendant's grandparents where he had frequently stayed. Evidence was also sufficient to establish his intent to steal because the breaking and entering occurred at night, and there was also evidence that burglar or burglars searched the house for things of value.

People v. Bielecki, 964 P.2d 598 (Colo. App. 1998). Second-degree burglary and third-degree assault are lesser-included offenses of first-degree burglary, so those convictions merge.

CARELESS DRIVING: §42-4-1402(1)

People v. Tanner, 2023 COA 97. The unit of prosecution under the careless driving statute, §42-4-1402(1), is the act of driving in the manner described and not the number of victims harmed by that conduct. Because the trial court declined to merge defendant's careless driving convictions based on the harm caused to each victim, the judgment is reversed, and the case remanded to merge the two careless driving convictions and vacate the sentence for the merged conviction. As the special concurrence points out, however, inadequacies in the careless driving statute, as it now stands, preclude judicial discretion to impose consecutive sentences when more than one victim is harmed by the defendant's conduct. Thus, the special concurrence urges the legislature to consider amending §42-4-1402(2)(c) to allow for the possibility of consecutive sentences that recognize the loss of each victim under §18-1-408(3).

CHILD ABUSE: §18-6-401

People v. Jones, 2020 CO 45. A "person," as that term is used in child abuse statute defining a child to be a "person" under the age of 16, does not include a fetus who suffers injuries in utero but who is later born alive. Overruled People v. Lage, 232 P.3d 138 (Colo. App. 2009).

Friend v. People, 2018 CO 90. §18-6-401 creates one crime of child abuse that can be committed in alternative ways. Under §18-6-401(7), when a person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is in a position of trust, that person is to be convicted of child abuse murder under §18-3-102(1)(f) and not child abuse resulting in death under §18-6-401. *Here:* prosecution did not prove separate counts of child abuse, and each of the child abuse convictions must merge into one conviction for child abuse resulting in death.

People v. Weeks, 2015 COA 77. Defendant's conviction/sentence for child abuse was upheld because, even though child abuse statute under which defendant was tried was ambiguous, the last phrase "ultimately results in the death of a child or serious bodily injury to a child" in §18-6-401(1)(a) applies to only the last enumerated pattern of abuse ("an accumulation of injuries"). The other enumerated patterns of abuse do not require a showing that they resulted in the victim's death or SBI as well.

People v. Stroud, 2014 COA 58. Subdural hematomas, retinal hemorrhaging, broken arms, and rib fractures are signs of shaken baby syndrome.

People v. Becker, 2014 COA 36. In child abuse – second or subsequent offense, the prior conviction is a sentence enhancer and not an element; it is prejudicial to inform jury of existence of old conviction.

People v. Casias, 2012 COA 117. To prove requisite mental state for child abuse, prosecution must prove that defendant was aware of the abusive nature of his conduct or of the circumstances in which he committed an

abusive act; or that he was aware of and consciously chose to disregard a substantial and unjustifiable risk that his conduct could result in injury.

People v. Ortega, 266 P.3d 424 (Colo. App. 2011). Guilty plea to child abuse-SBI §18-6-401(7)(a)(III)-an extraordinary risk offense §18-1.3-401(10)(b)(X)-requiring an aggravated-range sentence §18-6-401(7.5), §18-1.3-401(8)(d)(I)-automatically increases the presumptive range without proof of any additional facts; *Apprendi/Blakely* do not apply.

People v. Rector, 248 P.3d 1196 (Colo. 2011). Trial court was under no obligation to conduct a hearing or make specific findings under *Shreck* regarding the reliability/admissibility of the scientific principles employed by expert witness, pediatrician who specialized in child abuse, in prosecution for felony child abuse, where defendant chose to fashion request for a *Shreck* hearing generally and only challenged expert's testimony with respect to shaken-baby syndrome, and defendant did not renew her motion or file any new request for *Shreck* hearing prior to trial. Defendant waived appellate review issue of whether expert's testimony regarding his medical diagnosis of child physical abuse to victim usurped the jury's role such that jury instruction differentiating medical and legal child abuse was necessary, where defendant failed to object at trial and did not request a jury instruction on the different definitions of medical and legal child abuse. Testimony of State's expert witness, pediatrician who specialized in child abuse, regarding his medical diagnosis of child physical abuse to victim did not usurp jury's role, and trial court's failure to administer jury instruction differentiating medical/legal child abuse was not plain error; distinction between medical/legal child abuse was highlighted by defense counsel both during cross-examination and closing arguments, and jury was properly instructed on the law and its ability to accept/reject expert testimony.

People v. Laurent, 194 P.3d 1053 (Colo. App. 2008). Offense of child abuse by manufacturing methamphetamine in the presence of a child, §18-6-401(1)(c), is not constitutionally overbroad. Offense of manufacturing methamphetamine (§18-18-405(1)(a)) is a lesser included offense of child abuse by manufacturing methamphetamine in the presence of a child (§18-6-401(1)(c)).

People v. Sherrod, 204 P.3d 472 (Colo. App. 2007), rev'd other grounds, 204 P.3d 466 (Colo. 2009). An injury to a child's life or health, constituting child abuse, can be based on damage to child's mental or emotional well-being.

People v. Ortiz, 155 P.3d 532 (Colo. App. 2006). Although defendant claimed that he could not be convicted of child abuse because he did not recklessly place victim's son in a situation that posed a threat of injury to the child's life or health, by abandoning a 4-year-old in a vehicle in the middle of the night, with the key still in the ignition, defendant exposed the child to numerous perils.

People v. Weinreich, 119 P.3d 1073 (Colo. 2005). Jury instruction should substantially track the language of the statute describing the crime; a material deviation from the statute can result in reversible plain error, depending on the facts of the case. *Here*: instruction on child abuse resulting in death that tracked an obsolete version of the statute was plain, reversible error. "May have endangered" language exposed defendant to the risk of conviction for an act that jury may have perceived as endangering child's life or health but which did not cause his daughter's death.

People v. Dunaway, 88 P.3d 619 (Colo. 2004). In order to obtain a conviction for F3 child abuse resulting in SBI, prosecution must establish a causal connection between the three listed forms of conduct in §18-6-401(1)(a) and the resulting SBI.

People v. Pineda, 40 P.3d 60 (Colo. App. 2001). Child abuse statute could constitutionally be applied to stepmother who was present in family home when the abuse occurred, who took no steps to prevent the abuse,

and who actively participated in husband's cover-up. The law imposed an affirmative duty on this defendant to protect these children.

People v. Deskins, 927 P.2d 368 (Colo. 1996). Conscious disregard of risk to others does not require that defendant be aware that children are present. Here: defendant did not need to know there were children in the car that he hit; it was sufficient that there might have been children in any of the cars on the road that night; nor was defendant relieved of criminal liability because he was unaware of his victims' age.

People v. Smith, 932 P.2d 830 (Colo. App. 1996). §18-1-105 precludes court from suspending sentence of anyone convicted of F2 child abuse; also precludes imposition of probation or a deferred sentence; court may modify mandatory sentence §17-27.7-104 by reducing it and sending defendant to COMCOR.

COMPLICITY: §18-1-603

People v. Castillo, 2022 COA 20. Complicity is a theory of principal liability.

People in the Interest of B.D., 2020 CO 87. The dual-mental-state requirement for complicitor liability, requiring that complicitor have both the intent to aid, abet, advise, or encourage the principal in his criminal act or conduct and an awareness of those circumstances attending the act or conduct that are necessary for commission of the offense, applies only to the elements of the underlying offense and not to strict liability sentence enhancers related to the nature of the offense.

People v. Maloy, 2020 COA 71. Trial court was not required to give defendant's tendered jury instructions on complicity in addition to the COLJI instruction, in trial for child prostitution offenses; each of defendant's tendered jury instructions, including instructions that mere knowledge of prostitution was not a crime and that individual did not have legal duty to stop commission of prostitution, conveyed concepts present in the court's instruction that were at least implied, if not explicitly stated.

Butler v. People, 2019 CO 87. A complicitor is liable for a principal's act of money laundering if the prosecution can prove that: (1) the principal committed an act of money laundering; (2) the complicitor aided, abetted, advised, or encouraged that specific act of money laundering; (3) the complicitor intended to do so; (4) the complicitor was aware that the principal knew or believed that the property involved in the specific money laundering transaction represented the proceeds of a criminal offense; and (5) the complicitor was aware that the principal knew or believed that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the criminal offense. Evidence of defendant's participation in overall money laundering operation involving the buying and reselling of stolen goods on e-commerce websites was not enough, by itself, to establish complicitor liability for the two specific instances of money laundering with which he was charged. *Here:* defendant's convictions for money laundering as a complicitor, arising from his participation in a money laundering operation involving the buying and reselling of stolen goods via use of merchandise return cards and e-commerce websites, were supported by evidence that defendant was aware of and involved in the overall money laundering operation, that money was transferred to and from defendant and principal on day of purchase and resale of two items of merchandise, and that defendant had previously purchased a stolen merchandise card from a detective.

People v. Leyba, 2019 COA 144. Prosecutor's statement of law of complicity as to aggravated robbery during closing argument did not constitute misconduct, despite defendant's argument that, by excluding required mental state for commission of underlying offense and telling jury that state did not have to prove that defendant robbed anyone, prosecutor effectively told jury that people did not have burden to prove every element of crime; prosecutor explicitly mentioned mental state, and largely tracked elements of complicity, arguing that they had been met in defendant's case.

People v. Sandoval, 2018 COA 156. Charges for first-degree murder and aggravated robbery, based on theory of that defendant was a complicitor, did not require People to prove that defendant had advance knowledge of principal's intent to commit a crime; to the contrary, roughly contemporaneous knowledge by complicitor of principal's intent was sufficient.

People v. Jackson, 2018 COA 79, aff'd other grounds, 2020 CO 75 Defendant could be held legally accountable under the complicity statute as a principal in victim's death following a gang-related shooting, where a separate jury instruction defined first degree murder after deliberation, and the first degree instruction coupled with the complicity instruction accurately required the jury to find that defendant was aware that the shooter acted after deliberation and with the intent to cause victim's death. Separate complicity instructions were not warranted for each offense in prosecution for first degree murder after deliberation, attempted first degree murder after deliberation, attempted first degree murder with extreme indifference, conspiracy to commit first degree murder, and accessory; there was no authority requiring a separate complicity instruction for each offense to which complicity applied, and trial court instructed jury that each count charged a separate and distinct offense and that the evidence and the law applicable to each count had to be considered separately, uninfluenced by their decision as to any other count.

People v. Childress, 2015 CO 65M. A person is legally accountable as a principal for the behavior of another constituting a criminal offense if he aids, abets, advises, or encourages the other person in planning or committing that offense, and he does so with: (1) the intent to aid, abet, advise, or encourage the other person in his criminal act or conduct, and (2) an awareness of circumstances attending the act or conduct he seeks to further, including a required mental state, if any, that are necessary for commission of the offense in question. Complicitor liability is not limited to crimes defined as containing a culpable mental state but rather can extend to strict liability offenses.

People v. Theus-Roberts, 2015 COA 32. If the evidence presented establishes that two or more persons were jointly engaged in the commission of a crime, then it is appropriate for the trial court to instruct the jury on complicity. *Here:* evidence showing that two or more persons were jointly engaged in the shooting of cab driver was sufficient to support jury instruction on complicity theory of liability, in prosecution for attempted first-degree murder and related offenses; evidence including eyewitness testimony showed that defendant and an accomplice worked together in setting up driver for the robbery of money that resulted in driver being shot in the chest.

People v. Randell, 2012 COA 108. Where evidence is sufficient to support conviction as complicitor, an appellate court need not address defendant's contention that evidence was insufficient to support conviction as principal. Where evidence is sufficient to support a conviction on theory upon which jury was instructed, it is irrelevant that offense could have been charged and supported under a different subsection of statute defining the offense.

People v. Douglas, 2012 COA 57. In order to be guilty of a crime as complicitor, there must be evidence that the crime was actually committed. *Here:* defendant could not have been convicted of internet luring of a child and internet sexual exploitation of a child under a complicity theory because there was no evidence that the undercover officer with whom defendant communicated actually committed the crimes at issue.

CONSPIRACY: §18-2-201

People v. Rodriguez, 2024 COA 46. Expanding on *Lucero*, in which another division adopted the buyer-seller rule in the context of a conspiracy to distribute a controlled substance charge, this division rejected the premise that a proposed one-time sale of an ounce of methamphetamine between strangers establishes, by itself, a

conspiracy to distribute a controlled substance. Because insufficient evidence supported defendant's conviction, the COA remanded with directions to enter a judgment of acquittal.

People v. Bice, 2023 COA 98. When defendant is convicted of conspiring to distribute a controlled substance under §18-18-405(1), the offense level is governed by §18-18-405(2) — not §18-2-206(7)(a), which sets the offense level for conspiracy to commit a drug felony. Rejecting an argument that the two statutes are inconsistent, the COA held that: (1) conspiring to distribute is itself a violation of §18-18-405(1), not a conspiracy to commit such a violation; (2) §18-2-206(7)(a), by its terms, does not apply to such an offense; (3) §18-18-405(1) falls within §18-2-206(7)(a)'s exception for offense levels "otherwise provided by law"; and (4) §18-18-405(2) controls as the more specific statute. *Here:* because defendant was convicted of a level 1 drug felony under §18-18-405(1) and (2), he was correctly sentenced.

People v. Davis, 2017 COA 40M. A single conspiratorial agreement may not be divided into multiple charges. For a conspiracy, the following factors tend to show a single criminal episode: (1) the acts alleged occurred during the same period; (2) the type of overt act alleged is the same; (3) the unlawful objective of the conspiracy is the same; (4) the modus operandi is the same; and (5) the same evidence would be relevant to the charges. Conversely, the following factors suggest multiple criminal episodes: defendant is charged with conspiring with different parties; in different counties; in different agreements; and with allegations of different overt acts. *Here:* there was one criminal episode of conspiracy because the actions occurred in a relatively short time period in the same county, the conspiracy was primarily with one other person, and all the overt acts were done in furtherance of the same unlawful objective. Jury was not required to unanimously agree on the overt act supporting the conviction for conspiracy.

People v. Davis, 2017 COA 40M. A defendant does not waive an election or unanimity claim by failing to raise the issue in the trial court. A single conspiratorial agreement may not be divided into multiple charges. For a conspiracy, the following factors tend to show a single criminal episode: the acts alleged occurred during the same period, the type of overt act alleged is the same, the unlawful objective of the conspiracy is the same, the modus operandi is the same, and the same evidence would be relevant to the charges. Conversely, the following factors suggest multiple criminal episodes: defendant is charged with conspiring with different parties; in different counties; in different agreements; and with allegations of different overt acts. *Here:* there was one criminal episode of conspiracy because the actions occurred in a relatively short time period in the same county, the conspiracy was primarily with one other person, and all the overt acts were done in furtherance of the same unlawful objective. The jury was not required to unanimously agree on the overt act supporting the conviction for conspiracy.

People v. Lucero, 2016 COA 105. Under the "buyer-seller" rule, evidence of a buyer-seller relationship, without more, is insufficient to sustain conviction for conspiracy to distribute a controlled substance. Where the buyer is the end user, there is no agreement to advance further distribution of drugs. This rule applies equally to unpaid transfers.

People v. Samson, 2012 COA 167. To establish elements of theft under §18-4-401(1)(a), prosecution is not required to prove the precise value of the thing taken to establish the theft, although it must plead and prove that value to determine the theft's classification level. Because the completed crime of theft does not require proof of the defendant's knowledge of the value of the goods taken, a conspiracy to commit theft does not require prosecution to prove an agreement to take goods valued at particular amount of money.

People v. Vecellio, 2012 COA 40. Conspiracy statute reflects the "unilateral" approach to conspiracy, under which defendant may be convicted of conspiracy by agreeing with another party to commit a crime, regardless of whether the other party is an undercover police officer who feigns agreement. §18-2-201(1) defines conspiracy as the actions of a single actor agreeing with another, rather than as an agreement between two or

more persons. Legislature's adoption of Model Penal Code's definition of conspiracy further demonstrates that Colorado's definition of conspiracy reflects the unilateral approach. A person who believes he or she is conspiring with another to commit a crime is a danger to the public regardless of whether the other person has in fact agreed to commit the crime.

People v. Robinson, 226 P.3d 1145 (Colo. App. 2009). Existence of a conspiracy may be proved by circumstantial evidence which indicates that conspirators, by their acts, pursue the same objective, with a view toward obtaining a common goal. *Here*: evidence was sufficient to sustain defendant's conspiracy conviction, because evidence showed that: (1) police instructed informant to conduct a drug transaction with two people; and (2) defendant and "Dee" arrived together at the location identified by informant with an amount of cocaine consistent with amount of money informant was instructed by police to offer them; and (3) there were scales found in the vehicle. From this evidence, a reasonable trier of fact could find both an agreement between defendant and "Dee" to sell cocaine and at least one overt act (traveling to the location) in furtherance of that agreement.

People v. Flowers, 128 P.3d 285 (Colo. App. 2005). There was sufficient evidence to support defendant's conspiracy conviction where: (1) police observed defendant's vehicle follow another vehicle into a parking lot at approximate time of arranged drug deal and park next to the first vehicle; (2) after informant gave the first vehicle's occupant $200 for drugs, that person said he had to go "to the truck" to get the drugs and then immediately got in to defendant's vehicle; (3) once the deal was completed, defendant was in possession of $180 of marked money and first vehicle's occupant had remaining $20; and (4) more cocaine was found in defendant's vehicle when he was arrested.

People v. Zamora, 13 P.3d 813 (Colo. App. 2000). Trial court properly imposed consecutive sentences for aggravated robbery and conspiracy to commit aggravated robbery under §16-11-309(1) (a) because evidence proving the underlying crime and the conspiracy was not identical.

Palmer v. People, 964 P.2d 524 (Colo. 1998). Conspiracy to commit reckless manslaughter is not a cognizable crime because there are inconsistent *mens rea* (one cannot intend to cause death unintentionally.) There is a dual mens rea for conspiracy: (1) specific intent to agree; (2) specific intent to cause the result of the subject crime. For complicity (which is not an offense), the word "intend" does not connote specific intent; it has its common meaning in this context.

People v. Osborne, 973 P.2d 666 (Colo. App. 1998). Conspiracy and the object of the conspiracy are different and distinct offenses. The essence of conspiracy is an illegal agreement plus an overt act in furtherance. *Here:* there was sufficient circumstantial evidence of agreement: defendant had knowledge about details of the crime, both before and after it happened.

CONTRIBUTING TO THE DELINQUENCY OF A MINOR: §18-6-701

People v. Davis, 218 P.3d 718 (Colo. App. 2008). 2005 amendment to Liquor Code that restructured provision concerning alcohol and minors was not intended to preclude prosecution for contributing to the delinquency of a minor; legislature made an apparent drafting error, which it corrected in 2007. Concluding otherwise would lead to an illogical/absurd result and would be inconsistent with Liquor Code's legislative history.

Gorman v. People, 19 P.3d 662 (Colo. 2000). Although §18-6-701 does not contain an express mental state element, statute contains an implied element of "knowingly;" implied mental state does not apply to statutory element of age. *Here*: jury was properly instructed that prosecution does not have to prove defendant knew victim was under 18. Defense contained in §18-3-406 - defendant reasonably believed child to be 18 or older - is available to defendants charged with contributing to the delinquency of a minor.

CYBER CRIMES: §18-5.5-101, ET SEQ.

People v. Galang, 2016 COA 68. Under §18-5.5-102(3)(a), victim's loss of $0 is included within the statutory requirement of a loss "less than" $500 in order to be guilty of M2; as long as defendant knowingly accessed a computer system for the purpose of devising or executing the scheme or artifice to defraud, he may be found guilty of computer fraud occurs regardless of whether victim suffered any loss or damage.

People v. Stotz, 2016 COA 16. Computer crime statute was not void for vagueness on its face; statute's definition of damage was specific enough to provide a person of ordinary intelligence notice that the deletion of documents from a computer may have caused damage to data contained in a computer, and statute only proscribed conduct done knowingly without authorization or in excess of authorized access and with knowledge that it would impair the integrity of availability of information, data, computer program, computer software, or services on or via a computer, computer network, or computer system or part thereof. *Here:* statute provided sufficient notice that employees knowingly deleting files from company computers violated statute, and therefore computer crime statute was not void for vagueness as applied; although defendants alleged that they were either permitted to delete files or that they did not know they were not permitted to delete files, statute prohibited, with sufficient clarity, an employee's knowing deletion of only electronic copies of thousands of computer documents when employee knew that such deletion was not authorized by employer. Computer crime statute was not unconstitutionally overbroad as applied; prosecution arose from employees deleting files on company computers, statute proscribed knowingly damaging employer's property, and such conduct was within the power of the State to regulate because protecting an individual's private property served to protect the public welfare.

People v. Robb, 215 P.3d 1253 (Colo. App. 2009). Unless a computer crime charge is prosecuted on a complicity theory of liability, there must be evidence that defendant personally used or directed the use of a computer, computer system, or network to establish sufficient evidence to support a conviction for computer crime. *Here*: insufficient evidence that defendant used a computer, as defined in the statute, where evidence, at most, showed that he, without use of a computer, provided information concerning potential investors to another person and the other person used a computer to distribute fraudulent information to the potential investors.

People v. Rice, 198 P.3d 1241 (Colo. App. 2008). The input of data over the phone in response to computer-generated questions satisfies the meaning of the word "access" under §18-5.5-102. Defining the word "access" according to its ordinary meaning does not render the computer crime statute unconstitutionally vague.

People v. Pahl, 169 P.3d 169 (Colo. App. 2006). Computer crime statute, defining "computer" as "an electronic device which performs logical, arithmetic, or memory functions by the manipulations of electronic or magnetic impulses, and includes all input, output, processing, storage, software or communication facilities which are connected or related to such a device in a system or network," was not unconstitutionally vague as applied to defendant who used a computer with widely used software.

DEADLY WEAPONS: §18-1-901

Magana v. People, 2022 CO 25. A two-step inquiry applies to determine if an instrument is a "deadly weapon" for purposes of statute allowing enhancement of an offense to a crime of violence (COV) for sentencing purposes based on the use or threatened use of a deadly weapon: (1) instrument must be used or intended to be used as a weapon, and (2) instrument must be capable of causing serious bodily injury. An instrument can become a deadly weapon for purposes of statute allowing enhancement of an offense to a crime of violence (COV) for sentencing purposes based on the use or threatened use of a deadly weapon, when the instrument is used to start an unbroken, foreseeable chain of events capable of producing serious bodily injury or death. Statutory definition of deadly weapon, the use or threatened use of which may enhance an offense to a crime of

violence (COV) for sentencing purposes, focuses on what a thing is capable of doing, that being the potential result and not just the actual result. Fire alone is not a deadly weapon for purposes of the crime of violence (COV) sentence enhancer for first-degree arson.

People v. Strickler, 2022 COA 1. Fire qualified as statutory definition of deadly weapon, as supported crime of violence sentence enhancer in connection with conviction for attempted extreme indifference murder; weapon had been defined as instrument of offensive or defense combat, something used in destroying defeating or physically injuring enemy, and fire fell under "substance" definition of object as deadly weapon, which was matter of definite or known chemical composition.

People v. Lee, 2020 CO 81. Charges of second degree assault under both strangulation and deadly weapon subsections violated defendant's equal protection rights under State Constitution, and thus defendant could only be charged under the strangulation provision; both charges would always involve the use of a deadly weapon, in the case of strangulation the defendant's hands, and both offenses proscribed identical conduct with regard to strangulation, but the deadly weapon subsection punished conduct more harshly than the strangulation subsection. Because, in a strangulation, the instrument being used to strangle the victim (whether hands or otherwise) is always being used as a weapon and will always be at least capable of causing SBI or death, strangulation will always involve the use of a deadly weapon. Whenever a person, with the intent to cause bodily injury, causes bodily injury by applying sufficient pressure with his hands to the neck or by blocking the nose or mouth of another, thereby impeding or restricting the other person's breathing or blood circulation, the hands used to apply such pressure will have been used in a manner capable of producing death or serious bodily injury, and thus will have been used as a deadly weapon, regardless of the amount of pressure applied.

People v. Brooks, 2020 COA 25. Jury verdict on first degree burglary charge was ambiguous with respect to essential element of use of deadly weapon; as matter of first impression, where jury verdict and jury's special interrogatory answer were irreconcilable on deadly weapon element of first degree burglary, the proper remedy was the entry of a conviction for second degree burglary; and jury verdict that defendant did not use deadly weapon as required to find first degree burglary was not irreconcilable with jury verdict finding defendant guilty of menacing.

People v. Knobee, 2020 COA 7. Trial court erred by failing to instruct jury that to convict defendant of kidnapping with a deadly weapon, the kidnapping had to be "accomplished by" use of a deadly weapon.

People v. Slaughter, 2019 COA 27. Conduct prohibited by statute governing strangulation as assault in the second degree when charged with crime of violence sentence enhancer, and conduct prohibited by statute governing second degree assault with a deadly weapon, lacked differences that were both real in fact and reasonably related to general purposes of criminal legislation; decision to charge defendant with second degree assault by strangulation with crime of violence sentence enhancer violated equal protection.

People v. Denhartog, 2019 COA 23. Term "threaten" in statute defining first degree assault of a peace officer to include use of a deadly weapon to threaten a peace officer requires some declaration of purpose or intent to cause injury or harm and does not include commission of any act placing an officer at risk of harm. *Here:* defendant did not "threaten" peace officer when he suddenly and without warning backed his vehicle into officer, and defendant's actions did not constitute first degree assault of a peace officer, where defendant did not make an expression of purpose or intent to cause injury or harm to the officer or the officer's property.

People v. Buell, 2017 COA 148. Knife, which was four to five inches long and which was capable of producing serious bodily injury, was a deadly weapon, as required for second degree assault.

Lucero v. People, 2012 CO 7. Current definition of deadly weapon, §18-1-901(3)(e), states: "deadly weapon" means any of the following which in the manner it is used or intended to be used is capable of producing death

or serious bodily injury: a firearm, whether loaded or unloaded; a knife; a bludgeon; and any other weapon, device, instrument, material, or substance, whether animate or inanimate. Under this definition, there are no "per se" deadly weapons; an object, including a firearm, is not a deadly weapon absent evidence that the defendant used or intended to use it in a manner capable of producing death or serious bodily injury.

People v. Saleh, 45 P.3d 1272 (Colo. 2002). Whether an object is a "deadly weapon" does not depend upon the ultimate result of the object's use, in that the definitional statute does not require that the object actually cause serious bodily injury, but, rather, it states that the object must be "capable of producing" such injury. CSC's holding in *Mozee* requires the presence of an element of causation linking an object to the serious bodily injury in order for the object to actually cause the injury and qualify as a deadly weapon. Objects which are not inherently deadly, such as feet and hands, can become deadly weapons when used to start an unbroken, foreseeable chain of events capable of producing serious bodily injury or death. Jury may properly consider any resulting injury sustained by the victim in making the determination of whether or not an object qualifies as a deadly weapon. *Here:* defendant's foot was a deadly weapon as element of second degree reckless assault, since there was a sufficient causal connection between his foot and the victim's injuries, where defendant knew that victim was at the top of the stairs with her back to him, and he kicked her between the shoulder blades in order to propel her down the staircase, which was an action capable of causing death or serious bodily injury.

DISORDERLY CONDUCT: §18-9-106

People v. Naranjo, 2017 CO 87. Disorderly conduct requires that defendant act in a manner calculated to alarm; disorderly conduct statute does not reach every instance where a person holds a gun in public in another's presence; statute criminalizes conduct where gun is held in a manner "calculated to alarm."

People v. In the Interest of R.C., 2016 COA 167. Snapchat drawing of a penis on a picture of a juvenile's face did not constitute "fighting words" as a matter of law because no reasonable person confronted with such speech is likely to respond with violence; evidence was not sufficient to convict juvenile who created the image of disorderly conduct, §18-9-106.

People in Interest of K.W., 2012 COA 151. An actual breach of the peace is not required for a disorderly conduct conviction so long as there was the *possibility* of a breach. *Here:* sufficient evidence supported juvenile's adjudication based on her yelling obscenities at a security guard, even though nobody was personally offended by the words.

DRIVING AFTER REVOCATION PROHIBITED (DUR): §42-2-206

People v. Wambolt, 2018 COA 88. DUR is a lesser-included offense of driving after revocation prohibited (DARP) under the subset test announced in *Reyna-Abarca* and *Rock*.

Zubiate v. People, 2017 CO 17. DUR is not a lesser included offense of aggravated driving after revocation prohibited DARP; under the newly-announced subset test of the strict elements test, DUR contains an additional element that DARP does not: DUR prohibits driving a motor vehicle or an "off-highway vehicle," whereas DARP only prohibits a motor vehicle.

People v. Boulden, 2016 COA 109. Knowledge is an essential element of DUR; it requires that defendant possess knowledge of circumstances that would trigger a reasonable person to believe his license was under restraint; defendant must be actually aware of specific circumstances. *Here*: evidence was insufficient to show knowledge where there was verification of mailing of the notice of suspension to his LKA, but there was no evidence that defendant received notice or had any reason to know of suspension; although DMV mailing notice of revocation is sufficient to show knowledge in an administrative proceeding, it is insufficient in criminal proceeding.

People v. Dutton, 2014 COA 51. Reckless driving and vehicular eluding are lesser included offense of DARP.

People v. Espinoza, 195 P.3d 1122 (Colo. App. 2008). Defendant's driving record, including proofs of service, was sufficient to prove DARP, including that defendant had knowledge of his status as habitual traffic offender. Misdemeanor eluding is not limited to situations in which the person eluded police while operating a vehicle. *Here*: evidence that defendant ran from police on foot was sufficient.

People v. VanMatre, 190 P.3d 770 (Colo. App. 2008). Defendant argued trial court erred by not instructing jury that it was required to find the vehicle was reasonably capable of being rendered operable in order to convict him of illegally driving or operating a vehicle under DUI or DARP statutes. Term "drive" in the DUI statute means to exercise actual physical control over a motor vehicle, while term "operate" in DARP statute is somewhat broader, connoting the action of causing something to occur or to cause to function, usually by direct personal effort. Neither term requires actual physical movement of a vehicle, nor need a vehicle travel any particular distance; vehicle must be reasonably capable of being rendered operable before a person can be convicted of "driving" or "operating" the vehicle while intoxicated. The threat that impaired driving statutes seek to avoid is that a vehicle will be put into motion by an intoxicated occupant and thus pose a risk to the safety of the occupant and others. The risk does not exist when the vehicle is inoperable, but remains present when the reason for a vehicle's inoperability is temporary condition that can be quickly remedied, as when a wheel has been removed to change flat tire, the vehicle has run out of gas, or the battery has died. When considering whether a defendant exercised actual physical control over a vehicle or caused it to function (drove or operated a vehicle), a jury may consider the totality of the circumstances. When there is evidence indicating that the vehicle may not have been reasonably capable of being rendered operable, jury must be instructed that it must find the vehicle was either operable, reasonably capable of being rendered operable, in motion (whether by coasting or pushing), or at risk of being put in motion before finding defendant guilty of driving or operating a vehicle under DUI and DARP statutes. *Here:* although trial court did not instruct jury that it must find the vehicle was reasonably capable of being rendered operable, it did not err because there was undisputed testimony that the vehicle's alleged inoperability was a result only of a lack of fuel or a dead battery.

People v. Mersman, 148 P.3d 199 (Colo. App. 2006). In prosecution for DARP (drove while license was revoked as habitual traffic offender and while under the influence of alcohol), evidence of DUI was sufficient where: (1) defendant exhibited physical indicia of intoxication (watery, bloodshot eyes; moderately slurred speech) and moderate odor of alcohol; and (2) defendant refused to take a breath/blood alcohol test.

People v. Carlson, 119 P.3d 491 (Colo. App. 2004). DUI is a lesser-included offense of Aggravated Driving After Revocation Prohibited (Driving Under the Influence) under §42-2-206(1)(b)(I)(A); DUI conviction merges into Aggravated Driving conviction.

People v. Wilson, 114 P.3d 19 (Colo. App. 2004). The 6 different "aggravating offenses" listed in §42-2-206(1)(b) constitute essential elements of the crime of aggravated driving with a revoked license, and are not merely sentence enhancers. *Here*: failure to allege one of the specific aggravating offenses as part of the count charging aggravated driving with a revoked license rendered that felony count substantively defective.

Griego v. People, 19 P.3d 1 (Colo. 2001). "Knowingly" is the culpable mental state for DUR.

People v. Gregor, 26 P.3d 530 (Colo. App. 2000). Instruction required jury to find that defendant drove or operated a vehicle "knowing his privilege to drive a motor vehicle in this state was revoked pursuant to the habitual offender statute." Even though it combined elements that are listed separately in COLJI 37:03, this instruction was proper. Term "operate" does not require actual movement of the vehicle. To "operate" includes sitting in driver's seat and turning on the ignition.

In re People v. Ellison, 14 P.3d 1034 (Colo. 2000). Knowledge element of DUR - which requires defendant be actually aware of specific circumstances that would cause a reasonable person to be aware that the person's privilege to drive was under restraint - does not violate due process. DUR is a public welfare offense, rather than a traditional common-law offense; use of both subjective and objective components of knowledge is allowed.

DRUGS: §18-18-401, ET SEQ.

People v. Rodriguez, 2024 COA 46. Expanding on *Lucero*, in which another division adopted the buyer-seller rule in the context of a conspiracy to distribute a controlled substance charge, this division rejected the premise that a proposed one-time sale of an ounce of methamphetamine between strangers establishes, by itself, a conspiracy to distribute a controlled substance. Because insufficient evidence supported defendant's conviction, the COA remanded with directions to enter a judgment of acquittal.

People v. Bice, 2023 COA 98. When defendant is convicted of conspiring to distribute a controlled substance under §18-18-405(1), the offense level is governed by §18-18-405(2) — not §18-2-206(7)(a), which sets the offense level for conspiracy to commit a drug felony. Rejecting an argument that the two statutes are inconsistent, the COA held that: (1) conspiring to distribute is itself a violation of §18-18-405(1), not a conspiracy to commit such a violation; (2) §18-2-206(7)(a), by its terms, does not apply to such an offense; (3) §18-18-405(1) falls within §18-2-206(7)(a)'s exception for offense levels "otherwise provided by law"; and (4) §18-18-405(2) controls as the more specific statute. *Here:* because defendant was convicted of a level 1 drug felony under §18-18-405(1) and (2), he was correctly sentenced.

People v. McClintic, 2020 COA 120M. To be convicted of introduction of contraband in the first degree, defendant whose entry into a detention facility is involuntary must either deny possession when asked or conceal or attempt to conceal the presence of contraband on his or her person.

People v. Harrison, 2020 CO 57. A good faith reporting of emergency drug or alcohol overdose event, as affirmative defense to charge of possession of a controlled substance or possession of drug paraphernalia, requires both that a person report in good faith what is subjectively perceived to be an acute condition caused by consumption or use of drugs or alcohol and that a layperson would reasonably believe that the reported condition is a drug or alcohol overdose needing medical assistance. *Here:* evidence was sufficient to disprove affirmative defense of good faith reporting of emergency drug or alcohol overdose event, in prosecution for possession of a controlled substance and possession of drug paraphernalia; manager of fast food restaurant testified that she thought defendant was asleep, that she told 911 operators about defendant not waking up, that she expected responding officers to rouse defendant and ask her to leave after admonishing her for sleeping in restaurant, that she did not observe any alcohol or drugs, that she did not notice any signs of intoxication or impairment, and that it never crossed her mind that defendant was suffering from a drug or alcohol overdose.

People v. Hamm, 2019 COA 90. 2013 amendments to Controlled Substances Act do not apply retrospectively because Act's effective date clause is expressly prospective.

People in the Interest of D.M., 2019 COA 55. Federal Controlled Substances Act does not preempt Colorado's restitution statutes, and juvenile court did not err in ordering juvenile to pay restitution equaling value of marijuana he stole from a licensed marijuana store.

People v. Jacobs, 2018 COA 159. Defendant was convicted of distribution and conspiracy to distribute. Because convictions were based on the same quantum drugs, the conspiracy conviction violated double jeopardy.

People v. Jamison, 2018 COA 121. First degree possession of contraband is a lesser included offense of first degree introduction of contraband – making while confined under §18-8-203(1)(b) and must merge when the

charges are based on the same item of contraband. Possession is likely not a lesser included offense of introduction of contraband under §18-8-203(1)(a).

People v. Camarigg, 2017 COA 115. Sufficient evidence, even if circumstantial, supported defendant's conviction for possessing chemicals, supplies, or equipment with intent to manufacture methamphetamine because while all the materials were individually legal, collected together they constituted a large amount of the materials necessary to manufacture methamphetamine.

People v. Gonzales, 2017 COA 62. §18-18-413 is a separate offense from §18-18-403.5, and the exception for "a person acting at the direction of the legal owner of the controlled substance" is an element prosecution must disprove when charging someone with §18-18-413; it is not an affirmative defense to §18-18-403.5. §18-18-302(3)(c) is an affirmative defense to unlawful possession of a controlled substance.

People v. DeBorde, 2016 COA 185. If defendant files a motion under the "wobbler" statute, §18-1.3-103.5, after successfully completing his probation/COMCOR sentence, court must vacate the felony conviction and enter a misdemeanor conviction. Wobbler statute contemplates vacating only the felony conviction, not the sentence. Drug offender surcharge amount is properly determined by initial conviction. Merely referring to PD application does not establish that defendant does not have present/future ability to pay surcharge.

People v. Lucero, 2016 COA 105. Under the "buyer-seller" rule, evidence of buyer-seller relationship, without more, is insufficient to sustain a conviction for conspiracy to distribute a controlled substance. Where the buyer is the end user, there is no agreement to advance further distribution of drugs. This rule applies equally to unpaid transfers.

People v. Rice, 2015 COA 168. §18-18-405(3)(a)(I)(unlawful distribution) is a sentencing enhancement statute that requires mandatory minimum sentence and limits court's discretion to impose a lesser minimum sentence based on mitigating factors under §18-1.3-401(6).

People v. Douglas, 2015 COA 155. Evidence was sufficient to support defendant's conviction for possession with intent to manufacture/distribute less than five pounds of marijuana. Quantity of marijuana recovered at defendant's residence, the sophistication of the grow operation, and the presence of large quantity of money and guns were more indicative of distribution rather than marijuana grown for medicinal use.

People v. Davis, 2015 CO 36M. Plain error standard applies where defendant did not object to trial court's failure to merge defendant's possession and distribution of a controlled substance counts. Plain error is obvious and substantial and must have so undermined the fundamental fairness of the proceeding so as to cast serious doubt on the reliability of the judgment to merit reversal. The double jeopardy clauses of the U.S. and Colorado Constitutions prohibit multiple punishments for the same offense. Although the legislature may define multiple offenses and authorize multiple punishments based on the same behavior, a defendant may not be punished multiple times for the same conduct if one offense is included in the other. An offense is included in another if proof of the same or less than all the facts required to establish the commission of the greater offense establishes the lesser offense. Possession of a controlled substance under §18-18-405 is a lesser included offense of distribution under that section when the possession and distribution charges arise out of actions involving a single discrete quantum of drugs. When a jury convicts of both possession and distribution of the same quantum of drugs, trial court should merge the possession conviction into the distribution conviction. This case concerns the pre-2010 version of §18-18-405; in 2010, simple possession was moved to §18-18-403.5).

People v. Cisneros, 2014 COA 49. Where defendant was charged under special offender sentence enhancement §18-18-407(1)(f), trial court did not err by refusing to instruct jury on right to bear arms because it could not have found defendant used his weapon solely for self-defense purposes and verdict shows jury found nexus between defendant's possession of a weapon and his possession of narcotics with intent to distribute.

People v. Poe, 2012 COA 166. Finding of possession may be based upon jury's reasonable inferences from the evidence, including circumstantial evidence. *Here:* jury's finding of possession of drugs and paraphernalia was supported by circumstantial evidence of the location and placement of items in the defendant's residence.

People v. Taylor, 2012 COA 91. Entrapment instruction in undercover drug sale case was properly rejected where defendant made hand and head signals which caused police to contact him, and officers' two or possibly three questions on where to buy drugs were not such "persistent inducements" that they would make anybody act in a criminal manner. Abrogation recognized People v. Snider, 2021 COA 19.

People v. Reeves, 252 P.3d 1137 (Colo. App. 2010). There is no express requirement that an offense charged under §18-18-405(1)(a) arise from possession of any specific minimum weight of controlled substance itself. In order to read §18-18-405 consistently as a whole, under §18-18-405(2)(a)(I)(A), possession of more than one gram of a compound, mixture, or preparation containing a controlled substance on schedule II is a F4.

People v. Clendenin, 232 P.3d 210 (Colo. App. 2009). Affirmative primary care-giver defense under Colorado Constitution art XVIII, §14(2)(a), requires such care-giver have "significant responsibility" beyond just being accountable for one aspect of patient's well-being; act of supplying marijuana for medical use, by itself, is insufficient to constitute significant management responsibility for patient's well-being. *Here*: primary care-giver affirmative defense did not apply where provision of marijuana was itself the substance of the relationship. Crime of possession with intent to distribute is not unconstitutionally vague because it fails to state the quantity required to permit the inference that possessor intended to distribute the controlled substance. Phrase "intent to distribute" is term that person of ordinary intelligence can understand, and quantity required to permit fact finder to infer that possessor intended to distribute controlled substance is evidentiary in nature and depends upon facts of each case.

People v. Valenzuela, 216 P.3d 588 (Colo. 2009). Conspiracy to distribute a controlled substance under §18-18-405(1) is not an extraordinary risk crime under §18-1.3-401(10)(b).

People v. Robinson, 226 P.3d 1145 (Colo. App. 2009). While defendant's mere presence in the car would be insufficient alone to sustain drug conviction, additional evidence showed that: (1) police instructed informant to arrange meeting with two other people to purchase $300 worth of cocaine; (2) defendant was one of two people present in car at time and place arranged for drug deal; and (3) $300 worth of cocaine was found under defendant's seat.

People v. Scheffer, 224 P.3d 279 (Colo. App. 2009). Amount of controlled substance possessed is not an element of the offense of possession of a controlled substance under §18-18-405(1)(a).

People v. Laurent, 194 P.3d 1053 (Colo. App. 2008). Manufacturing methamphetamine §18-18-405(1)(a) is a lesser included offense of child abuse by manufacturing methamphetamine in the presence of a child §18-6-401(1)(c).

People v. Montalvo-Lopez, 215 P.3d 1139 (Colo. App. 2008). Drug importation special offender finding does not require evidence that defendant intended to import and distribute the drugs in Colorado, only that they were brought to Colorado "from a foreign or external source."

People v. Martinez, 165 P.3d 907 (Colo. App. 2007). Sufficient evidence to support convictions for: (1) special offender sentence enhancer of having a handgun available for use because the gun was operable - where officer/small arms specialist testified that gun appeared to be capable of firing a bullet, and trigger was locked with a padlock and defendant kept a key to that lock on his key chain; and (2) manufacturing of methamphetamine based upon items indicative of methamphetamine manufacturing, including large quantities of decongestants purchased over the internet by defendant and his father.

People v. Blinderman, 148 P.3d 232 (Colo. App. 2006). Attempted distribution of a schedule II controlled substance is not an extraordinary risk offense.

People v. Harte, 131 P.3d 1180 (Colo. App. 2005). §18-18-415(1) (b) operates as exception to physician-patient privilege found at §13-90-107(1)(d). Determinations as to whether these statutes apply to admissibility of testimony in court proceedings rest with trial court, not with recipient of such communications, a prospective witness, or another health care provider. Defendant was convicted of obtaining a controlled substance by fraud and deceit and argued that evidence was insufficient to prove he obtained Percocet by misrepresentation or deceit, rather than by fraud or subterfuge. COA disagreed because: (1) a misrepresentation is a false, incorrect, or misleading representation by words or other means that under the existing circumstances amounts to an assertion not in accordance with the facts. Deceit is the act or practice of deceiving, as by falsification or concealment, and (2) the terms "deceit" and "misrepresentation" include representations that convey a false understanding, whether by communication of false information or by concealment of information.

People v. Atencio, 140 P.3d 73 (Colo. App. 2005). Evidence was sufficient for possession even though drugs were found in a place not under defendant's exclusive control because circumstantial evidence supported inference of possession; defendant fled the officers; drugs were located near fence where defendant was stopped; owner of yard in which drugs were located testified that the drugs were not there thirty minutes earlier, and baggies of drugs were warmer than night air.

People v. Tweedy, 126 P.3d 303 (Colo. App. 2005). Evidence sufficient to convict defendant of special drug offender count where he had martial arts knives locked in hotel room safe along with drug paraphernalia and methamphetamine, and where witness testified that he placed the knives in the safe after seeing police at the door.

People v. Taylor, 131 P.3d 1158 (Colo. App. 2005). To commit possession with intent to sell an imitation controlled substance (§18-18-422), defendant need not make an express or implied representation that substance is a true controlled substance. Where defendant makes statements about nature of a substance or its inordinate resale value, packages it like an illicit substance, takes evasive actions to conceal the substance from law enforcement, or stores it with controlled substances, factfinder may infer that defendant is aware that substance appears to be a controlled substance.

People v. Flowers, 128 P.3d 285 (Colo. App. 2005). Separate convictions for possession of a controlled substance and distribution of a controlled substance do not violate double jeopardy where they are factually distinct-based upon separate quantities of drugs.

People v. Perea, 126 P.3d 241 (Colo. App. 2005). §18-18-405 requires only that defendant know that he or she possesses a controlled substance, and not that he or she know the precise controlled substance possessed. Sufficient evidence that defendant knowingly possessed a controlled substance in this case, where cousin tossed baggie to defendant as police were stopping the car and said: "I'm going to jail for a long time if I have it on me." From this statement by cousin, the type of baggie, and defendant's attempt to hide baggie in sock, jury could infer that defendant knew it contained a controlled substance.

People v. Abiodun, 111 P.3d 462 (Colo. 2005). §18-18-405 defines only one offense and not separate criminal offenses-possession and distribution are two different ways of committing the same offense. Because possessing and distributing controlled substances are alternative ways of committing the same offense under §18-18-405, those offenses merge unless they are supported by different funds of evidence. As such, the *Blockberger* or strict-elements test does not apply to determine a merger outcome.) *Here:* because defendant possessed and distributed the same discrete quantum of drugs on each date charged, his possession convictions merge into his distribution convictions.

People v. Baca, 109 P.3d 1005 (Colo. App. 2004). To sustain a conviction for possession of a controlled substance, the prosecution must show that the defendant had knowledge he was in possession of a narcotic drug and that he knowingly intended to possess the drug. Knowledge can be inferred from the fact that the defendant is the driver and sole occupant of the vehicle, irrespective of whether he is also the vehicle's owner. *Here:* jury could infer knowledge: defendant was driver and sole occupant of car when stopped by police; the car held a digital gram scale and a wallet containing a large amount of cash, and when defendant got of car he held a cell phone and pager. While defendant's wife testified that the car and drugs belonged to her and defendant did not know about the cocaine, jury could disbelieve her testimony and logically conclude that defendant knowingly possessed the cocaine.

People v. Frantz, 114 P.3d 34 (Colo. App. 2004). Defendant was properly convicted of possession of pseudoephedrine, a nonprescription over-the-counter cold and sinus remedy, as a controlled substance analog. Pseudoephedrine has substantially similar chemical structure and substantially similar effects on the human nervous system as two Schedule II controlled substances: ephedrine and methamphetamine. In addition, while pseudoephedrine has an approved medical use, it was not here in its "intended and unconverted form" because defendant had dissolved tablets in water to extract the pseudoephedrine in preparation for producing methamphetamine.

People v. Goodale, 78 P.3d 1103 (Colo. 2003). The legislature has and can treat marijuana differently from other, allegedly more dangerous, drugs without violating equal protection. It chose to do so in § 18-18-406.5, prohibiting unlawful use of marijuana in a detention facility. That statute did not provide a treatment option whereas, under § 18-18-404, users of more serious drugs could request treatment and, if granted, have proceedings suspended and dismissed if treatment was successful. It cannot be said that the legislature's choice was completely arbitrary or irrational.

People v. Gilmore, 97 P.3d 123 (Colo. App. 2003). Possession of cocaine is a lesser included offense of possession with the intent to distribute and thus the possession conviction must be vacated. *Here*: defendant was convicted of possession of the same cocaine that served as the basis for the distribution conviction. There was sufficient evidence to support defendant's conviction for possession with intent to distribute where the police saw defendant leave the premises where someone had just sold drugs, defendant was in possession of cocaine when he was arrested, there was a security camera monitoring the front door of the apartment, there were dozens of tin foil squares found inside the apartment, and there was a lock box and large sums of cash throughout the apartment. *Apprendi* is not applicable to the repeat drug offender sentencing enhancer.

Martinez v. People, 69 P.3d 1029 (Colo. 2003). The language of the special drug offender statute does no more than extend the length of the sentence required for drug felonies. It is unlike those enhancement provisions in which the language of the statute makes clear that an aggravating factor elevates the classification of the underlying felony. *Here*: defendant found to be both a special drug offender and an habitual criminal argued that the sentence enhancing provision of the special drug offender statute was preempted by the enhanced sentencing provision of the habitual criminal statute. The court rejected his claim and harmonized the two sentencing provisions. By using a formula that increases the length of a sentence without reclassifying the offense for which it is imposed, the legislature has required the application of two different sentence-enhancing provisions when the special offender is also an habitual criminal, independently mandating sentence enhancements for different aggravating circumstances. Neither the special offender statute nor the habitual criminal statute purports to limit the effect of additional aggravation or to place an upper limit on the ultimate sentence for a defendant to which its provisions apply. Because the applicable sentence under the special offender provision was greater than that required under the habitual criminal statute, the length of the defendant's permissible sentence was not limited by his habitual criminal status, although his habitual criminal status did require a sentence to incarceration.

People v. Triantos, 55 P.3d 131 (Colo. 2002). During defendant's booking search for possession of drug paraphernalia, a petty offense, officers discovered methamphetamine in his pocket, and the People charged him accordingly. The trial court suppressed the meth because §16-2-201, petty offense arrests, does not permit the arrest of a suspect on a petty offense unless circumstances indicate that he would be unlikely to comply with the terms of a penalty assessment notice. When read with §16-3-102, the statute clearly permits an officer to arrest an offender "who has committed a crime in his presence," and possession of drug paraphernalia is a crime.

Whitaker v. People, 48 P.3d 555 (Colo. 2002). Defendant made an *Apprendi* challenge to the findings required to enhance his sentence under §18-18-405(3)(a), for possession of more than 1000 grams of a controlled substance, and under §18-18-407(1) (d) for importation. While the prosecution must prove that defendant knowingly possessed a controlled substance, it was not required to prove that defendant knew that the amount he possessed was over 1000 grams, or that he knew that he transported the drug across state lines.

Shipley v. People, 45 P.3d 1277 (Colo. 2002). Under the special drug offender statute, §18-18-407(1), the reference to "a term greater than the presumptive range for a class 2 felony but not more than twice the maximum term for a class 2 felony authorized in the presumptive range" mandates only the *length* of the sentence the offender must receive. Therefore, sentencing alternatives, such as probation and community corrections, are permissible if the offender is otherwise eligible.

People v. Valdez, 56 P.3d 1148 (Colo. App. 2002). Evidence was sufficient that defendant knew the illegal nature of pills in his possession. In addition to the drug paraphernalia found, the pills were found next to his bed and underneath his mattress, wrapped together in the same cellophane cigarette packaging as codeine tablets found in his shirt in his closet, and testimony established that he knew the codeine tablets required a prescription. Illegal possession of codeine is either a misdemeanor or felony, depending on the concentration. *Here*: Because there was no evidence regarding the concentration, the felony conviction is reversed and the case remanded for entry of a misdemeanor conviction (even though the jury was not instructed on the misdemeanor).

People v. Coleman, 55 P.3d 817 (Colo. App. 2002). If defendant is convicted of possessing a kilogram or more of cocaine with intent to distribute, and is found to be a special offender for importing the cocaine, he receives the benefit of a sentencing anomaly: the trial court may impose the minimum sentence under the special offender provision, §18-18-407, even though that may be less than the minimum sentence required for possession with intent to distribute under §18-18-405(3)(a)(III).

People v. Warren, 55 P.3d 809 (Colo. App. 2002). Trial court gave a definitional instruction of "possession" that tracked the model jury instructions, instead of the definition of "possess" recited in People v. Villapando, 984 P.2d 51 (Colo. 1999). No error since there is no appreciable difference between the two definitions. Under §18-18-405(1) (a), a defendant is punished more severely for possession of a controlled substance than for use of the same substance under §18-18-404. No equal protection violation. Possession may be punished more severely than use because one who has possession, but does not use it, has the capability of distributing or dispensing it to others.

People v. Perry, 68 P.3d 472 (Colo. App. 2002). With the exception of simple possession and attempted simple possession, all drug-related crimes proscribed in §18-18-405(1) are class 3 felonies, including possession with intent to distribute.

People v. Rios, 43 P.3d 726 (Colo. App. 2001). Because the special offender statute, §18-18-407, does not create a substantive offense, but only increases the sentence for the underlying offense, the trial court may not impose a separate sentence on the special offender count. After directing the officers to the apartment where they could buy drugs, defendant gave the officer $7 to combine it with the officers' money in order to obtain crack cocaine. In addition, one of the officers testified that he offered, and defendant took, a piece of the crack

cocaine, although no drugs were found on the defendant when he was arrested. There was sufficient evidence to support the defendant's conviction for attempted possession.

People v. Wiley, 51 P.3d 361 (Colo. App. 2001). If the amount of controlled substance that the defendant allegedly possessed is less than a usable quantity, then the People must produce other evidence supporting an inference that the defendant knew she possessed the substance. However, the determination of whether the evidence is sufficient to go to the jury on the question of knowing possession is a determination for the trial court to make, and the defendant is not entitled to a jury instruction on that point.

People v. Trusty, 53 P.3d 668 (Colo. App. 2001). Possession with intent to distribute a schedule II controlled substance is a class 3 felony. Under §18-18-407(2)(a), to punish a defendant as a special offender for possessing drugs on public housing grounds with intent to distribute, possession of drugs at that location is not enough. The jury must find that defendant intended specifically to distribute to a person or people on public housing grounds.

People v. Graham, 53 P.3d 658 (Colo. App. 2001). The jury's verdict that the weight of the drugs was between 25-450 grams was a sentencing consideration, not an element of a separate crime. Therefore, defendant's separate convictions for (1) simple possession (2) possession of 25-450 grams, and (3) possession with intent to distribute 25-450 grams, legally constituted one crime of possession with intent to distribute, a class 3 felony, with the mandatory-sentence requirements based upon the weight.

People v. Martinez, 36 P.3d 201 (Colo. App. 2001). The drug special offender statute is a sentence enhancing provision, not a substantive offense. Defendant's sentence cannot be enhanced under both §18-18-405(3)(a) and §18-18-407. §18-18-405(3 (a) does not apply where an accused is found to be a special offender under §18-18-407.

Richardson v. People, 25 P.3d 54 (Colo. 2001). If the amount of controlled substance that defendant allegedly possessed is less than a usable quantity, then the People must produce other evidence supporting an inference that the defendant knew he possessed the substance. The determination of whether the evidence is sufficient to go to the jury on the question of knowing possession is a determination for the trial court to make, and defendant is not entitled to a jury instruction on that point.

People v. Pierrie, 30 P.3d 816 (Colo. App. 2001). §18-18-405(2) (a) (I) provides that offenses involving a schedule I or II controlled substance are class 3 felonies except, that offenses involving a schedule II substance, are class 4 felonies if "based on possession." The statutory term "based on possession" is subject to alternative reasonable interpretations, but the legislative history makes clear that it only refers to simple possession and not to possession with intent to distribute. Therefore, the legislature intended that only simple possession of a schedule II controlled substance would be a class 4 felony

People v. Pineda-Eriza, 49 P.3d 329 (Colo. App. 2001). No *mens rea* requirement is included in or implied by §18-18-407(1), the special offender/importation sentence enhancer. Defendant's separate conviction and sentence for possession with intent to sell greater than 28 grams of cocaine must be vacated because the jury's verdict was the basis of a sentence enhancer, as opposed to a substantive offense. The sentence enhancer did not apply to defendant's conviction for possession with intent to sell because that conviction was already enhanced by a special/offender importation enhancer, and it could not be applied to either of the other two substantive convictions because defendant was only on notice that the enhancer was applicable to the "intent to sell" charge. The trial court correctly concluded that the version of §18-18-407(1) in effect prior to 7/1/97 required a mandatory minimum sentence of 24 years and one day. The trial court correctly concluded that it had no authority to reconsider defendant's mandatory minimum sentence of 24 years and one day imposed under the former version of §18-18-407(1) even though the subsequent version of the statute requires only a mandatory

minimum of 8 years. There was sufficient evidence that defendant had control over the cocaine. Although the cocaine was hidden under a companion's clothing, the companion testified that defendant paid her to carry the cocaine, told her where to find it and how to hide it, supplied her with a plane ticket, and told her what to do upon their arrival in Denver.

Marijuana Offenses

People v. Garcia-Gonzalez, 2020 COA 166. "Land" as used in the statute prohibiting the cultivation of marijuana on land (§18-18-406(3)(a)(I)), did not include enclosed, locked spaces on residential property, but was not limited to open spaces and could include the land around a residence. Here, the trial court properly dismissed a charge under this statutory provision where the marijuana plants were growing in a 6home's detached garage.

People v. Torline, 2020 COA 160. Free exercise of religion (under U.S. and Colorado Constitutions) is not an affirmative defense to the charge of cultivation of marijuana with intent to manufacture or distribute. *Held*: the trial court properly rejected defendant's proposed defense because there was no legal basis for it, since the law was not unconstitutional as applied to him. The statutes are neutral laws of general applicability which advance the legitimate interests of public health and safety and are rationally related to that end. There was no evidence of religious animus in passing the statutes.

People v. Crouse, 2017 CO 5. Federal Controlled Substance Act includes preemption language that states it will not preempt state law on the same subject matter unless there is a positive conflict between a CSA provision and state law so that the two cannot consistently stand together. Federal CSA preempts article XVIII, section 14(2)(c) of Colorado Constitution, which requires the immediate return of marijuana to defendant upon acquittal. While CSA permits "lawful" enforcement of laws by officer, the conduct must be lawful under both state and federal law. Because return of marijuana is unlawful under federal law, it preempts this provision of Colorado Constitution.

Russell v. People, 2017 CO 3. Col. Const. art. XVIII, §16 (Amendment 64), which legalized possession of one ounce or less of marijuana and marijuana concentrate, applies retroactively and deprived the State of its power to continue to prosecute cases where there was a conviction for possession of less than one ounce of marijuana pending on direct appeal when the Amendment became effective.

People v. Boyd, 2017 CO 2. Under U.S. v. Chambers, 291 U.S. 217 (1934), Col. Const. art. XVIII, §16 Amendment 64 nullified the State's authority to continue prosecuting the possession of one ounce or less of marijuana. As a result, Amendment 64 invalidated any such conviction as to defendants whose direct appeals had not been exhausted on December 10, 2012.

People v. Montante, 2015 COA 40. The attempt to influence a public servant statute is not unconstitutional as applied to physicians making false statements in medical marijuana certifications.

People v. Fioco, 2014 COA 22. For purposes of affirmative defense under Colorado Constitution art XVIII, §14(4)(b), for possession of marijuana in excess of two ounces or six plants, "medically necessary" means "necessary based on a physician's assessment." Physician's assessment and advice must precede possession of excess marijuana or plants. Defendant may not raise an affirmative defense under §14(4)(b) on after-the-fact medical assessment.

People v. Garcia, 251 P.3d 1152 (Colo. App. 2010). Possession of 8 ounces or more of marijuana is a lesser included offense of possession of marijuana with intent to sell or distribute.

People v. Valencia, 169 P.3d 212 (Colo. App. 2007). Court applied *Abiodun* analysis to marihuana statute (§18-18-406 et. seq.) and upheld defendant's convictions for possession with intent to distribute marihuana

and possession of 8 or more ounces of marihuana because there were two separate parcels of marihuana to support the convictions.

People v. Graybeal, 155 P.3d 614 (Colo. App. 2007). Where defendant was charged with "transferring marijuana to a person under the age of fifteen" under §18-18-406(7)(b), trial court properly refused to instruct jury under §18-18-406(5) that "transferring or dispensing of not more than one ounce of marijuana from one person to another for no consideration shall be deemed possession and not dispensing or sale thereof." §18-18-406(5) does not create an exception to the offense under §18-18-406(7)(b), which criminalizes the transfer of "any amount of marijuana" to a person under fifteen.

EMBEZZLEMENT: §18-8-407

People v. Berry, 2017 COA 65. "Public property" as used in embezzlement statute §18-8-407(1) means (and is limited to) money or property owned by the public (the state or one of its political subdivisions).

ENTICEMENT OF A CHILD: §18-3-305

People v. Johnson, 2024 CO 32. The CSC rejects the COA reading of the word "attempt" in the enticement of a child statute, §18-3-305(1), as referring to the inchoate crime of "attempt" defined in §18-2-101(1). Instead, trial courts should interpret "attempt" under §18-3-305(1) in accordance with its plain meaning. *Here:* defendant uttered sexually tinged words to a child standing on a sidewalk while defendant was in a vehicle; defendant's words and actions, taken together and viewed in the light most favorable to the prosecution, constituted sufficient evidence for a reasonable person to conclude that defendant attempted to invite or persuade the victim to enter his vehicle with the intent to commit unlawful sexual contact upon her.

People v. Cook, 197 P.3d 269 (Colo. App. 2008). The two enticement of a child convictions do not merge because one was based on the enticement of the child by an adult (subsection a), and the other was based on the dissemination of that material (subsection b). Since the two subsections were based on different acts with different culpable mental states, trial court properly denied the merger request.

EXTORTION: §18-3-207

People v. Campbell, 174 P.3d 860 (Colo. App. 2007). Because §18-3-207(1) (criminal extortion) does not include protected speech within its reach, it is not unconstitutionally overbroad. To commit criminal extortion, an actor must: make a substantial threat to another person; make the threat without legal authority, and with intent to induce the other person against that person's will to either perform an act, or refrain from performing a lawful act; and threaten to cause the result – that is, economic hardship, bodily injury, or damage to property or reputation – by either performing or causing an unlawful act to be performed, or invoking action by a third party whose interests are not substantially related to the interests pursued by the person making the threat (this third requirement limits statute's applicability and reduces the risk that the statute criminalizes otherwise protected speech).

FELONY DUI, DUI & DWAI: §42-4-1301, ET SEQ.

People v. Spencer, 2024 COA 75. The express consent statute, §42-4-1301.1, requires a driver to choose between and submit to either a blood or breath alcohol test when demanded by a police officer who has probable cause to believe the driver is intoxicated. When a medical professional attempts to draw blood from defendant for ten minutes but is unsuccessful in locating a vein, law enforcement's failure to provide the chosen blood test constitutes "extraordinary circumstances" that excuse the duty to provide the test. §42-4-1301.1(2)(a.5). Neither the CSC's decision in *Null*, nor the language of the express consent statute requires the prosecution in such circumstances to prove that subsequent attempts to draw blood would have been unsuccessful.

People v. Crabtree, 2024 CO 40. Recognizing that it erred in the remedy it meted out in *Linnebur*, the CSC now holds that a trial court's error in failing to present the element of the defendant's relevant convictions to the jury in a felony DUI case is not structural and is, instead, a trial error. Therefore, it does not warrant automatic reversal; rather, it is subject to an appropriate case-specific, outcome-determinative standard of reversal. To qualify for relief under Crim. P. 52(b), an error must be **plain error at the time-of-trial** (i.e., obvious or clear-cut). The CSC declines to adopt the time-of-appeal rule ushered in *Johnson v. People*, 520 U.S. 461 (1997), and *Henderson v. United States*, 568 U.S. 266 (2013). The CSC did carefully consider replacing Colorado's plain error standard in its entirety with the federal plain error standard. In the end, the court heeds the wisdom of the aphorism "if it ain't broke, don't fix it." Colorado's plain error standard has served this state's courts well, and neither the parties in this case nor the wider bar have expressed interest in the federal approach, much less identified deficiencies justifying a complete rebuild of the applicable methodology. Such an overhaul would inevitably be terribly disruptive—unnecessarily so given the postconviction remedy available under Crim. P. 35(c)(1) when a "significant change in the law" occurs while a direct appeal is pending. *Here:* the COA incorrectly found plain error based on the plainness of the error at the time of appeal, even though it is undisputed that the error was not plain at the time of trial. Because the error was not plain at the time of trial, defendant is not entitled to relief under Crim. P. 52(b). COA judgment is reversed, and the case is remanded to the COA with instructions to return it to the trial court for reinstatement of defendant's felony DUI conviction and sentence.

People v. Herold, 2024 COA 53. Under *Gorostieta*, the description of a person with a prior conviction as a "caucasian male" with the same name and date of birth as the current defendant is not sufficiently "specific corroborating evidence of identification connecting the defendant" to the person with the prior conviction for purposes of proving that the current defendant has a prior conviction when that prior conviction is an element of the charged offense. COA reversed defendant's felony DUI conviction and remanded for entry of a judgment of conviction for misdemeanor DUI.

People v. Burdette, 2024 COA 38. Nothing in the express consent statute's text mandates the blood test result's suppression in a later criminal trial for DUI if police don't obtain the sample within two hours of driving because the prosecution doesn't need to prove a specific BAC to meet its burden of proof in a DUI trial. §42-4-1301(1)(f). The "within two hours" language is instead intended only to ensure "timely cooperation by equivocating drivers." It doesn't impose any condition on an officer's testing request. *[Cert Accepted (11/12/24) in case #24SC388: (1) Whether it violates "anew" the right to counsel to transform a misdemeanor into a felony based on a prior conviction obtained in violation of the right to counsel. (AAG Brenna Brackett)]*

People v. Burdette, 2024 COA 38. In a felony DUI case, the COA considers whether an alleged denial of defendant's Sixth Amendment right to counsel in two prior DUI cases divested the convicting courts of subject matter jurisdiction, rendering defendant's collateral attacks timely. COA concludes that a violation of defendant's Sixth Amendment right to counsel does not strip a trial court of its subject matter jurisdiction. Defendant's reliance on an eighty-six-year-old CSC opinion saying that the right to counsel is "jurisdictional" does not comport with the Supreme Court's and Colorado courts' narrower definition of "jurisdiction" today, including subject matter jurisdiction. Therefore, the trial courts entering defendant's prior convictions did not lose subject matter jurisdiction when they allegedly violated the defendant's Sixth Amendment right to counsel, rendering the defendant's collateral attacks untimely. *[Cert Accepted (11/12/24) in case #24SC388: (1) Whether it violates "anew" the right to counsel to transform a misdemeanor into a felony based on a prior conviction obtained in violation of the right to counsel. (AAG Brenna Brackett)]*

People v. Montoya, 2024 CO 20. DUI trials are governed by the same evidentiary rules as any other criminal trial. Accordingly, criminal courts are not bound by the law of refusal that governs administrative, driver's license- revocation hearings. So, if a driver initially refuses blood or breath testing under Colorado's expressed

consent statute but later requests testing, criminal trial courts should consider whether the proffered evidence of refusal or recantation is admissible under the Colorado Rules of Evidence. The CSC also concludes that, under the circumstances here, the trial court misapplied CRE 106 and erred by admitting evidence of defendant's refusal to submit to testing and excluding evidence of his subsequent request for testing.

People v. Young, 2024 COA 1. In felony DUI case, COVID-19 pandemic constituted an "extraordinary circumstance," under §42-4-1301.1(2)(a.5)(I), sufficient to warrant an officer to require defendant to submit to a blood test in lieu of a breath test.

In Re People v. Woodside, 2023 CO 25. The plain language of §42-4-1307(5)(a) imposes second-offense penalties when defendant has a relevant prior conviction at the time of sentencing; it does not require that conduct underlying a second-offense sentence occur after conduct underlying the first-offense sentence. *Here:* defendant committed two alcohol-related offenses in relatively quick succession; he pled guilty first to the later committed offense which was sentenced as his first despite having occurred second in time. Afterward, he pled guilty to the earlier-committed offense and argued that it too should be sentenced as his first.

People v. Grudznske, 2023 COA 36. The General Assembly has passed laws that criminalize DUI, including separate crimes for vehicular homicide (DUI) and attempted vehicular assault (DUI). The General Assembly has also passed laws that allow for the prosecution of persons that cause the death or attempt to assault another through conduct manifesting an extreme indifference to the value of human life generally. For the first time, COA must resolve whether a defendant may be prosecuted for both extreme indifference first degree murder and vehicular homicide (DUI), and similarly, attempted extreme indifference first degree assault instead of attempted vehicular assault (DUI).

People v. Kembel, 2023 CO 5; People v. Dexter, 2023 CO 5. In these Rule 21 appeals, the question presented is whether a jury trial for the offense of felony DUI may be conducted piecemeal, with the element of prior convictions tried separately, only after the jury returns a guilty "verdict" on the other elements. CSC holds that a trial court may not bifurcate the elements of the offense of felony DUI (or of any offense) during a jury trial. CSC makes absolute the rules to show cause issued in these cases. While a bifurcated trial is permitted in prosecutions for second or subsequent offenses when the prior convictions are alleged as a basis for imposition of a harsher sentence and are relevant only to punishment, *Linnebur* made clear that the existence of a prior DUI is an element, not a sentence enhancer, for felony DUI. The proper way to safeguard defendant's rights charged with a single substantive offense is not through bifurcation but through carefully crafted jury instructions that guard against the potential of one element influencing the jury's findings on the remaining elements.

People v. Raider, 2022 CO 40. Search warrants are irrelevant to the issue of consent under expressed consent statute prohibiting forced collection of blood or breath of any person suspected of driving under the influence (DUI) because statute pertains to a recognized exception to the Fourth Amendment's warrant requirement, which is consent; by definition, a valid warrant functions as an entirely independent constitutional ground for conducting a search. Expressed consent statute, including its prohibition against forced specimen collection of blood or breath of any person suspected of driving under the influence (DUI), functions as an exception to the Fourth Amendment's prohibition against warrantless searches, which is consent, and therefore, statute does not apply to blood draws performed pursuant to a judicially authorized search warrant for which consent is unnecessary; because consent operates as an exception to the Fourth Amendment's warrant requirement, the expressed consent statute necessarily does not contemplate searches performed pursuant to a warrant. Expressed consent statute's prohibition against forced specimen collection of blood or breath of any person suspected of driving under the influence (DUI) applies only to warrantless tests based on implied consent; statute's prohibition against forced specimen collection has no bearing on searches executed pursuant to a valid warrant.

People v. Viburg, 2021 CO 81M. CSC answers question left open in Linnebur v. People, 2020 CO 79M where the CSC held that prior convictions are an element of the crime of felony DUI, meaning they "must be proved to the jury beyond a reasonable doubt." CSC had declined to address whether double jeopardy barred retrial of the felony DUI charge, where defendant was convicted of misdemeanor DUI. CSC now holds that double jeopardy does not bar retrial because defendant was not previously acquitted of felony DUI.

People v. Tun, 2021 COA 34. Defendant's right to equal protection is not violated when he is convicted of a felony under the DUI statute, §42-4-1301, and sentenced in accordance with §42-4-1307(6.5). COA still reversed the convictions under *Linnebur*.

People v. Linnebur, 2020 CO 79M. The legislature intended to treat felony DUI as a distinct offense that included prior convictions as elements to be tried to a jury and found beyond a reasonable doubt, rather than as a sentencing enhancer to be found by the court. Where this element was incorrectly decided by the court, the case should be remanded to allow the prosecution to elect between resentencing on the misdemeanor offense or retrial on the felony charge.

People v. Tafoya, 2019 CO 13. Defendant charged with felony DUI under §42-4-1301(1)(a) is charged with F4 and may demand and receive a PH, §16-5-301(1)(b)(II).

People v. Fuerst, 2019 COA 2. Expressed Consent Statute, §42-4-1301.1 authorizes an officer under §42-4-1301.1(2)(b) to request that suspect submit to blood test to determine suspect's drug content after officer has already requested under §42-4-1301.1(2)(a)(I), and suspect has completed, a breath test to determine alcohol content. Nothing in the statutory language ties together §42-4-1301.1(2)(a)(I) and (2)(b)(I) and so an officer is not prohibited from requesting both an alcohol test and a drug test when there is probable cause to do so. Admission of laboratory report, containing defendant's blood test results, through testimony of forensic toxicologist expert witness was not a violation of defendant's constitutional confrontation rights because witness's testimony did not constitute "surrogate testimony" found to be problematic under *Bullcoming* but was instead similar to the circumstances in *Marshall*. *Here:* toxicologist had personally reviewed the information, including the raw data, performed some of the testing, and certified the results of the quality control process by signing the laboratory report; fact that toxicologist did not hold a formal supervisory position at toxicology laboratory was immaterial.

People v. Wambolt, 2018 COA 88. Defendant was convicted of DARP in his first trial, but jury hung on whether he committed "aggravated" DARP because it could not agree on whether the underlying offense involved DUI/DWAI. In a second trial, jury convicted defendant first of DWAI and then found he committed aggravated DARP in a second phase of the proceeding. COA concluded defendant was unconstitutionally tried twice for the same offense in violation of double jeopardy because, under the unique facts of this case, defendant was tried twice for DARP and was not properly tried for aggravated DARP as jury was not instructed on that offense.

Fitzgerald v. People, 2017 CO 26. When there has been no search, and when implied consent law does not criminalize a drunk driving suspect's refusal to undergo chemical testing, introducing evidence of that refusal at trial does not impermissibly burden defendant's Fourth Amendment right to be free from unreasonable searches. *Here:* police, with probable cause for a drunk driving offense, asked driver to take a chemical test; driver refused, and his statement of refusal was offered in evidence against him at trial under §42-4-1301(6)(d).

People v. Simpson, 2017 CO 25. By driving in Colorado, driver consented to terms of the expressed consent statute and that statutory consent satisfied the consent exception to 4th amendment's warrant requirement.

People v. Hyde, 2017 CO 24. If police officer has probable cause to believe that an unconscious person was driving under the influence, a warrantless blood draw under Expressed Consent Statute (§42-4-1301.1) does not violate Fourth Amendment or Equal Protection.

Cain v. People, 2014 CO 49. Under §42-4-1301, preliminary breath test results may not be used as evidence in any court action except as provided by statute, and nothing in statute allows using such results as impeachment evidence.

People v. Schaufele, 2014 CO 43. When considering admissibility of the results of a warrantless involuntary blood draw, trial court must follow Missouri v. McNeely, 133 S.Ct. 1552 (2013), which instructs court to consider totality of the circumstances in assessing exigency. CSC declined to adopt a modified rule proposed by Chief Justice Roberts in his *McNeely* concurring/dissenting opinion - plurality opinion interpreting a plurality opinion.

Grassi v. People, 2014 CO 12. Under the express consent statute, police may require person to submit to testing if they have probable cause to believe that person was driving a motor vehicle in violation of the prohibition against DUI or other alcohol-related offenses. Where a person is dead/unconscious as provided in §42-4-1301.1(8), police must have probable cause to believe defendant was driving a motor vehicle in violation of any of the laws enumerated in §42-4-1301.1(2)(a)(I), before obtaining blood to test for blood alcohol content.

People v. Null, 233 P.3d 670 (Colo. 2010). Where police fail to provide DUI defendant with his chosen implied consent test (blood), prosecutor must present evidence of extraordinary circumstances justifying that failure or risk suppression of defendant's refusal to take a breath test and, ultimately, dismissal of DUI charge.

People v. Brown, 250 P.3d 718 (Colo. App. 2010). Sufficient evidence to support jury's finding of special offender sentence enhancer of having a handgun available for use. *Here*: just before the gun was discovered, defendant was alone in the room, behind a bolted door; as officers were searching the room, he stated that "all that shit is mine." Though this statement was made before the gun was found, and defendant argued it referred only to the drugs, the meaning of the statement was a question of fact for jury.

People v. VanMatre, 190 P.3d 770 (Colo. App. 2008). Term "drive" in DUI statute means to exercise actual physical control over a motor vehicle, while term "operate" in DARP statute is somewhat broader, connoting the action of causing something to occur or to cause to function, usually by direct personal effort. Neither term requires actual physical movement of a vehicle, nor need a vehicle travel any particular distance; vehicle must be reasonably capable of being rendered operable before a person can be convicted of "driving" or "operating" the vehicle while intoxicated. *Here:* although trial court did not instruct jury that it must find the vehicle was reasonably capable of being rendered operable, it did not err because there was undisputed testimony that vehicle's alleged inoperability was a result only of a lack of fuel or a dead battery. The threat that impaired driving statutes seek to avoid is that a vehicle will be put into motion by an intoxicated occupant and thus pose a risk to the safety of the occupant and others. The risk does not exist when the vehicle is inoperable, but remains present when the reason for a vehicle's inoperability is temporary condition that can be quickly remedied, as when a wheel has been removed to change flat tire, the vehicle has run out of gas, or the battery has died. When considering whether defendant exercised actual physical control over a vehicle or caused it to function (drove or operated a vehicle), a jury may consider the totality of the circumstances. When there is evidence indicating that the vehicle may not have been reasonably capable of being rendered operable, the jury must be instructed that it must find the vehicle was either operable, reasonably capable of being rendered operable, in motion (whether by coasting or pushing), or at risk of being put in motion before finding the defendant guilty of driving or operating a vehicle under the DUI and DARP statutes.

Turbyne v. People, 151 P.3d 563 (Colo. 2007). Where police had adequate protocol in place but were unable to administer blood test requested by defendant due to extraordinary circumstances, prosecution could go forward notwithstanding police failure to comply with defendant's request. Officer's invalid and coercive statement to defendant that he had to either submit to a breath test (when the blood test he requested could not be performed) or lose his license requires suppression of breath test results.

People v. Mersman, 148 P.3d 199 (Colo. App. 2006). In prosecution for aggravated driving with a revoked license (drove while license was revoked as habitual traffic offender and while under the influence of alcohol), evidence of DUI was sufficient where (1) defendant exhibited physical indicia of intoxication (watery, bloodshot eyes; moderately slurred speech) and moderate odor of alcohol; and (2) defendant refused to take a breath or blood alcohol test. Where DUI defendant refused to take a breath or blood alcohol test, trial court properly instructed jury that it could consider that refusal in determining defendant's guilt or innocence.

People v. Cruthers, 124 P.3d 887 (Colo. App. 2005). Under a "strict elements" analysis, DUI is a lesser-included offense of vehicular assault based on DUI, so the DUI must merge into the vehicular assault offense.

Riley v. People, 104 P.3d 218 (Colo. 2004); People v. Gillett, 629 P.2d 613 (Colo. 1981). Established the remedy of dismissal of charges as sanction for officer's denial of driver's right to select a chemical test to measure sobriety except when such denial occurred under circumstances amounting to good cause. *Here*: no good cause where driver chose blood test, but service provider was not able to respond in time to take an accurate sample; no evidence of extraordinary circumstances preventing provider from responding in timely fashion. Inconvenience, busy work-load, or delay do not suffice to comprise extraordinary circumstances sufficient to excuse compliance with the express consent statute.

People v. Mojica-Simental, 73 P.3d 15 (Colo. 2003). §16-3-09 (5) applies in a DUI trial because its provisions do not conflict with those in §42-4-1301. §16-3-309(5) addresses how a lab report can be admitted at trial, whereas §42-4-1301 describes procedures for administering tests to be used in DUI cases.

ESCAPE & CONTRABAND: §18-8-201, ET SEQ.

People v. Gregory, 2020 COA 162. Legislation creating a new offense is ameliorative under People v. Stellabotte, 2018 CO 66 and §18-1-410 where: (1) the new offense covers identical conduct as an existing offense; and (2) the new offense is a lesser class of offense. *Here:* where defendant was alleged to have removed his ankle monitor while on ISP parole, he was entitled to the ameliorative benefit of the new crime of "unauthorized absence," and the trial court properly dismissed the felony escape charge.

People v. McClintic, 2020 COA 120M. To be convicted of introduction of contraband in the first degree, a defendant whose entry into a detention facility is involuntary must either deny possession when asked or conceal or attempt to conceal the presence of contraband on his or her person.

People v. Jompp, 2018 COA 128. 2013 version of §18-1.3-801(5) precludes a non-custodial escape conviction from being used as a current conviction for habitual criminal purposes.

People v. Evans, 2015 COA 156. Under §18-8-208.1(2), a consecutive sentence for attempted escape is required only when defendant: (1) is "held for or charged with but not convicted of a felony;" and (2) is later "convicted of the felony or other crime for which he was originally in custody or confinement." Plain reading of statute indicates that consecutive sentencing provision is triggered only after a subsequent conviction for a felony charge pending at the time of the attempted escape. §18-8-209(1) applies only to §18-8-201 through §18-8-208 and to §18-8-211. *Here:* §18-8-208.1 is not within that stated range and §18-8-209(1) does not apply.

People v. Johnson, 2013 COA 122. Escape under §18-8-208 is a "continuing offense" that does not terminate until defendant is returned to custody in Colorado.

People v. Iversen, 2013 COA 40. Elements of "knowingly and unlawfully" for introducing contraband into a detention facility (§18-8-203) do not require that defendant knew the contraband he introduced was unlawful; purpose of statute is to control contraband in prison, and defendant is not required to know the unlawfulness of all contraband items, as not all such items are unlawful; statute only requires defendant be aware of his conduct-know he is introducing contraband; "unlawfully" is not a term of mental culpability. *Here*: evidence of a doctor's visit and note recommending marijuana only addressed the "unlawfully" element and were properly excluded; exclusion did not violate defendant's right to present a defense.

Townsend v. People, 252 P.3d 1108 (Colo. 2011). ISP parolee's failure to remain at his residence of record constitutes the offense of escape from ISP; "extended limits of confinement," as set forth in statute, concern geographic and time limits placed on an ISP parolee.

People v. Corral, 174 P.3d 837 (Colo. App. 2007). Construing plain language of §18-8-209, consecutive sentences are not mandated where defendant was not actually serving a sentence at the time he escaped from custody. *Here:* defendant pled guilty but was not sentenced when he escaped; §18-8-209 does not mandate consecutive sentencing.

People v. White, 179 P.3d 58 (Colo. App. 2007). Sentence providing for concurrent mandatory parole periods under *Luther I* is illegal because it is inconsistent with the statute providing that sentences for escape shall run consecutively with any sentences to be served by the offender.

People v. Padilla, 113 P.3d 1260 (Colo. App. 2005). Defendant "escapes" within meaning of §18-8-208 when he absents himself from the controls placed on him by the state. *Here:* defendant "escaped" when he broke out of the building to which he was confined, even though he failed to get completely free from the facility.

People v. Benzor, 100 P.3d 542 (Colo. App. 2004). The nature of the prior conviction in the escape from custody statute, §18-8-208, is a sentence enhancer, not an element of the offense. The *mens rea* of "knowingly" for the offense of escape from custody does not apply to the fact or nature of the conviction for which the defendant is confined.

People v. Nitz, 104 P.3d 240 (Colo. App. 2004). Defendant who pled guilty to unlawful use of marihuana in a detention facility (F-6), was subject to aggravated sentencing under §18-1.3-401(8) (a) (IV), which requires that defendant under confinement as a convicted felon at the time of commission of a new felony be sentenced to at least the midpoint in the presumptive range for that felony. The sentence aggravator under §18-1.3-401(8)(a)(IV) does not apply to every person convicted of possession or use in a detention facility because not every person confined in a detention facility is a convicted felon. The General Assembly has the authority to determine that possession of marihuana in a detention facility is a more egregious offense if committed by a convicted felon.

People v. M.B., 90 P.3d 880 (Colo. 2004). §18-8-210.1 is not in conflict with the definition of "felony" in article XVIII section 4 of the Colorado Constitution. It does not convert a delinquency adjudication into a felony conviction. Rather, it simply authorizes the People to bring felony escape charges against a sub-set of juvenile offenders who committed acts which, if committed by an adult, would be a felony. Such juvenile offenders may be charged with felony escape under 18-8-208(2).

People v. Luther, 58 P.3d 1013 (Colo. 2002). Under §17-22.5-101, reincarceration period for a parole violation plus a new consecutive sentence for escape are treated as one continuous sentence, with one period of mandatory parole following it.

People v. Perea, 74 P.3d 326 (Colo. App. 2002). Defendant who escaped while on mandatory parole received a consecutive sentence for the escape; reincarceration following parole violation is incarceration on an already-imposed sentence; when defendant is given a consecutive sentence for a felony committed while on parole, he

must finish serving the incarceration on the first sentence, then he must serve both the incarceration and mandatory parole periods of the second sentence.

People v. Garcia, 64 P.3d 857 (Colo. App. 2002). Mandatory parolees are in "custody or confinement" of the DOC, within the meaning of the escape statute, §18-8-208(2).

People v. Lanzieri, 25 P.3d 1170 (Colo. 2001). Defendant was ordered to a COMCOR facility by his parole officer. He later left without permission and was tried for escape. COA affirmed the trial court's grant of judgment n.o.v., on the ground that only the parole board (not a single parole *officer*) had authority to place defendant in the program, and therefore defendant could not have escaped from the facility's "lawful custody or confinement." Assuming the parole officer's directive was an irregularity in defendant's placement in the facility, it was not so egregious as to negate the "lawful custody or confinement" element of escape. Defendant may not challenge the legality of his sentence by resorting to self-help when he has the means to seek relief through judicial channels.

People in the Interest of J.A.C., 25 P.3d 1269 (Colo. App. 2001). §18-8-208(10) was not meant to restrict the class of facilities from which a juvenile could escape to "staff-secure" facilities only. Rather, the statute expands the meaning of "custody and confinement" to include those facilities that are not traditionally custodial, such as those that are "staff secure."

People v. Williams, 33 P.3d 1187 (Colo. App. 2001). There was sufficient evidence to support escape conviction under §17-27.5-104 where defendant was advised and acknowledged that violating the terms of his residential curfew would subject him to prosecution for escape and it was undisputed that defendant was not at his residence for three days.

People v. Eurioste, 12 P.3d 847 (Colo. App. 2000). After being arrested, defendant escaped from custody. He was later convicted of both escape and the original charge for which he was arrested. On the basis of §18-8-209, the trial court ordered the sentences to be served consecutively. But §18-8-209 only applies where a defendant escapes *after* being convicted. And §18-8-208.1(2) requires consecutive sentences for escape attempts only. There is no statute requiring consecutive sentences for completed escapes committed before trial. On remand, trial court could impose consecutive terms on its discretionary authority.

People v. Forester, 1 P.3d 758 (Colo. App. 2000). Under the plain language of §17-27-106(1) (a), a person who absconds from a non-residential community corrections placement commits the crime of escape in violation of §17-27-106(1)(a) and §18-8-208.

FALSE INFORMATION TO A PAWNBROKER: §29-11.9-103

People v. Richards, 23 P.3d 1223 (Colo. App. 2000). To prove giving false information to a pawnbroker, prosecution must show that defendant knowingly lied about any item of information required under §12-56-103; prosecution need not prove that all of defendant's information was false. *Here*: defendant said he had purchased 40 CDs, when in fact they had been stolen.

FALSE REPORT OF EXPLOSIVES: §18-8-110

People ex rel. C.F., 2012 COA 75. Prosecution under §18-8-110 (false report of explosives) requires proof that the caller indicated a bomb "had been placed" in particular location.

FORGERY & IMPERSONATION: §18-5-101, ET SEQ.

People v. Carian, 2017 COA 106. A urinalysis report is a "written instrument" but is not "filed or required by law to be filed or legally fileable" under first-degree forgery statute; probation officers are not mandated by law to receive or maintain urinalysis reports.

People v. Hoggard, 2017 COA 88. Second degree forgery is a lesser-included offense of felony forgery; instructing jury on greater offense did not result in constructive amendment or reversible instructional error.

People v. Riley, 2015 COA 152. Second degree forgery is not a lesser included offense of first degree forgery. For that reason, the prosecution constructively amended the charge by submitting a jury instruction for first degree forgery where the defendant had been charged and convicted of the second degree offense. The term "attempt" in attempt to influence a public servant (§18-8-306) maintains its common meaning. Courts should not provide definitional instructions based on the inchoate crime of "attempt".

People v. Garcia, 2014 COA 85. Criminal impersonation is "Crime Involving Moral Turpitude" under the Immigration and Naturalization Act, and permanently bars a deported defendant from reentering the U.S.

People v. Randell, 2012 COA 108. It is doubtful that old cases which hold that forgery cannot be committed when defendant utters a legitimate document, govern the current forgery statute.

People v. Kovacs, 2012 COA 111. Forgery encompasses the addition of materially false information to an instrument, genuine or non-genuine, that purports complete the instrument as to render it legally operative.

People v. Blue, 253 P.3d 1273 (Colo. App. 2011). Trial court erred in reducing charge from attempt to influence a public servant to false reporting to authorities, because defendant's conduct, in giving police a false name, could have been prosecuted under either statute, and there was no language in criminal code indicating an intent to limit prosecution of such conduct to a specific statute.

Montes-Rodriguez v. People, 241 P.3d 924 (Colo. 2010). Under criminal impersonation, §18-5-113, the term "false capacity" refers to a false legal capacity; "false identity" means "holding oneself out to a third party as being another person." What factual circumstances are sufficient to constitute holding oneself out as being another person cannot be decided as a matter of law. Where defendant provided accurate information concerning his name, address, birth date and place of employment, but provided an incorrect social security number, evidence was insufficient to support finding that he had assumed a false identity under §18-5-133. Where defendant filled out a loan application using a false social security number, evidence was insufficient to support finding he had assumed a "false capacity" under §18-5-113, because the evidence failed to show that he lacked the legal capacity to obtain a loan without a social security number.

People v. Vigil, 251 P.3d 442 (Colo. App. 2010). Where information charged defendant with several counts of offering a false instrument for recording did not identify the particular statements or assertions alleged to be false, charges were not fatally deficient because defendant was able to prepare a defense, did not object to the sufficiency of the information or request a bill of particulars, and did not allege or demonstrate prejudice.

Alvarado v. People, 132 P.3d 1205 (Colo. 2006). Defendant who was a passenger in a car contacted by police gave police a false name. *Here:* conviction for criminal impersonation affirmed. §18-5-113(1)(e) proscribes one act of criminal impersonation that involves two forms of mens rea: knowingly assuming a false identity, with intent to unlawfully gain a benefit or to injure or defraud another. "The criminalized conduct can occur in the same breath."

People v. Perez, 129 P.3d 1090 (Colo. App. 2005). Legislature's use of the phrase "assumes a false or fictitious identity" in §18-5-113(1) evinces its intent that criminal impersonation can be continuing or can occur at a specific time.

People v. Cunefare, 102 P.3d 302 (Colo. 2004). Evidence sufficient for forgery, 18-5-102, where defendant wrote a letter, forged with victim's signature, to DA urging him to drop DV charges; letter was a "written instrument" intended to affect defendant's "legal status;" statute applies to any interest, right, obligation, or status, and is not limited to financial, property, or legal matters.

People v. Bauer, 80 P.3d 896 (Colo. App. 2003). For criminal impersonation, §18-5-113(1), term "capacity" takes on in its common meaning, which is "legal qualification, competency, power or fitness." Possessing the knowledge and skill to perform the functions of an attorney is not the equivalent of the capacity to act as an attorney; one must also possess a valid license in order to have the legal qualifications to act in the capacity of an attorney; a person who represents himself as an attorney and performs legal work when he knows that he has no valid license to do so assumes a false or fictitious capacity for purposes of the criminal impersonation.

FRAUD: §18-5-205, ET SEQ.

People v. Felgar, 58 P.3d 1122 (Colo. App. 2002). §18-5-205(8), proscribing fraud by check, does not set forth a mandatory presumption; it creates only a permissive inference: if defendant has insufficient funds to pay a check that is presented for payment within 30 days, jury can infer that the defendant knew he had insufficient funds.

People v. Gutierrez, 1 P.3d 241 (Colo. App. 1999). §18-5-205(2) (fraud by check) criminalizes issuance of an insufficient funds check in payment, or partial payment, of a pre-existing debt; under present statute the insufficient funds check need not induce the giving of a thing of value because a causal relationship between the issuance of the check and act of obtaining the thing of value is no longer necessary; current statute does not exclude payment of a pre-existing debt.

GAMING OFFENSES: §18-10-101, ET SEQ.

People v. Luke, 948 P.2d 87 (Colo. App. 1997). Materiality of statement is of no merit in determining whether person has made a "false or misleading statement" to the gaming commission.

People v. Warner, 930 P.2d 564 (Colo. 1996). Under *Bagby*, DA cannot charge felony burglary and possession of burglary tools for conduct that is specifically addressed in limited gaming act as misdemeanors.

HARASSMENT & STALKING: §18-9-111

People v. Miller, 2024 COA 66. This case was previously published (2024 COA 45) to hold that a person "contacts" a victim within the meaning of the stalking statute, §18-3-602(1)(c), by phoning the victim, even if the victim does not answer the calls. This new opinion, following a petition for rehearing after the CSC issued Whiteaker v People, 2024 CO 25, also holds that first-degree criminal trespass is a lesser included offense of first-degree burglary.

Pellegrin v. People, 2023 CO 37. CSC holds that a domestic violence finding under §18-6-801(1)(a) does not impose a "penalty" as contemplated by *Apprendi* and its progeny. Defendant has no Sixth Amendment right to have a jury, instead of the trial judge, determine whether the crimes for which he was convicted included an act of domestic violence.

People In Int. of R.D., 2020 CO 44. "True threat," which is not protected by First Amendment, is statement that intended or foreseeable recipient would reasonably perceive as serious expression of intent to commit act of unlawful violence; appellate court had to review constitutionality of harassment statute's application to juvenile's messages posted on microblogging service; as matter of first impression, objective tests are insufficient to distinguish what is a true threat from what is constitutionally protected speech. *Here:* reaction of high school students to juvenile's messages posted on microblogging service was relevant factor for appellate court to consider when determining if juvenile's statements were true threats; and government had to prove that juvenile had the subjective intent to threaten in order to find juvenile guilty of harassment.

People v. Wagner, 2018 COA 68. Where a single time period with factually inseparable incidents are alleged, §18-3-602(1)(a), (1)(b), and (1)(c) provide alternative theories for committing stalking; such convictions are multiplicitous and must be merged.

People v. Folsom, 2017 COA 146. The stalking statute, §18-3-602(1)(c), is not vague on its face or as applied. It is not each individual act of stalking that must cause a reasonable person to suffer emotional distress, but, rather, the combined acts of the defendant that would cause such a result.

Roberts v. People, 2017 CO 76. *Pickering* held that trial court properly instructed jury that prosecution did not bear burden of disproving beyond a reasonable doubt defendant's claim of self-defense to charge of reckless manslaughter; *Pickering* did not establish a broad rule that self-defense is a defense to all crimes requiring intent, knowledge, or willfulness. *Pickering* did not require the jury be instructed that self-defense was an affirmative defense to harassment.

People v. Serra, 2015 COA 130. There was no evidence defendant followed victim inside the store to where she hid, and no evidence he did so with intent to harass, annoy, or alarm her.

People v. Chase, 2013 COA 27. Evidence was sufficient to establish a "credible threat" under §18-9-111(4)(b)(II) where: one of victims testified that she feared for her and her family's safety, she did not go to work for 3 days, and she pulled her child out of school; and other victim testified he feared for his family's safety and bought a gun when he returned to Colorado. Evidence was sufficient to establish repeated conduct in connection with a credible threat where defendant sent victims 6 separate emails over 2 days; nothing in §18-9-111(4)(b)(II) indicates that defendant should be relieved of criminal liability simply because victims read the emails in one sitting and did not retrieve each of the emails the moment they were delivered. Evidence was sufficient to establish conduct "in connection with" a credible threat—that is, the emails shared a continuity of purpose—where: 4 of the emails referred specifically to defendant's demand that an eviction notice be removed from his door;2 of the emails referred to victims by name; and all 6 emails referred to specific or implicit intended retaliation.

People v. Thomeczek, 284 P.3d 110 (Colo. App. 2011). Harassment, §18-9-111(1), is not a lesser included offense of violation of a protection order, §18-6-803.5(1); the two offenses are sufficiently distinguishable to permit multiple punishments because each of the offenses requires proof of an element the other does not. Violation of a protection order can serve as the predicate offense to a second degree burglary conviction. *Here*: unlawful entry of the residence was not the only means by which jury could have found defendant violated the protection order. Thus, both convictions did not rely on the same act to prove the offense.

People v. Herron, 251 P.3d 1190 (Colo. App. 2010). Each stalking count requires two separate incidents, at minimum, to support the conviction, and multiple incidents must be separated by time and place. *Here*: defendant's convictions for two counts of stalking violate double jeopardy because there were only three incidents at issue. Plain language of stalking statute defines a continuous course of conduct by which defendant repeatedly follows, approaches, contacts, or places a victim under surveillance.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). Conduct "in connection with" a credible threat means "acts which further, advance, promote, or have a continuity of purpose, and may occur before, during, or after the credible threat." *Here:* sufficient evidence to support conclusion by reasonable jury that defendant's subsequent communications with victim shared a continuity of purpose with his prior threat on her life: He first told victim on July 26th "when I go to jail, I get out, and then you're dead"; he later told her "you are dead" and "you are toast," and left several voice mail messages for her containing threats. Evidence was sufficient to establish "serious emotional distress" under §18-9-111(4)(b)(III) where: victim testified that she was "really beside [herself] and didn't know what to do" after defendant's July 26 telephone calls; she left her house and went to her neighbor's house; she testified that she was "very much" afraid and increased her level of awareness of her surroundings; she described her emotional state as: "Cars go by at the restaurant, your heart jumps, you're always panicking," and she testified she was "very fearful" and "very distressed" because she realized that defendant could easily act on his threats.

People v. Richardson, 181 P.3d 340 (Colo. App. 2007). §18-9-111(4)(b)(III) is neither vague nor overbroad on its face; it need not expressly exempt from its coverage constitutionally-protected activity to survive an overbreadth challenge. Constitutional right to petition the government for a redress of grievances includes the right of access to the courts. First Amendment does not grant a license to use the courts for improper purposes or immunize a person's pursuit of baseless, frivolous, or vexatious litigation. Litigation is baseless if it is devoid of reasonable factual support or lacking in any cognizable basis in law; frivolous, if unsupported by rational argument based in the evidence or law; and vexatious, if brought or maintained in bad faith to annoy or harass another. *Here*: sufficient evidence to support harassment-stalking–serious emotional distress- defendant's activity in intentionally filing lawsuits without notice to the victim, with the intention to use them to harass her and cause her serious emotional distress, was not constitutionally protected.

People v. Cross, 127 P.3d 71 (Colo. 2006). Under harassment-stalking – serious emotional distress, an objective test is applied to gauge whether stalker's acts would cause reasonable person to suffer serious emotional distress, and victim must actually suffer serious emotional distress. Knowingly" applies only to stalker's acts, and prosecution need not prove that stalker knew that his acts would cause reasonable person, or victim, to suffer serious emotional distress.

People v. Yascavage, 80 P.3d 899 (Colo. App. 2003), aff'd other grounds, 101 P.3d 1090 (Colo. 2004). In harassment-stalking, there does not have to be evidence that defendant knew his conduct would cause reasonable person serious emotional distress, since that would impart a nonexistent requirement that defendant must intend to cause such distress. Instead, defendant only must be aware of his conduct, and result of conduct is evaluated under an objective standard.

People v. Suazo, 87 P.3d 124 (Colo. App. 2003). Jury instruction for harassment-stalking must make it clear that the mental state "knowingly" applies to every element of the crime including the threat and the conduct connected with the threat. *Here*: instruction: "(1) knowingly made a credible threat to the victim (4) and in connection with such threat, repeatedly followed, approached, or contacted the victim," was improper and needed to be corrected to show that "knowingly" applied to the conduct.

People v. Sullivan, 53 P.3d 1181 (Colo. App. 2002). Under §18-9-111(4)(b)(III): there is no requirement that offender be immediately and physically present; term "under surveillance" includes electronic surveillance that records a person's whereabouts as that person moves from one location to another and allows the stalker access to that information either simultaneously or shortly thereafter; victim need not prove she obtained treatment or counseling in order to show that she suffered serious emotional distress; "repeatedly" requirement of §18-9-111(4)(c)(IV) is satisfied when the information is retrieved or gathered on more than one occasion. *Here:* even if defendant only downloaded information from GPS device once, the device "repeatedly" recorded his wife's movements; defendant's use of GPS to collect information concerning his wife's activities was surveillance.

People v. Peay, 5 P.3d 398 (Colo. App. 2000). Act of spitting on someone satisfies the "physical contact" element of harassment §18-9-111(1)(a).

HAZARDOUS WASTE OFFENSES

People v. Thoro Products, 70 P.3d 1188 (Colo. 2003). Specific statute of limitations, §25-15-308(4), requires that hazardous waste violations be prosecuted within 5 years of commission or 2 years of discovery, whichever is earlier. Under statute, defendants could not be prosecuted in 1997 for spills that last occurred in the mid-1980s. Although unlawful "disposal" includes a "leak" of hazardous waste, and although some courts have construed "leak" to include on-going migration of hazardous waste into groundwater, such a reading would nullify the statute of limitations and violate the rule of lenity. To commit unlawful storage of hazardous waste under §25-15-310, defendant must know that he is storing the material and know that the material is waste.

General sentencing provisions of §18-1-105 do not apply to unclassified felonies; trial court lacked authority to impose an "aggravated range" sentence for unlawful storage of hazardous waste; §25-15-310 prescribes the permissible penalties for hazardous waste violations.

People v. Inman, 950 P.2d 640 (Colo. App. 1997). A "hazardous waste incident" includes the abandonment or dumping of a hazardous substance that need not threaten immediate and irreparable harm; the absence of any discharge into the environment (i.e., air, surface or ground water) is immaterial; there was no need to prove cylinders of chlorine had monetary value as prerequisite to proving they were "permanently" dumped or abandoned. Jury can infer specific intent to permanently abandon irrespective of commercial worth.

HUMAN TRAFFICKING (ADULTS & CHILDREN): §18-3-501, ET SEQ.

People v. Hines, 2021 COA 45. Defendant was convicted of human trafficking for sexual servitude, based on two discrete acts, either one of which could have constituted the offense of trafficking. Applying People v. Archuleta, 2020 CO 63M, COA held the human trafficking offense was charged and tried as a continuing course of conduct constituting a single transaction, so a modified unanimity instruction was not required. The proper focus of the human trafficking statute is on the defendant's intent, not the victim's susceptibility to being trafficked. The statute's use of the phrase "for the purpose of coercing" should not be "construed to mean 'with the effect of'" coercing. Rather, in this context, "for the purpose of" indicates "an anticipated result that is intended or desired." To prove human trafficking, then, the prosecution had to present sufficient evidence that the defendant enticed or recruited the victim or transferred her to the other pimp with the intent of coercing her to engage in commercial sexual activity. *Here:* prosecution presented sufficient evidence that the defendant coerced the victim into prostitution by false promises of love, drugs, and physical violence.

People v. Cardenas, 2014 COA 35. Under §18-3-502, the plain language of trafficking in children statute prohibits the sale, exchange, barter, or lease of a child; it does not prohibit the sale, exchange, barter, or lease of a child's services; evidence must establish a transfer of the child's physical or legal custody.

IDENTITY THEFT: §18-1-901

People v. Rodriguez-Morelos, 2025 CO 2. The Court held that the use of a nonprofit organization's name and tax-exempt document does not constitute the use of personal identifying information under Colorado's identity theft statute, §18-5-902(1)(a). Although other parts of the identity-theft statute protect organizations, this provision of the identity-theft statute that references personal identifying information applies only to information concerning single, identified human beings.

People v. Poot-Baca, 2023 COA 112. Criminal possession of a financial device, §18-5-903(1), is not a lesser included offense of identity theft, §18-5-902(1)(a), under either §18-1-408(5)(a), or §18-1-408(5)(c).

Preliminary Hearing

People v. Hacke, 2023 CO 6. Defendant, who is out of custody, is not entitled to a PH on the charge of identity theft (F4) because he was not accused of a class 4, 5, or 6 felony that required "mandatory sentencing" (sentence that includes some incarceration). Defendant's criminal history will subject him to mandatory sentencing in the event of a conviction is of no consequence. The relevant inquiry isn't whether defendant's criminal history subjects him to mandatory sentencing if he is convicted of identity theft. It's whether identity theft as an F4 he's accused of committing requires a mandatory sentence. CSC discharges the rule to show cause issued in this case.

Allman v. People, 2019 CO 78. Unit of prosecution for identity theft, §18-5-902(1)(a) is based on each "use" of the victim's personal or financial identifying information, rather than for each "identity" stolen. Accordingly, a defendant may be properly convicted of multiple counts of identity theft for using a single victim's information.

People v. Molina, 2017 CO 7. Under statutory definition in §18-1-901(3)(r), both employment and an apartment lease constitute "thing[s] of value;" each of these items can be basis for an identity theft conviction.

People v. Perez, 2016 CO 12. In employment context, prosecution can satisfy requirement under identity theft §18-5-902 that defendants knew the personally identifying information they exploited actually belongs to real people where: (1) tax withholding are not flagged for a substantial period of time (raising inference that offender knew tax withholdings from his paycheck were going into someone's account); and (2) defendant successfully used same Social Security number with several employers (raising inference that he knew it was authentic because it was successfully tested on multiple systems).

People v. Campos, 2015 COA 47. Sufficient evidence to support conviction for identity theft for using victim's name/Social Security number to obtain a job because employment constitutes a "thing of value" under identity theft statute §18-5-902.

People v. Trujillo, 2015 COA 22. For reasons different than those outlined in *Jauch*, the COA held that the identity theft statute and the unauthorized use of a financial transaction device statute do not violate the equal protection guarantee. While the statutes have similarities, "a reasonable distinction can be drawn between the conduct punished by the two statutes, because . . . the felony identity theft statute describes a theft perpetrated against the account holder of a financial device, while the misdemeanor statute describes fraudulent conduct committed against the provider of cash, property, or services in a financial transaction."

People v. Jauch, 2013 COA 127. The fact that the identity theft statute imposes a harsher penalty than the statute prohibiting unauthorized use of a financial device does not violate equal protection. The elements for identity theft require proof of an element that unauthorized use of a financial device does not; identity theft requires proof that the financial device used belonged to another.

INDECENT EXPOSURE/PUBLIC INDECENCY: §18-7-302

People v. Battigalli-Ansell, 2021 COA 52. Defendant was convicted of internet exploitation of a child, which requires proof that defendant knew or believed he was communicating with a person under 15. Affirming the conviction, COA held that trial court did not abuse its discretion by excluding expert's proposed opinion that defendant's communications were consistent with fantasy age-play, because that opinion would have constituted improper bolstering of defendant's testimony that he believed he was communicating with an adult.

People In The Interest of J.O., 2015 COA 119. Neither unlawful sexual contact nor indecent exposure requires proof of a specific sexual mens rea.

People v. Barrus, 232 P.3d 264 (Colo. App. 2009). Where defendant exited his car nude while woman was present but no evidence was presented that he exposed his genitals to her or even knew she was there, evidence was insufficient to support indecent exposure.

People v. Schreiber, 226 P.3d 1221 (Colo. App. 2009). Prior conviction provision in §18-7-302(4), which increases a conviction for indecent exposure from a M1 to F6 if defendant has two prior indecent exposure convictions or a comparable offense, is a sentence enhancer and is not required to be proven to a jury beyond a reasonable doubt; it may be found by court and must only be proven by a preponderance of the evidence.

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). For public indecency, §18-7-301(1), conduct must have occurred in either a "public place" or a "place where the conduct may reasonably have been expected to be viewed by members of the public." Dormitory room of a detoxification facility meets requirements of statute.

INCITING & ENGAGING IN A RIOT: §18-9-101, ET SEQ.

People v. Lacallo, 2014 COA 78, overruled other grounds, McCoy v. People, 2019 CO 44. Engaging in a riot is not a lesser included offense of rioting in a detention facility.

People v. Mullins, 209 P.3d 1147 (Colo. App. 2008). Self-defense is an affirmative defense to inciting a riot, §18-9-102; and engaging in a riot, §18-9-104.

People v. Martinez, 83 P.3d 1174 (Colo. App. 2003). Defendant's 48-year sentence was not unconstitutionally disproportionate to his offenses. Defendant was convicted of solicitation for child prostitution, and his habitual criminal counts were based on convictions for aggravated incest, felony menacing, engaging in a riot, and violation of bail bond conditions.

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). Evidence sufficient to support engaging in a riot where testimony of several witnesses supported conclusion that more than one person was at grave risk of danger or injury, and complicity instruction clearly applied to any acts where defendant had aided, abetted, advised or encouraged one of three or more people engaging in the riot.

INTERNET LURING OF CHILD: §18-3-306

People v. Douglas, 2012 COA 57. In order to be guilty of a crime as complicitor, there must be evidence that the crime was actually committed. *Here:* defendant could not have been convicted of internet luring of a child and internet sexual exploitation of a child under a complicity theory because there was no evidence that the undercover officer with whom defendant communicated actually committed the crimes at issue.

People v. Boles, 280 P.3d 56 (Colo. App. 2011). Internet luring statute (§18-3-306) encompasses constitutionally protected speech for two reasons: (a) the prohibition is not content-neutral because it applies only if a communication describes "explicit sexual conduct"; and (b) the definition of "explicit conduct," while narrow, is broader than the definition of obscenity as an exception to constitutionally protected speech. Internet luring statute does not discriminate against or unduly burden interstate commerce because it regulates the conduct of persons who, through sexually explicit communications sent over the Internet, endanger the welfare of minors. The "luring" prong of the statute does not discriminate against or burden interstate trade; but rather regulates the conduct of individuals who intend to use the internet to endanger the welfare of children. There is no legitimate commerce that would be derived from these communications. *Here*: defendant failed to show that the luring statute suppresses "a large amount of speech" subject to constitutional protection because the "in connection with" language of the luring part of the statute should be read to mean "to further, advance, promote, or have a continuity of purpose."

INTERFERENCE STAFF OF EDUCATIONAL FACILITY: §18-9-109

People ex rel. C.F., 2012 COA 75. Prosecution under §18-8-110 (false report of explosives) requires proof that the caller indicated a bomb "had been placed" in particular location. Prosecution under §18-9-109(2)(interference with staff, faculty, or students of educational institutions) requires that perpetrator be on the premises when engaging in such interference.

People ex rel. J.P.L., 49 P.3d 1209 (Colo. App. 2002). Willful interference with the students, faculty, or staff of an educational institution requires proof that defendant knew his conduct was practically certain to bring about a disruption of educational activities, and that the conduct amounts to restraint, abduction, coercion, intimidation, force, or violence, or threats of force or violence.

JURY TAMPERING: §18-8-609

People v. Iannicelli, 2019 CO 80. Where defendants stood outside of courthouse and gave jury nullification fliers to people reporting for jury duty, trial court properly dismissed charges of jury tampering under §18-8-609(1); although prospective jurors were "jurors" under the tampering statute, defendants were not communicating with them about a specifically identifiable case.

People v. Brandt, 2017 COA 150. §18-8-609(1), applies only to attempts to improperly influence jurors or those selected for a venire from which a jury in a particular case will be chosen; it does not apply to attempt to influence those merely summoned for jury duty but not yet assigned to the venire, or chosen as a juror, in a particular case. *Here:* defendants identified people summoned to jury duty in Denver District Courthouse, and then handed them leaflets stating, in various ways, that jurors had a right to exercise jury nullification.

KIDNAPPING: §18-3-301, ET SEQ.

Garcia v. People, 2022 CO 6. Trial court commits error when it presents the jury with a jury instruction that defines the phrase "seizes and carries," in the second degree kidnapping statute as "any movement, however short in distance;" error in supplemental instruction in second degree kidnapping case defining "seizing and carrying" as "any movement, however short in distance" was not harmless; and there is no requirement that defendant's movement of victim must substantially increase risk of harm to victim in order for jury to find defendant guilty of second-degree kidnapping. Overruled People v. Owens, 97 P.3d 227 (Colo. App. 2004); People v. Bondsteel, 442 P.3d 880 (Colo. App. 2015); People v. Rogers, 220 P.3d 931 (Colo. App. 2008).

People v. Herdman, 2012 COA 89. Sexual assault is not a lesser-included offense within second-degree kidnapping-sexual assault.

Lewis v. People, 261 P.3d 480 (Colo. 2011). Under §18-1-408, sexual assault and second degree kidnapping-sexual assault are separate offenses, such that sexual assault is not included within second degree kidnapping-sexual assault. Because statutes specifically authorize separate convictions and punishments for kidnapping-sexual assault) and sexual assault, such punishments can "never run afoul of constitutional jeopardy protections," even if those offenses would be the "same" for federal double jeopardy purposes. Even if USSC eventually concludes that sentence enhancers are elements of offenses for double jeopardy purposes, such a determination should not affect sentencing for multiple offenses in Colorado.

People v. Baker, 178 P.3d 1225 (Colo. App. 2007). A sexual assault conviction does not merge into a second-degree kidnapping conviction, even when the kidnapping conviction is enhanced under §18-3-302(3)(a) based on the person kidnapped being a victim of a sexual offense. CSC's decision in *Henderson*, is still good law on this point, even after *Apprendi*.

People v. Kendall, 174 P.3d 791 (Colo. App. 2007). First and second degree kidnapping do not prohibit the same conduct with disparate penalties and do not violate equal protection. Second degree kidnapping deals with nonforcible takings and the use of deceit; first degree kidnapping requires the use of force. Also, §18-3-302(2) only applies to children.

People v. Ortiz, 155 P.3d 532 (Colo. App. 2006). Plain language of second degree kidnapping does not require proof that child be taken for any particular duration in order to show the actor had the "intent to keep or conceal the child from his parent of guardian." Evidence proving defendant violently took child from victim without telling her where he was going is sufficient to sustain jury's verdict, irrespective of fact that defendant's sister later attempted to return child to the victim.

People v. Weare, 155 P.3d 527 (Colo. App. 2006). First degree kidnapping under "make any concession" does not require that defendant actually intend to release his victim once the concession is made. Failure of defendant's information and jury instructions to include the BI element that elevates first degree kidnapping to a F1 did not matter since the kidnapping conviction merged into felony murder conviction; evidence was uncontested that victim had died during the kidnapping; and any level of kidnapping would have supported defendant's felony murder conviction.

Winter v. People, 126 P.3d 192 (Colo. 2006). Insufficient evidence that employee lockers were included in the class of items listed in third degree burglary statute; lockers were unlocked and unsecured, and while designed to hold property, they were not designed exclusively for the safekeeping of valuables and money.

People v. Ramirez, 140 P.3d 169 (Colo. App. 2005). Under Colorado law, sexual assault does not merge with second degree kidnapping enhanced by the fact that the kidnapping victim was sexually assaulted. Apprendi v. New Jersey, 530 U.S. 466 (2000) and its progeny do not require a different result.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Evidence of asportation was sufficient where restaurant employee was moved at gunpoint from restroom to kitchen to freezer.

People v. Williams, 89 P.3d 492 (Colo. App. 2003). Fact that second-degree kidnapping provides same sentence enhancer, regardless of whether the underlying sexual assault charge is a misdemeanor or felony, does not violate equal protection; legislature may provide same punishment for different types of criminal conduct without implicating equal protection.

People v. Joyce, 68 P.3d 521 (Colo. App. 2002). Under statutory elements test, false imprisonment is not a lesser-included of attempted second-degree kidnapping because the latter may be proven without showing the victim was actually "seized."

People v. Harlan, 8 P.3d 448 (Colo. 2000). Creating a substantially increased risk of harm to victim is not a material element of second-degree kidnapping; it is a factual circumstance reviewing courts consider in some cases to determine whether there is sufficient evidence to prove defendant moved victim from one place to another; trial court properly rejected defendant's instruction that included this as an element.

LEAVING SCENE OF ACCIDENT: §42-4-1603

People v. Arzabala, 2012 COA 99. Unit of prosecution for leaving the scene of an accident is the number of accident scenes, not the number of victims involved in the accident.

People v. Hernandez, 250 P.3d 568 (Colo. 2011). Although leaving the scene of an accident statute – § 42-4-1603(1) – does not explicitly state that the driver "shall identify himself as the driver," the language of the statute implies such a requirement because its provisions cannot otherwise be given logical effect. Statute requires that driver of a vehicle affirmatively identify himself as the driver before leaving the accident scene if that fact is not reasonably apparent from the circumstances.

MENACING: §18-3-206

People v. Margerum, 2018 COA 52. A single physical act supporting an assault conviction, with no additional physical action or verbal threat, can be sufficient to simultaneously support menacing conviction.

People v. Naranjo, 2017 CO 87. Defendant was charged with felony menacing for pointing a gun at a nearby car on a highway and telling the driver and passenger, "You don't want to fuck with me," was not entitled to jury instruction on the lesser non-included offense of disorderly conduct with a deadly weapon; knowingly pointing a gun at another individual at close range in the threatening manner described by the victims in defendant's case was felony menacing, and jury could not have acquitted defendant of felony menacing while simultaneously

convicting defendant of disorderly conduct with a deadly weapon based on defendant's testimony that he picked up the gun that he noticed sliding around in his car and casually put it in the glove box while not pointing it in any direction.

People v. Lopez, 2015 COA 45. Evidence sufficient to establish felony menacing because, even though officer/victim did not see a knife when defendant lifted his shirt, jury could have concluded that defendant displayed knife because there was some evidence that he had a knife in his waistband.

People v. Wheeler, 170 P.3d 817 (Colo. App. 2007). Interpreting "use" in its statutory context, §18-12-106.5 (use of a stun gun) unambiguously creates a separate crime whenever a stun gun facilitates commission of any crime, whether or not it is discharged. Misdemeanor menacing is not a lesser-included offense of use of a stun gun.

People v. Shawn, 107 P.3d 1033 (Colo. App. 2004). Defendant was caught shoplifting and engaged in physical altercation during which he pinched, scratched, and tried to bite store employee; during struggle, defendant said, "I'm HIV positive. Let go of me. Let go of me." In upholding felony menacing, COA found defendant's words, coupled with his actions, were sufficient to lead reasonable person to find that defendant's conduct was practically certain to cause fear, and that it was intended to threaten the victim; court also found that HIV-infected blood or other bodily fluids are capable of causing SBI which satisfied definition of "deadly weapon."

People v. Saltray, 969 P.2d 729 (Colo. App. 1998). Menacing does not require that victim be aware of defendant's conduct. If there is evidence from which jury could reasonably find that defendant knew his actions, if discovered, would place victim in fear of imminent SBI, then intent element is established. *Here:* defendant pulled a gun and pointed it at victim, but victim turned away and never saw it.

People v. District Court, 926 P.2d 567 (Colo. 1996). Menacing, felony or misdemeanor, is a general intent crime; it is unnecessary to prove actual subjective fear on part of victim; it is sufficient that defendant was aware that his conduct was practically certain to cause fear.

MONEY LAUNDERING: §18-5-309

People v. Woodyard, 2023 COA 78. Distinguishing People v. Tafoya, 2021 CO 62, COA holds that the police's use of a camera mounted on a telephone pole to surveil the street and sidewalk in front of defendant's residence for about seven weeks was not a search within the meaning of the Fourth Amendment to the U.S. Constitution. Therefore, the trial court did not err by denying defendant's motion to suppress the camera evidence. COA also holds that to prove money laundering under §18-5-309(1)(b)(I), there must be evidence that defendant transferred money to someone else; evidence that defendant received money from someone else does not prove money laundering under that subsection. But COA rejects defendant's argument that to prove money laundering under that subsection, the prosecution must present evidence that the money transferred in the charged transaction came from committing another offense. Defendant's two convictions for violating the COCCA are vacated as well as the money laundering convictions and a few of the conspiracy to distribute illegal drugs convictions. Remaining counts are affirmed.

People v. Nevelik, 2021 COA 30. State of Colorado lacks jurisdiction over a defendant accused of money laundering in an internet scam when there is no record evidence that he had any contact with the victims in Colorado, either physically or electronically.

Butler v. People, 2019 CO 87. Sufficient evidence that defendant aided, abetted, advised, or encouraged principal in money laundering; although evidence defendant assisted in overall money laundering operation alone was insufficient to establish his guilt to each specific charge of money laundering, that provided circumstantial evidence of his guilt; even though defendant was not personally present at time of money laundering transactions during detective's undercover sale of allegedly stolen goods, given defendant previously

bought stolen gift card from undercover detective, and gave principal money the morning prior to purchase of the stolen goods, evidence was sufficient to show defendant was complicit in two money laundering transactions.

People v. Butler, 2017 COA 98. §18-5-309(1)(a)(II)(A) of the money laundering statute requires prosecution to prove: (1) defendant conducted or attempted to conduct a financial transaction; (2) defendant knew or believed that the property involved in that transaction represented the proceeds of a criminal offense; and (3) defendant knew or believed that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified criminal offense.

MURDER & MANSLAUGHTER: §18-3-101, ET SEQ.

People v. Feldman, 2024 COA 119. As a matter of first impression, the COA holds that, when the county coroner certifies the cause and manner of a victim's death as "undetermined," the prosecution may present other evidence regarding the cause and manner of the victim's death in a subsequent criminal proceeding, even if it conflicts with the coroner's determination. COA rejected defendant's argument that the prosecution's expert witness usurped the county coroner's sole authority to determine the cause and manner of the victim's death, thereby violating either the subdelegation doctrine or the separation of powers doctrine. There is no support for defendant's claim that the coroner is part of the legislative branch of government.

Sellers v. People, 2024 CO 64. In this petition, the CSC considers whether a life without the possibility of parole ("LWOP") sentence for felony murder is categorically unconstitutional or, alternatively, grossly disproportionate to the offense of felony murder following the General Assembly's 2021 reclassification of that offense. Based on objective indicia of societal standards and evolving standards of decency as expressed in legislative action and state practice, as well as the exercise of its independent judgment, the CSC concludes that an LWOP sentence for felony murder for an adult offender (19-years-old) is not categorically unconstitutional. The CSC also concludes that, even assuming without deciding that felony murder is not per se grave or serious, defendant's offense here was, in fact, grave and serious. Thus, defendant's LWOP sentence, although severe, does not run afoul of the Eighth Amendment or article II, section 20 of the Colorado Constitution and was not grossly disproportionate.

People v. Kirby, 2024 COA 20. As a matter of first impression, applying the statutory elements test articulated in *Reyna-Abarca* and *Chapman*, both reckless manslaughter, §18-3-104(1)(a), and careless driving resulting in death, §42-4-1402(1), are lesser-included-offenses of reckless vehicular homicide, §18-3-106(1)(a) under the statutory elements test and §18-1-408(5)(a).

People v. Shockey, 2023 COA 121. Jury findings that defendant was guilty of second-degree murder but did not use a deadly weapon (in a special interrogatory) were inconsistent where the victim was shot and the jury was not instructed on complicity. The majority concluded this required vacation of the conviction, while the dissent argued the remedy should be a new trial. *[Cert Accepted (9/30/24) in case #24SC117: (1) Whether any claim that the jury's findings are inconsistent was waived where the findings were read aloud by the district court and the defendant did not object until after the jury was discharged; (2) Whether a finding on a special interrogatory that the prosecution had not proven beyond a reasonable doubt the defendant used, or possessed and threatened the use of, a deadly weapon is logically and legally inconsistent with a conviction for second degree murder or negates an element of that offense; (3) Whether the appropriate remedy for an inconsistent verdict and special interrogatory finding is vacation of the conviction and entry of a judgment of acquittal or reversal of the conviction and remand for a new trial (Brock Swanson, FAAG)].*

In re People v. Smith, 2023 CO 40. In this C.A.R. 21, the CSC reviews a trial court's order treating a defendant's charge of first-degree murder as a capital offense for purposes of article II, §19(1)(a) of the

Colorado Constitution, which authorizes a trial court to deny bail if proof is evident and presumption is great that a capital offense has been committed. Because (1) the term "capital offenses," as it appears in §19(1)(a), plainly and unambiguously refers to offenses for which a statute authorizes the imposition of the death penalty and (2) the General Assembly has statutorily abolished the death penalty as a punishment for offenses (like the one here) charged on or after July 1, 2020, §16-11-901, the CSC concludes that the trial court abused its discretion when it treated the charge of first-degree murder as a capital offense and then denied defendant's request for bail.

Garcia v. People, 2023 CO 30. The trial court did not err by refusing to provide defendant's requested jury instruction defining the term "universal malice," which appears among the statutory elements for extreme-indifference first-degree murder. The court reasoned that the plain language of the statute should be sufficiently clear to a reasonable person of common intelligence. The court however notes that "the better practice would be to define 'universal malice' as including 'a willingness to take life indiscriminately[.]'"

People v. Gallegos, 2023 COA 47. Unlike other affirmative defenses of entrapment and self-defense, the elements of the felony murder affirmative defense are distinct from the elements of felony murder - because a defendant can be convicted of felony murder even if another person caused the victim's death, the felony murder affirmative defense focuses on elements that allow the jury to weigh defendant's responsibility and whether defendant should be convicted of murder for a death he did not directly cause. Thus, a defendant need not be compelled to admit the predicate felony, and thus admit felony murder, to assert the felony murder affirmative defense. *Here:* because some credible evidence supported defendant's affirmative defense, the trial court erred by rejecting defendant's tendered felony murder affirmative defense instruction; defendant's conviction for felony murder dismissed ad case remanded for retrial. Finding no other reversible error, the division affirms the defendant's remaining convictions. *[Cert Accepted (2/12/24) in case #23SC605: (1) Whether the division erred in concluding that a defendant need not be compelled to admit the predicate felony to raise the statutory felony murder affirmative defense when the evidence conflicted as to whether the defendant was involved in the predicate felony (AAG Brenna Brackett)]*

People v. Grudznske, 2023 COA 36. **(1)** The General Assembly has passed laws that criminalize DUI, including separate crimes for vehicular homicide (DUI) and attempted vehicular assault (DUI). The General Assembly has also passed laws that allow for the prosecution of persons that cause the death or attempt to assault another through conduct manifesting an extreme indifference to the value of human life generally. For the first time, COA must resolve whether a defendant may be prosecuted for both extreme indifference first degree murder and vehicular homicide (DUI), and similarly, attempted extreme indifference first degree assault instead of attempted vehicular assault (DUI). **(2)** COA concludes that prosecution and resulting convictions under the DUI laws and the general criminal statutes addressing extreme indifference crimes do not violate defendant's right to equal protection and are consistent with the General Assembly's intent in enacting these laws. *Here:* while under the influence of alcohol, defendant drove his pickup into another vehicle, killing its driver. The struck vehicle was propelled into an intersection, where it collided with other vehicles, injuring those occupants. Defendant attempted to flee the scene, showing little concern for the victims. **(3)** COA agreed with other divisions that voluntary intoxication is not a defense to the circumstances element of extreme indifference first degree murder. *Here:* judge gave a limiting instruction that read "You may not consider evidence of self-induced intoxication as a defense to any of the charges in this case. But in helping you to evaluate the circumstances under which the alleged crimes occurred, the lawyers may draw your attention to all of the evidence, including evidence of self-induced intoxication." Defendant argued the court should have instructed the jury that voluntary intoxication may be used to traverse the circumstances element (universal malice). **(4)** The clear structure of the extreme indifference statutes demonstrate that knowingly applies only to the action and outcome elements of the statutes, not the circumstances element. The circumstances element is described in

the independent introductory clause, and only after that clause is completed does the word knowingly make its appearance, where it then modifies the action and outcome elements. Thus, under the plain language of the statute, the General Assembly has indicated its intention that knowingly modifies the action and outcome elements but not the circumstances element. *Here:* defendant argued that because the CSC did not address whether knowingly applied to the circumstances elements of the crime in Montoya v. People, 2017 CO 40, it implicitly concluded that knowingly also applies to the introductory phrase: "[u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally." §18-3-102(1)(d). COA rejected that analysis, in part, because the trial court's interpretation of *Montoya's* silence as an implicit suggestion that knowingly does not apply to the circumstances element was reasonable. The trial court's instructions correctly reflected this interpretation and were not erroneous.

People v. Vasquez, 2022 COA 100. Defendant can be convicted of fourth degree arson for lighting another person's clothing on fire while that person is wearing the clothing and such an act can serve as the predicate felony for felony murder.

People v. Jackson, 2020 CO 75. Doctrine of transferred intent does not apply to first-degree murder; attempted first degree murder conviction related to same criminal conduct and involved same victim as first degree murder conviction, and thus was a lesser included offense; and error in convicting defendant of both first degree murder and attempted first degree murder of same victim in violation of double jeopardy principles was plain error.

People v. Jones, 2020 CO 45. A "person," as that term is used in child abuse statute defining a child to be a "person" under the age of 16, does not include a fetus who suffers injuries in utero but who is later born alive. Overruled People v. Lage, 232 P.3d 138 (Colo. App. 2009).

People v. Anderson, 2019 CO 34. Statutory definition of extreme indifference murder does not limit conviction of that offense to conduct endangering more than one person. *Here:* defendant's conduct—rapidly firing 13 rounds in deputy's direction—could be found by reasonable jurors to be conduct evidencing willingness to take life indiscriminately, without knowing or caring whose life, or whose lives, might be lost as result of his conduct.

Friend v. People, 2018 CO 90. Under §18-6-401(7), when a person knowingly causes the death of a child who has not yet attained 12 years of age and person committing the offense is in a position of trust, that person is to be convicted of child abuse murder under §18-3-102(1)(f) and not child abuse resulting in death under section §18-6-401.

People v. Griego, 2018 CO 5. Attempted reckless manslaughter/attempted second degree assault, which are both crimes against persons, require a showing of a risk to an actual, discernible person and a risk to general public is not sufficient. *Here:* defendant had 7 prior DUIs and drove drunk and in an extremely reckless manner on a two lane road at approximately 9pm; because officer testified that defendant's driving did not jeopardize any oncoming traffic, no one was in any imminent danger, and oncoming traffic was 100-150 feet away, there were insufficient facts to support verdicts for attempted reckless manslaughter/attempted second degree assault.

Montoya v. People, 2017 CO 40. While extreme indifference murder requires proof that defendant was practically certain his conduct would cause death/he was knowingly engaging in conduct creating a grave risk of death to another, proof that defendant knowingly caused death is not required; jury is required only to find that defendant knowingly engaged in conduct strongly corroborative of his purpose to commit extreme indifference murder.

Doubleday v. People, 2016 CO 3. To establish that defendant committed a predicate offense for felony murder, prosecution must prove beyond a reasonable doubt all of the elements of the predicate offense, including the inapplicability of any properly asserted affirmative defense to the predicate offense. *Here:* jury found defendant

not guilty of attempted aggravated robbery and completed the portion of a special interrogatory noting that the acquittal was based on jury's finding that prosecution did not disprove the affirmative defense of duress beyond a reasonable doubt.

Martinez v. People, 2015 CO 16. Instruction defining "after deliberation" as an interval of time "sufficient for one thought to follow another" is legally incorrect pursuant to Key v. People, 715 P.2d 319 (Colo. 1987). *Here:* defense counsel did not object to the instruction on that basis, so the standard of review was plain error; error was not plain because overwhelming evidence proved defendant deliberated and jury instructions as a whole adequately explained the law. There was sufficient evidence to convict defendant of first degree murder after deliberation as a complicitor because defendant participated in loading and reloading the gun used to kill victim, dragged victim injured from being shot 5 times through the yard to the street, and taunted victim before co-defendant fired fatal shot.

People v. Gross, 2012 CO 60M. Trial court should always instruct on self-defense where there is evidence to support the instruction, even where self-defense is not a true element-negating affirmative defense but is instead a traverse, as in extreme indifference murder. *Here*: no plain error in failing to instruct on self-defense because (1) jury acquitted defendant of extreme indifference murder and convicted him of second degree assault, and (2) trial court did properly instruct on self-defense in relation to second degree assault; (3) jury's verdicts demonstrated that prosecution proved defendant's guilt beyond a reasonable doubt as to all charges because jury rejected defendant's self-defense vis-à-vis second degree assault, which required a higher burden of proof than self-defense vis-à-vis extreme indifference murder.

People v. Stovall, 2012 COA 7M. Escape, §18-8-208, is a predicate offense for felony murder and plain language of statute refers to all levels of escape. Defendant's intent may logically vary in committing crimes against separate victims. *Here*: defendant's convictions for attempted after deliberation and attempted extreme indifference murder were proper where defendant shot at an officer with the specific intent to kill him and with an extreme indifference to life in general as to the other officer in the vehicle.

People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011). Trial court did not need to give supplemental instructions defining "extreme indifference to human life" or "grave risk of death" because the terms consist of commonly understood words.

People v. Duran, 272 P.3d 1084 (Colo. App. 2011). Impossibility is not a defense to an attempt crime. *Here*: even if victim had already been killed from first volley of gunshots by the time defendant fired second volley of gunshots into the crowded house where victim was located, fact that it would have been impossible for defendant to kill victim was no defense to attempted first-degree murder-extreme indifference.

Brown v. People, 239 P.3d 764 (Colo. 2010). Second degree murder is lesser included offense of first degree murder.

People v. Medina, 260 P.3d 42 (Colo. App. 2010). Felony murder may be based on a predicate felony of burglary committed for purpose of assault, even where person intended to be assaulted is person actually killed.

People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010). In first degree murder/attempted first degree murder, evidence was sufficient to establish defendant acted after deliberation where he: (1) unfolded his knife before stabbings; (2) stabbed victims in particularly vulnerable locations—neck, chest, and back; and (3) stated before the stabbings, "We're ready for this" and "You don't want to do this."

People v. Portillo, 251 P.3d 483 (Colo. App. 2010). A menacing conviction does not merge into an attempted extreme indifference murder conviction. "Because the offense of menacing requires proof of an element that need not be proved to obtain a conviction for attempted extreme indifference murder (knowingly placing, or

attempting to place, another person in fear of imminent serious bodily injury), the former offense is not a lesser included offense of the latter."

People v. Alvarado-Juarez, 252 P.3d 1135 (Colo. App. 2010). Extreme indifference murder does not prohibit same conduct as reckless manslaughter; fact that murder statute carries a harsher penalty does not violate equal protection.

People v. Reynolds, 252 P.3d 1128 (Colo. 2010). Evidence that defendant swerved in front of first driver and engaged his brakes, which resulted in that driver losing control, crossing the median, and colliding with second driver's car was sufficient to support defendant's conviction for vehicular homicide of second driver, whose death was a natural and probable consequence of defendant's conduct. It was foreseeable defendant's conduct in swerving in front of first driver and engaging his brakes would result in collision between first and second driver travelling in opposite direction on a divided highway, and death of second driver. The foreseeability limitation applied to civil liability for negligence does not apply to criminal liability for homicide. Evidence was sufficient to support extreme indifference murder of 2 drivers in road rage incident, notwithstanding the fact that his conduct was specifically directed at one of the drivers.

People v. Reynolds, 252 P.3d 1128 (Colo. 2010). Evidence was sufficient to support extreme indifference murder conviction of two drivers in a road rage incident, notwithstanding fact that his conduct was specifically directed at one of the drivers.

People v. Phillips, 219 P.3d 798 (Colo. App. 2009). For purposes of felony murder, defendant's intent to commit underlying felony can be inferred from circumstantial evidence if there is a close relationship between a killing and subsequent felony. *Here*: evidence was sufficient to support felony murder conviction when the killing occurred prior to commission of the underlying felony.

People v. Rubio, 222 P.3d 355 (Colo. App. 2009). Attempted extreme indifference murder covers knowing conduct that creates a grave risk of, but does not result in, death; prosecution is not required to prove that defendant knew his actions were "practically certain" to cause death; knowingly requirement in this type of offense relates to the *conduct*, not its *result*; knowingly requirement is satisfied by proving defendant "engaged in conduct that in fact created a grave risk of death." *Here:* evidence was sufficient where defendant shot an AK-47 assault rifle into a parked car and several occupied residences, evidencing an attitude of universal malice manifesting extreme indifference to human life generally.

People v. Valdez, 183 P.3d 720 (Colo. App. 2008). Provocation mitigator does not apply where defendant intentionally puts himself in the provoking situation by going to his estranged wife's house for purpose of being there while she is engaged in sexual relations with her boyfriend.

People v. Lehnert, 163 P.3d 1111 (Colo. 2007). Attempt statute defines a "substantial step" as "any conduct … which is strongly corroborative of the firmness of the actor's purpose." It need not further enumerate the particular circumstances that satisfy that definition. *Here*: although defendant was arrested before producing operational bombs or placing them within striking range of her victims, there was abundance of evidence of her determined and sustained efforts to implement her plan, which could be found by reasonable jurors to be strongly corroborative of her firmness of purpose to commit murder.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). Evidence supporting 2 conspiracy to commit murder convictions was sufficient, as testimony showed defendant and his fellow gang members agreed to kill victims, and defendant thereafter tried to shoot the victims.

People v. Grant, 174 P.3d 798 (Colo. App. 2007). Jury instructions are inadequate where, in an appropriate case, they do not explicitly advise that intoxication and mental impairment must be considered in connection with the "intent" and "after deliberation" elements of first degree murder. *Here:* even in case where defendant

cannot claim that he was insane due to self-induced intoxication, if evidence shows that his level of intoxication led him to believe he was killing or assaulting demons, dragons, or the devil—as opposed to killing or assaulting humans—then evidence is sufficient.

People v. Candelaria, 148 P.3d 178 (Colo. 2006). With first degree murder, jury's findings of extreme indifference and specific intent with regard to a particular individual are neither logically nor legally inconsistent. Because Colorado Criminal Code defines a single offense of first-degree murder that can be committed in different ways, the verdict form should offer the jury an opportunity to find defendant not guilty or guilty of "first degree murder." If the verdict is guilty, the jury should indicate by special interrogatory the separate statutory subsections it found the defendant to have violated. Where jury finds defendant guilty of firs-degree murder of a single victim on multiple theories, the mittimus must reflect a single, generic judgment of conviction for first-degree murder, unless entry of a judgment of conviction upon any of the theories would be barred by convictions of other offenses simultaneously entered against the defendant. Should they become important on appeal or in post-conviction proceedings, jury's findings on the different theories are adequately reflected in special interrogatories.

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). Although victim voluntarily handed his money to defendant during the course of a drug deal, he would have still been able to retrieve it once he learned he had bought imitation controlled substances; where defendant shot victim in order to keep victim's money, evidence was sufficient to show that he killed victim during the course of a robbery and was guilty of felony murder.

People v. Prieto, 124 P.3d 842 (Colo. App. 2005). Defendant's conduct constituted both felony murder and vehicular homicide, including the penalty enhancement mandated by the fact that defendant was fleeing commission of a felony at the time of the vehicular homicide, §18-1.3-401(8)(g). Conviction/sentencing under more severe felony murder statute does not violate equal protection because felony murder and vehicular homicide do not proscribe identical conduct-the offenses are distinguished by the culpable mental state, the degree of causation, the predicate offenses involved, and the requirement that the actor operate a motor vehicle for vehicle homicide. Legislature has not precluded conviction/punishment for felony murder by enacting the allegedly more specific fleeing-from-a-felony penalty enhancer for vehicular homicide; this penalty provision bears none of the indicia of a specific statute intended to preempt prosecution under a more general statute.

Auman v. People, 109 P.3d 647 (Colo. 2005). Arrest, by itself, does not terminate a co-participant's liability for felony murder when death occurs at the hands of another participant who remains in flight.

People v. Petschow, 119 P.3d 495 (Colo. App. 2004). Trial court did not err in refusing to merge convictions for attempted first degree assault and attempted first degree murder of same victim, since the use of a deadly weapon is an element of attempted first degree assault but not attempted first degree murder.

Cassels v. People, 92 P.3d 951 (Colo. 2004). Evidence of victim's drunken insults/threats, along with pushing/shoving the defendant, constituted a serious and highly provoking act sufficient to excite an irresistible passion in a reasonable person; trial court erred in failing to give an instruction on heat of passion mitigator to second-degree murder.

People v. Beatty, 80 P.3d 847 (Colo. App. 2003). Language of extreme indifference murder statute does not require that conduct against more than one victim be charged in one combined count; defendant may be charged with/convicted of multiple counts of attempted extreme indifference murder where his conduct endangers several people.

People v. Sepulveda, 65 P.3d 1002 (Colo. 2003). When conviction is reversed, court must grant prosecution the option to retry the case, or to accept conviction for the lesser offense if all the elements of that offense are met, and defendant does not suffer undue prejudice. The "reasonable person" referred to in statutory mitigator of

heat of passion is measured against the standard of an *objectively reasonable person*, and not by whether a reasonable person possessing defendant's subjective, personal traits and characteristics would have suffered an irresistible passion to kill as a result of victim's passions. *Here:* prosecution must be given option of accepting second-degree murder because evidence established that defendant knowingly caused victim's death, and he was not unduly prejudiced because he was not entitled to provocation instruction that was refused.

People v. Ramirez, 56 P.3d 89 (Colo. 2002). Insufficient evidence to support heat of passion instruction where victim refused defendant's marriage proposal, requested that he leave her home, and pushed him toward the door when he did not comply; those actions are not serious and highly provoking acts that would excite an irresistible urge in a reasonable person.

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). Under §18-8-105(2)(d), to be guilty as accessory to crime a person need not actually obstruct police from detecting the principal, but only commit an act that obstructs police from "any act which might aid" in detecting the principal. *Here:* evidence defendant told police first that victim shot himself, then that defendant had accidentally shot him, when actually third person was the killer, was sufficient to support defendant's conviction for accessory to criminally negligent homicide. He concealed information, the existence of the third person, that might have aided police.

People v. White, 64 P.3d 864 (Colo. App. 2002). Defendant may not be convicted of both felony murder and second-degree burglary because the burglary offense, as a predicate felony, is a lesser-included offense of felony murder.

People v. Darbe, 62 P.3d 1006 (Colo. App. 2002). Reasonable person referred to in heat of passion mitigator is an *objectively reasonable* individual, not a subjectively reasonable one possessing defendant's personality traits or defects.

People v. Skinner, 53 P.3d 720 (Colo. App. 2002). First-degree assault is not a lesser-included offense of attempted first-degree murder.

People v. Caldwell, 43 P.3d 663 (Colo. App. 2001). Instruction defining attempted first-degree murder stated that defendant must have intentionally engaged in conduct constituting a substantial step toward the commission of first-degree murder; instruction failed to state that defendant must have acted after deliberation and with intent to cause death. This instruction is disapproved; but no plain error, because culpability elements of intent and deliberation were prominently included in the instruction defining first-degree murder. Deliberation was proven where defendant did not immediately stop for police officer's lights and siren, but instead continued driving until he pulled into a parking lot and made a U-turn back towards officer; defendant's intent to kill was proven by location of bullet holes in the patrol car and the path of bullets toward the driver.

People v. Garcia, 28 P.3d 340 (Colo. 2001). Provocation (heat of passion) is a mitigating factor that reduces the range of punishment for second-degree murder; second-degree murder upon provocation is not a separate offense from second-degree murder; it is prosecution's burden to disprove provocation.

People v. Martinez, 32 P.3d 582 (Colo. App. 2001). Second-degree murder committed in the heat of passion is a *per se* COV; because this F3 is both a *per se* COV and an extraordinary risk crime, presumptive sentencing range is 10-32 years.

People v. Ellis, 30 P.3d 774 (Colo App. 2001). In attempted extreme indifference murder, evidence that defendant fired a gun through a closed front door, knowing that victims were behind the door but also knowing that as many as 35 adults/children were in the vicinity, was sufficient to establish defendant displayed universal malice.

People v. Cook, 22 P.3d 947 (Colo. App. 2000). Predicate felony merges into felony murder. *Here*: defendant's robbery conviction merged into felony murder conviction and had to be vacated.

People v. Laurson, 15 P.3d 791 (Colo. App. 2000). Attempted second-degree murder is not a lesser-included offense of first-degree assault, because proof of first-degree assault does not prove "awareness that death is practically certain to result."

Assisted Suicide: §18-3-104(1)(b)

People v. Gordon, 32 P.3d 575 (Colo. App. 2001). Term "aid," as used in aided suicide statute, must be limited to passive aid, providing the means by which victim then goes forward and kills himself. It cannot include acts that actually cause death. *Here:* defendant admitted firing 3 shots at his girlfriend but claimed that he did so only to put her out of her misery after she fired a shot into her head; she died as a result of 4 gunshots to the head; coroner could not testify that any one shot was the cause of death. Trial court properly rejected defendant's tendered instruction on lesser offense of "aided suicide."

Sanderson v. People, 12 P.3d 851 (Colo. App. 2000). Assisted-suicide law, §18-3-104(1)(b), does not interfere with religious beliefs, so it does not violate First Amendment's Free Exercise Clause; statute is a valid, religiously-neutral, generally applicable criminal statute that prohibits conduct a state is free to regulate.

Solicitation: §18-2-301

Melina v. People, 161 P.3d 635 (Colo. 2007). Defendant was properly tried/convicted on single count of solicitation for his multiple requests to various individuals that victim be killed; People's theory of the case and the evidence presented established a single transaction, and defendant was not entitled to a jury instruction on unanimity.

OBSTRUCTION: §18-8-104

People v. Snider, 2021 COA 19. Unit of prosecution for obstruction of a peace officer, §18-8-104, is defined in terms of discrete volitional acts, not the number of officers involved. Resisting arrest under §18-8-103(1)(a), is a lesser included offense of second degree assault on a peace officer under §18-3-203(1)(c).

People v. Lopez, 2015 COA 45. An officer need not be in the process of arresting defendant before defendant can be charged with obstructing.

Dempsey v. People, 117 P.3d 800 (Colo. 2005). Because §18-9-108, Disrupting Lawful Assembly, focuses on defendant's conduct not the content of his speech, it can be applied in a constitutional manner; the conduct is contained in the provision that if defendant intends to disrupt a lawful meeting and "significantly obstructs or interferes with the meeting" he has violated the statute; CSC suggests a definition of "significant" that would assist juries. Though mere verbal opposition alone may not suffice, a combination of statements and acts by defendant including threats or physical interference or interposition of an obstacle can constitute Obstructing a Peace Officer, §18-8-104(1)(a). *Here*: encounter with police was prompted by defendant's disruption of a political rally; considering the sufficiency of the evidence and emphasizing that the governing analysis looks to totality of the circumstances and not to segregated instances, court rejected defendant's claims that he had legal right for each of several ways he refused to cooperate with officers.

OFFICIAL MISCONDUCT:

People v. Berry, 2017 COA 65. Sufficient evidence supported defendant's conviction for first degree official misconduct; defendant committed an "an act relating to his office but constituting an unauthorized exercise of his official function" when he used his office as a sheriff's deputy to facilitate and effectuate purchase of guns from third party; he followed gun owner's wife in his police car, spoke to her while in full police uniform, and gave her comfort that because he was police officer, transaction was lawful. Applying narrow definition of

"public property," Court held that evidence was insufficient to prove that defendant embezzled "public property" when he removed privately owned guns from sheriff's office evidence room and converted them to his own use.

ORGANIZED CRIME (COCCA): §18-17-101, ET SEQ.

McDonald v. People, 2021 CO 64. An associated-in-fact enterprise under COCCA must have structural features necessary under federal RICO that being: (1) minimum amount of structure, namely, a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit the associates to pursue the enterprise's purpose, and (2) ongoing organization of associates, functioning as a continuing unit, that exists separate and apart from the pattern of racketeering activity in which it engages. Jury instruction on "enterprise" under COCCA did not adequately inform jury of meaning of term and instructional error was not harmless. Double jeopardy principles did not bar retrial. Overruled People v. James, 40 P.3d 36 (Colo. App. 2001).

People v. Randell, 2012 COA 108. An "enterprise" for COCCA purposes need not have any legitimate conduct in addition to the conduct stemming from defendant's racketeering activities. *Here:* obtaining fraudulent tax refunds and credits by using shell companies to avoid detection "related to the conduct of the enterprise." Distinguishes People v. Chaussee, 880 P.2d 749, 758 (Colo. 1994).

People v. Davis, 2012 COA 56. If 1 predicate act falls within its respective statute of limitations period, other predicate acts occurring within10 years before that act can used as evidence of racketeering activity even if they could not be prosecuted separately because their statutes of limitations have expired.

People v. Destro, 215 P.3d 1147 (Colo. App. 2008). For defendant to be convicted of a COCCA violation, he/she must have "knowingly" participated in an enterprise through a pattern of racketeering activity and "knowingly" acquired an interest in or control of any enterprise or real property through a pattern of racketeering activity. *Here:* evidence was sufficient to establish defendant's company's involvement in the transactions as "managerial efforts that affect the success or failure of the enterprise" where: (1) the company's literature promised that it would conduct all maintenance and upkeep of the properties and that it was totally responsible for costs of maintenance, upkeep, improvements, repairs, and continuing management; (2) the company took sole responsibility for finding a tenant.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). Definition of "enterprise" in COCCA statute is not impermissibly vague. COCCA does not violate equal protection because defendant must commit at least 2 predicate offenses which must have been conducted as part of an enterprise, which are additional requirements reasonably related to the legislative purpose of deterring organized crime.

People v. Hoover, 165 P.3d 784 (Colo. App. 2006). The legislature has authorized separate punishments for violations of COCCA and its predicate offenses, even where the convictions arise from the same conduct.

People v. Pollard, 3 P.3d 473 (Colo. App. 2000). Under COCCA, a person engaged in a pattern of racketeering activity must act in concert with another person or entity; a separate entity is formed by the act of incorporation, and the corporation constitutes an "enterprise" within the meaning of §18-17-104(3). Defendant's corporation was a separate entity from defendant, and a COCCA charge was proper.

CHILD PROSTITUTION: §18-7-402, ET SEQ.

People v. Shannon, 2024 COA 41. Defendant's conviction for human trafficking under §18-3-504(2)(a)(trafficking for child servitude), doesn't violate his right to equal protection of the laws because that statute proscribes conduct—in which defendant engaged—that is not proscribed by the soliciting for child prostitution statute, §18-7-402, or by the inducement of child prostitution statute, §18-7-405.5.

People v. Vega-Dominguez, 2024 COA 32. In this as-applied constitutional challenge, the COA, extending the analysis in *Maloy*, holds as a matter of first impression that the crimes of attempted patronizing a prostituted child and attempted inducement of child prostitution prohibit the same conduct, yet the former carries a much harsher sentence. Defendant's conviction for the former offense violates equal protection. *[Cert Accepted (12/23/24) in case #24SC319: (1) Whether the court of appeals improperly held that Colorado's equal protection doctrine was plainly violated by respondent's conviction for attempted patronizing a prostituted child because it prohibited the same conduct as attempted inducement of child prostitution; (2) Whether the trial court reversibly erred by failing to instruct the jury on a required mental state for the crime of soliciting for child prostitution, and whether the required mental state for soliciting for child prostitution is intentional (SAAG Jessica Ross)]*

People v Price, 2023 COA 96. As a matter of first impression, COA concludes there is no as-applied equal protection violation because the patronizing a child prostitute statute criminalizes different conduct than the pimping of a child statute. COA also holds the trial court erroneously instructed the jury on the definition of "enterprise" based on McDonald v. People, 2021 CO 64 and reverse the COCCA conviction. Because the prosecution presented sufficient evidence of an enterprise under the overruled definition, case remanded for a new trial on the COCCA charge.

People v. Randolph, 2023 COA 7. The mens rea for soliciting for child prostitution under §18-7-402(1)(a) and (b) is knowingly. This division disagrees with, People v. Ross, 2019 COA 79, which had held that the phrase "for the purpose of" is the equivalent of intentionally. While an earlier division in, People v. Emerterio, 819 P.2d 516 (Colo. App. 1991) also held that the requisite mental state is knowingly, that decision did not analyze the meaning of "for the purpose of." Thus, this decision is the first to reject the contention that "for the purpose of" is a specific intent element. *[Cert Accepted (9/25/23) in case #23SC167: (1) Whether the trial court reversibly erred in instructing the jury that "knowingly" was the culpable mental state for soliciting child prostitution. (AAG Fellow Daniel Magalotti)]*

People v. Ross, 2021 CO 9. Solicitation of Child Prostitution §18-7-407 precludes defendant from raising a defense based on either his lack of knowledge of the child's age or his reasonable belief that the child was an adult. But it does not relieve the People of their burden of proof under subsections (a) and (b) – to prove that, in soliciting or arranging (or offering to arrange) a meeting, defendant's purpose was *child* prostitution. The requisite mental state for soliciting for child prostitution applies to all the elements (and every part of each element) in §18-7-402(1)(a) and (b) including that the purpose that defendant's conduct was the prostitution of or by a child. Neither the victim's age nor defendant's knowledge of, or belief concerning, the victim's age is an element of soliciting for child prostitution under §18-7-402(1)(a),(b). CSC declined to decide whether the mental state was with intent or knowingly or to comment on soundness of COA holding that the mental state was with intent in People v. Ross 2019 COA 79).

People v. Ross, 2019 COA 79. Soliciting for child prostitution, §18-7-402, is a specific intent crime, and prosecution must present evidence that defendant had the specific intent of soliciting for child prostitution.

People v. Houser, 2013 COA 11. Generally, a constitutional challenge to a statute should not be entertained for the first time on appeal. However, COA may, as a matter of discretion, take up an unpreserved challenge to the constitutionality of a statute, but only where doing so would clearly further judicial economy. *Here:* COA chose not to address defendant's unpreserved constitutional challenge to the child prostitution statute because doing so would not further judicial economy.

People v. Madden, 111 P.3d 452 (Colo. 2005). Patronizing a prostituted child requires an exchange of something of value, a commercial transaction, that occurs between the patron -- the person having the sexual

contact with the child -- and the child, or between the patron and the one inducing the child to participate in the sexual act -- the pimp.

People v. Jacobs, 91 P.3d 438 (Colo. App. 2003). The word "solicits" as used in the elements of the substantive offense of Soliciting For Child Prostitution (§18-7-402) has a meaning different than the word "solicitation" as it is used in the inchoate offense of Criminal Solicitation (§18-2-301(1)). Therefore, there is no need to give an instruction based on the elements of the offense of Criminal Solicitation when instructing a jury on the elements of the offense of Soliciting For Child Prostitution. The affirmative defense of Abandonment and Renunciation is not an affirmative defense to the offense of Soliciting For Child Prostitution.

People v. Martinez, 83 P.3d 1174 (Colo. App. 2003). Defendant's 48-year sentence was not unconstitutionally disproportionate to his offenses. Defendant was convicted of solicitation for child prostitution, and his habitual criminal counts were based on convictions for aggravated incest, felony menacing, engaging in a riot, and violation of bail bond conditions.

PERJURY: §18-8-501, ET SEQ.

People v. Paglione, 2014 COA 54. While perjury warnings by prosecution to potential defense witness are not per se improper, they should be the exception, not the rule. Conflicting or anticipated testimony will rarely rise to the level that justifies a perjury warning. Defendant must establish that a perjury warning constituted reversible error by a preponderance of the evidence. In determining whether perjury warnings were improper, reviewing court examines the totality of the circumstances, considering, among other factors, those set forth in *Blackwell*: (1) the manner in which prosecution raises the issue, including the warning's extent and timing, the language employed, and whether prosecutor communicated directly with witness or through an attorney; (2) prosecution's basis in the record for believing witness might lie; (3) the warning's effect on witness's willingness to testify; (4) whether court attempted to remedy any misconduct; (5) whether prosecution capitalized on witness's absence by directing jury's attention to it during closing argument; and (6) the significance of witness's testimony to defense.

People v. Gibbons, 397 P.3d 1100 (Colo. App. 2011), aff'd other grounds, 328 P.3d 95 (Colo. 2014). Evidence was sufficient to support perjury given obvious inconsistencies between stolen jet ski's attributes, description on the jet ski's permits, and between the permits themselves.

People v. Schupper, 140 P.3d 293 (Colo. App. 2006). By signing an application for court-appointed counsel, defendant made the statements contained therein under oath in an official proceeding. First degree perjury charge should not have been dismissed.

People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000). Under §18-8-506, proof of perjury is sufficient when two witnesses independently establish that defendant's statement was false. Once trial court has determined that sufficient evidence has been presented under perjury "two-witness rule," trial court is not required to submit jury instruction that falsity of a statement may not be established solely through contradiction by the uncorroborated testimony of single witness. *Here*: proof was sufficient because prosecution's attack on validity of gasoline receipt was evidence contradicting defendant's testimony; and gas station manager's testimony that no gasoline purchase was made at the time defendant claimed was plainly inconsistent with defendant's statement.

People v. Vance, 933 P.2d 576 (Colo. 1997), rev'd other grounds, 19 P.3d 1 (Colo. 2001). In perjury prosecution, materiality is an element for jury, not judge, to decide.

PIMPING: §18-7-206

People v Price, 2023 COA 96. As a matter of first impression, COA concludes there is no as-applied equal protection violation because the patronizing a child prostitute statute criminalizes different conduct than the pimping of a child statute. COA also holds the trial court erroneously instructed the jury on the definition of "enterprise" based on McDonald v. People, 2021 CO 64 and reverse the COCCA conviction. Because the prosecution presented sufficient evidence of an enterprise under the overruled definition, case remanded for a new trial on the COCCA charge.

People v. Grosko, 2021 COA 28. COA decides two issues concerning §18-7-206: (1) "pimping" is a continuing offense, so the statute of limitations does not begin to run as long as the pimping continues; and (2) the unit of prosecution is based on the number of prostitutes: defendant can be convicted of a separate pimping count for each prostitute the defendant receives money or things of value from.

POWPO & WEAPONS VIOLATIONS: §18-12-101, ET SEQ.

Johnson v. People, 2023 CO 7. CSC holds that the term "transfer," as used in §18-12-111(1) (unlawful purchase of firearm), includes temporary transfers and the shared use of a firearm. Thus, the evidence was sufficient to sustain defendant's conviction. CSC also concludes that although defendant didn't waive her constitutional challenges, she forfeited them. However, because there wasn't a legal definition of "transfer" before today, any error in failing to further define the term for the jury wasn't obvious and doesn't warrant reversal for plain error. CSC affirms the COA judgment.

People v. In the Interest of L.C., 2017 COA 82. §18-12-105, which criminalizes unlawfully carrying a concealed weapon, is not unconstitutionally vague-even though statute's definition of "knife" encompasses (with minor exceptions) any blade over 3.5 inches, statute also specifies that it applies only when concealment is "unlawful." §18-12-105 is also not vague for lack of a specific intent requirement-requirements that concealment be knowing and unlawful prevent statute from being unconstitutionally vague, even without specific intent requirement.

People v. In the Interest of A.B, 2016 COA 170. Under Children's Code, "deferred adjudication" carries a different meaning than "adjudication." Deferred adjudication only means a plea has entered, not a conviction. Deferred adjudication may not serve as a predicate prior offense for POWPO. This is despite fact that adult felony DJ&S means adult defendant has a prior conviction for purposes of POWPO.

People v. Sandoval, 2016 COA 14. U.S. and Colorado Constitutions do not protect an individual's right to possess a short shotgun for self-defense; trial court did not err by precluding defendant from raising affirmative defenses based on right to bear arms and self-defense. Evidence was sufficient to prove defendant knowingly possessed the particular short shotgun that he was charged with possessing where: defendant admitted he possessed a short shotgun and it would be found at his residence; short shotgun that defendant was charged with possessing was found in shed in residence's backyard; a key to shed was found on porch of defendant's residence; and a spent shotgun round that was fired from the short shotgun was found in bedroom of defendant's residence.

People v. Carbajal, 2014 CO 60. Colo. Const. Art. II, §13, permits a citizen to "keep and bear arms in defense of his home, person and property." However, POWPO criminalizes such possession by convicted felons. While §13 underlies an affirmative defense to POWPO, that defense is statutory choice-of-evils defense, codified at §18-1-702. Unlike most affirmative defenses, the choice-of-evils is subject to a special procedure, and the court did not alter that procedure for POWPO cases. To submit the affirmative defense to jury, POWPO defendant must point to evidence that he/she possessed the weapon in response to a reasonable belief in a threat of

imminent harm, and jury should be instructed on those elements. Stock instruction on affirmative defense to POWPO is implicitly disapproved.

Lucero v. People, 2012 CO 7; Montez v. People, 2012 CO 6. Definition of deadly weapon, §18-1-901(3)(e), means any of the following which in the manner it is used or intended to be used is capable of producing death or SBI: a firearm, whether loaded or unloaded; a knife; a bludgeon; any other weapon, device, instrument, material, or substance, whether animate or inanimate. Under this definition, there are no "per se" deadly weapons. An object, including a firearm, is not a deadly weapon absent evidence that defendant used or intended to use it in a manner capable of producing death or SBI.

People v. DeWitt, 275 P.3d 728 (Colo. App. 2011). A law is not retrospective merely because it might operate on a fact/status preexisting the effective date of the legislation, as long as its punitive features apply only to acts committed after the statutory proscription becomes effective. The "knowingly" mental state required for POWPO does not apply to prior-felony-conviction element of the offense. Two POWPO convictions merge where they are based on different predicate felony convictions but involve the same incident and weapon. Defendant charged with POWPO may raise an affirmative defense that he possessed a weapon for the constitutionally protected purpose of defending his home, person, or property. *Here:* POWPO was not applied retrospectively because the prohibited conduct, possession of a weapon, occurred after the 1994 amendment; it does not matter that defendant's predicate felonies occurred before the change in the law. Defendant was entitled to instruction on affirmative defense because he "not only testified to a general fear for his personal safety, but also tied his fear to specific trends of violence and incidents in the areas where he regularly walked and in the stores that he regularly visited, including the [grocery store where he was charged with possessing a handgun]." Defendant testified that: (1) he regularly walked from his apartment to the grocery store armed with his handgun, (2) his reason for purchasing and carrying the handgun was "self-defense," (3) he had concerns for his personal safety and his property both in his home and in his neighborhood, (4) he was aware of reports of recent muggings at the grocery store, (5) he had seen things in his neighborhood that put him on "alert status," and (6) someone had recently attempted to break into his apartment on two occasions.

People v. Montez, 280 P.3d 9 (Colo. App. 2010), rev'd other grounds, 2012 CO 6. Each weapon possessed by a previous offender constitutes a separate POWPO offense.

People v. O'Neal, 228 P.3d 211 (Colo. App. 2009). Under §18-1-901(3)(h), the phrase "capable or intended to be capable" does not modify each type of possible firearm listed in the statute. Because it modifies only "other instrument or device," under §18-1-901(3)(h), a pistol (no matter what its condition, no matter what defendant's intent may be with respect to it) is a "per se" firearm.

People in the interest of O.R., 220 P.3d 949 (Colo. App. 2008). For carrying a concealed weapon, the test of concealment is "whether a weapon is so carried as not to be discernible by ordinary observation." This is a question of fact for the factfinder. *Here*: evidence was insufficient to prove that the juvenile was carrying a concealed weapon where officer pursuing juvenile could see an object that appeared to be a handgun in the juvenile's pocket.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). In POWPO, evidence was sufficient to show defendant had a real firearm given victim's observations of handgun and defendant's threats; mere possibility that object in question was a fake firearm does not suggest that there was insufficient evidence to support a finding that the object was a real firearm capable of discharging a projectile. Challenges to sufficiency of evidence require reviewing court to determine whether relevant evidence, when viewed as a whole and in the light most favorable to prosecution, is substantial and sufficient to support a conclusion by a reasonable person that defendant is guilty of the crime charged beyond a reasonable doubt. Convictions will not be reversed for lack of evidence simply because a different result could have been reached.

People v. Wheeler, 170 P.3d 817 (Colo. App. 2007). Interpreting "use" in its statutory context, §18-12-106.5 (use of a stun gun) unambiguously creates a separate crime whenever a stun gun facilitates commission of any crime, whether or not it is discharged. Misdemeanor menacing is not a lesser-included offense of use of a stun gun.

People v. Brown, 119 P.3d 486 (Colo. App. 2004). Possession of an illegal weapon is a lesser-included offense of POWPO where the same weapon is alleged in each charge.

People v. Jackson, 98 P.3d 940 (Colo. App. 2004). Evidence was sufficient to support POWPO conviction where police retrieved a gun from house where defendant was arrested, victim identified the gun belonged to defendant, victim stated defendant used the gun when he threatened her on several occasions, and another witness testified that victim had previously shown her defendant's gun and asked her to record the serial number.

People in the Interest of J.W.T., 93 P.3d 580 (Colo. App. 2004). A person carrying a knife with a blade less than three and one-half inches in length on school grounds cannot be prosecuted under §18-12-105.5(1) unless the prosecution can also establish that the person used or intended to use the knife as a weapon.

People v. White, 55 P.3d 220 (Colo. App. 2002). Statutory requirement for illegal discharge of a firearm-firearm be discharged "into any motor vehicle"-is satisfied by evidence that defendant fired a gunshot into the hood of a car; shot does not need to be fired into passenger compartment of automobile.

A.P.E. v. People, 20 P.3d 1179 (Colo. 2001). To convict for carrying a concealed weapon under the catchall definition of "knife," §18-12-101(1)(f), prosecution must prove that defendant intended to use the object as a weapon; object's mere appearance is insufficient to sustain conviction, even if object's apparent primary purpose is use as a weapon.

PUBLIC INDECENCY: §18-7-301

People in the Interest of D.C., 2019 COA 22. Under public indecency, §18-7-301(1), residents, staff, and teachers at YOS facility are "members of the public" for purposes of statute and sufficient evidence established that juvenile exposed his genitals in a place where the conduct may reasonably be expected to be viewed by members of the public.

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). Public indecency statute employs an objective standard and is applicable to the performance of sexual acts "in a public place or where the conduct may reasonably be expected to be viewed by members of the public." Because this objective standard depends not on what a particular defendant actually knew, but rather on what a reasonable person should have known, the crime of public indecency is a strict liability offense. A dormitory room of a detoxification facility is a place where conduct may reasonably be expected to be viewed by members of the public.

RESISTING ARREST: §18-8-103

People v. Snider, 2021 COA 19. Unit of prosecution for obstruction of a peace officer, §18-8-104, is defined in terms of discrete volitional acts, not the number of officers involved. Resisting arrest under §18-8-103(1)(a), is a lesser included offense of second degree assault on a peace officer under §18-3-203(1)(c).

RETALIATION AGAINST A JUDGE: §18-8-615

People v. Berry, 292 P.3d 954 (Colo. App. 2011). To commit retaliation against a judge under §18-8-615(1)(b)(II)(B) an individual making a credible threat to a person who has a duty to report must know that the person to whom he is making the threat is subject to a duty to report.

ROBBERY: §18-4-301, ET SEQ.

People v. Mortenson, 2023 COA 92. The COA decides two issues of first impression: (1) there is insufficient evidence to support a defendant's conviction of aggravated robbery where the theft taking was not from the person or presence of another with the use of force; and (2) it is an appropriate exercise of a division's discretion to decline to direct the trial court, on remand from such a vacated aggravated robbery conviction, to enter a judgment of conviction for the lesser included offense of attempted aggravated robbery, applying Halaseh v. People, 2020 CO 35M. The partial dissent concludes that when a defendant's conviction on a greater offense is vacated for insufficient evidence, and even if the jury was not instructed on the lesser included offense, the trial court on remand should enter a judgment of conviction on the lesser included offense.

People v. Serna-Lopez, 2023 COA 21. As a matter of first impression, the COA concludes that the elemental subsections of the aggravated robbery statute set forth alternative means of committing the same offense. Because the trial court entered separate felony convictions for separate counts alleging alternative means by which defendant committed aggravated robbery (deadly weapon and article fashioned as deadly weapon) against the same victim, one of the two convictions merges into the other.

People v. DeGreat, 2018 CO 83. Self-defense can apply to aggravated robbery charges, where, as here, the unique facts and conflicting evidence raise a factual question of whether the defendant's use of force and act of taking are simultaneous and inseparable from one another.

People v. Buell, 2017 COA 148. Evidence was sufficient to support aggravated robbery, even though defendant used force or intimidation only after he took the property; there is no requirement that application of force or intimidation be virtually contemporaneous with the taking.

People v. Firm, 2014 COA 32. §18-4-302(1)(b) and (1)(c) proscribe different conduct and do not violate equal protection.

People v. Williams, 2012 COA 165. To satisfy "presence of another" element of robbery under §18-4-301(1), where property taken is not within victim's physical possession, there must be sufficient evidence that victim had ownership or control over the property.

People v. Gregg, 298 P.3d 983 (Colo. App. 2011). In aggravated robbery, evidence that defendant put his hand in his jacket to make it appear he had a gun provided sufficient evidence that defendant represented he was armed.

People v. Lovato, 179 P.3d 208 (Colo. App. 2007). Robbery of an at-risk adult merges with a conviction for aggravated robbery. Based on the reasoning of *McKinney*, robbery of an at-risk adult is a penalty enhancer, not a substantive element, and cannot be considered when applying the strict elements test. Because simple robbery is a lesser included offense of aggravated robbery, robbery of an at-risk adult is a lesser included offense of aggravated robbery.

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). Although victim voluntarily handed his money to defendant during course of a drug deal, he would still have been able to retrieve it once he learned he had bought imitation controlled substances. Where defendant shot victim in order to keep victim's money, evidence was sufficient to show that he killed victim during the course of a robbery and was also guilty of felony murder. There was no evidentiary basis for an instruction on theft as a lesser included offense of robbery, since evidence established that defendant shot victim as a means of retaining possession of victim's money.

People v. Bass, 155 P.3d 547 (Colo. App. 2006). Attempted robbery and use of a stun gun were not based on identical evidence so as to require concurrent sentences where pushing victim to ground to take her purse was a substantial step toward robbery and additional use of the stun gun established a separate criminal act. Where

attempted robbery was identified in the information as the predicate offense for use of a stun gun, defendant's conviction/sentence for attempted robbery do not merge with his conviction for use of a stun gun. Offense of use of a stun gun only requires the general commission of a criminal offense, not a specific predicate crime.

People v. Wilford, 111 P.3d 512 (Colo. App. 2004). Trial court did not abuse its discretion in rejecting defendant's tendered instruction defining "confederate," as found in §18-4-302(1)(c); term is commonly understood and within comprehension of the jury, and defendant's tendered instruction (which was similar to the definition of conspiracy) imposed an additional element not required by the offense.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). Evidence was sufficient to show employee had the right to exercise control over employer's money, and that money was taken from employee's presence.

People v. Clemons, 89 P.3d 479 (Colo. App. 2003). Evidence was sufficient to support robbery from the presence of the victim where defendant lured hotel clerk away from front desk, attacked her, and confined her in a closet in a separate room in order to return to the front desk and steal money from the cash register.

People v. Clifton, 74 P.3d 519 (Colo. App. 2003). Where defendant menaces multiple store employees and takes property belonging only to one employer from the presence of these employees, a separate robbery conviction as to each employee is proper.

People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003). Two hotel employees had control over the hotel's property when defendant brandished a gun and demanded to be taken to the safe. Even though only one employee handed the property to defendant, the property was taken from the presence of both employees. Defendant committed a separate robbery as to each victim.

People v. Borghesi, 66 P.3d 93 (Colo. 2003). Common law robbery and case law emphasize the assaultive, or violent aspect of robbery and de-emphasize the larcenous aspect; gravamen of robbery is violent nature of the taking, and robbery statutes are intended primarily to protect persons, not property. To constitute robbery, property must be taken from the "person or presence of another." The phrase "presence of another" means that the property taken must be within victim's reach, inspection or observation such that victim would be able to retain control over the property but for the force or threat of force directed by the perpetrator against the victim. *Here*: because both store clerks were counting the money in the store's cash register at the time of the violent taking, each clerk had sufficient control over the property to constitute a separate victim of robbery.

People v. Dotson, 55 P.3d 175 (Colo. App. 2002). Second-degree assault is not a lesser-included offense of aggravated robbery because it requires proof of actual bodily injury and specific intent, while aggravated robbery does not.

People v. Blankenship, 30 P.3d 698 (Colo. App. 2000). Sentences for aggravated robbery and robbery of an at-risk adult must be concurrent where the offenses involve one act and one victim.

People v. Laurson, 15 P.3d 791 (Colo. App. 2000). Self-defense is not a defense to felony murder or to aggravated robbery. Although the evidence showed that defendant had acted in another's defense, no evidence suggested that defendant held a reasonable belief that unlawful physical force was imminent against him. Therefore, defendant was not entitled to an instruction on self-defense. Defendant tendered an instruction telling the jury that it was relevant that he knew about the victim's prior acts of violence. The trial court properly rejected this instruction. Although the evidence was relevant and could be considered as part of the totality of circumstances, a special instruction was unnecessary. Where there was no dispute about how the fight started or who started it, defendant's tendered instructions regarding the concepts of initial aggressor and duty to retreat were irrelevant and unnecessary.

SECURITIES FRAUD: §11-51-105, ET. SEQ.

People v. Schnorenberg, 2023 COA 82. Where defendant is charged with securities fraud under §11-51-501(1)(b), or §11-51-501(1)(c), evidence that a lawyer advised defendant that a misstatement or omission was not material or that a course of business was not fraudulent is relevant to whether defendant had the required mental state to support a securities fraud conviction. An instruction explaining the relevance of advice of counsel evidence in securities fraud prosecutions is necessary when such evidence is admitted at trial. *Here:* trial court erred in excluding defendant's testimony about the content of his lawyer's advice regarding the securities offerings at issue; because this testimony was offered for its effect on defendant's state of mind, it was not hearsay; the testimony should not have been excluded under CRE 403. The exclusion of this evidence and the failure to give an instruction explaining its relevance warrant reversal and seven of his convictions for securities fraud were barred by the statute of limitations and must be vacated. Lastly, the COA directs the trial court on remand to two recent supreme court decisions addressing the parameters of admissible expert testimony from securities law experts in securities fraud cases. *[Cert Accepted (5/28/24) in case #23SC776: (1) Whether, in this securities fraud case, the COA misconstrued the law in concluding that the trial court reversibly erred by limiting the defendant's testimony, and not giving a defense-tendered jury instruction, about the advice of counsel (SAAG Trina Kissel)].*

People v. Thompson, 2018 COA 83. Evidence was sufficient to support a finding that promissory note was a security: (1) under Reves v. Ernst & Young, 494 U.S. 56 (1990), a promissory note is presumed to be a security-notes that are for less than 9 months are not excepted from this presumption; and (2) under the four-part "family resemblance" test adopted in *Reves*, three out of four factors support a conclusion that the promissory note here was a security. Where defendant's securities fraud trial predated *Mendenhall*, trial court did not plainly err by instructing jury that "security" meant "any note." *Mendenhall* adopted a four-factor family resemblance test to determine if a note was a security. Applying four-factor family resemblance test for the first time on appeal, the note was a security, so the evidence was sufficient to prove securities fraud. No plain error in failing to merge defendant's two securities fraud convictions; although counts were multiplicitous, no Colorado case, well-settled legal principle, or statutory command addressed the proper unit of prosecution under Colorado securities law; in the absence of an objection, it cannot be concluded that this would have been obvious to the trial court. The trial court properly admitted other acts evidence in theft and securities fraud prosecution where the evidence established that the defendant had obtained money from another victim by selling a parcel of land that the defendant did not own.

People v. Mendenhall, 2015 COA 107M. If the relevant instrument in a securities fraud case is a note, jury must be instructed that all notes are not securities and instructed on how to determine whether the note is a security using the test from Reves v. Earnst & Young, 494 U.S. 56 (1990).

People v. Robb, 215 P.3d 1253 (Colo. App. 2009). Sufficient evidence to support securities fraud/course of business where there was evidence that defendant: (1) directly sold the partnership units that jury found constituted "securities"; (2) was culpable for misrepresentations made to victims; and (3) knew of the existence of cease and desist orders prohibiting sales of the securities in other states. Defendant's acquittal on other counts of securities fraud did not render verdicts inconsistent and, even if they were inconsistent, that would provide no basis for reversal of his conviction.

People v. Destro, 215 P.3d 1147 (Colo. App. 2008). Proof of knowledge that an investment is a security is not required for a conviction of "willful" securities fraud under §11-51-105 and §11-51-603(1). For defendant to be convicted of conspiracy, he or she must have "the intent" to promote or facilitate the commission of securities fraud. However, defendant does not have to know he was offering a security to commit securities fraud. Thus, for defendants charged with COCCA or conspiracy based on securities fraud, so long as the defendant willfully

engaged in certain acts, and those acts amounted to securities fraud, it was not necessary that the defendant knew he was dealing with a security to: (1) knowingly engage in a pattern of racketeering activity, namely, securities fraud; or (2) have the specific intent to promote or facilitate the commission of securities fraud. The term "security" includes an investment contract, and an investment contract is: (1) a contract, transaction, or scheme whereby a person invests his or her money; (2) in a common enterprise; and (3) is led to expect profits derived from the entrepreneurial or managerial efforts of others. *Here*: although the victims did not invest money directly with defendant, they agreed to purchase properties, allowed defendant's company to locate renters for the properties and maintain them, and agreed to sell the properties back to defendant's company after one year. The buyers also obtained mortgage loans to purchase the properties. Under these circumstances, the evidence was sufficient to establish that a "security" was involved, and that defendant was guilty of securities fraud.

People v. Pahl, 169 P.3d 169 (Colo. App. 2006). While trial court may make preliminary determination of whether instrument could be a security, court did not err in submitting to jury the issue of whether the joint operating agreement was a security. Law is sufficiently clear that joint operating agreements like the one here can be a "security; " investors' subjective beliefs as to whether they are purchasing a security are not dispositive, and reasonable jurors could find the agreement between defendant and the investors was a security. There was insufficient evidence to sustain convictions for theft from an at-risk adult, where there was only passing reference to the source of the funds the victims provided to the defendant, and the prosecution provided no explanation of whether these individuals had possessory or proprietary interest in the funds they turned over to defendant.

People v. Hoover, 165 P.3d 784 (Colo. App. 2006). Question whether an instrument is a "security" is a question of fact for the jury to decide. *Here*: evidence presented at trial was sufficient to support jury's conclusion that investment contract sold by defendant was a security.

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). An element of securities fraud, §11-51-501(1)(b), is that defendant misrepresent, or fail to disclose, material information. The standard for materiality is objective. Information is material "if there is a substantial likelihood that a reasonable investor would consider the matter important in making an investment decision." A misrepresented or omitted fact is "important" when a "reasonable investor would regard it as significantly altering the 'total mix' of information made available." These standards apply in both criminal and civil actions under the Colorado Securities Act. Under §11-51-501(1)(b), securities fraud can occur when defendant omits to state a material fact "necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." The italicized phrase does not modify the term "material fact." Rather, it simply requires to fact finder to determine whether, under the circumstances, any statements that were made, were misleading without the omitted fact. Whether an omitted fact is material does not depend on whether a specific investor would have considered it material. Although the Colorado Securities Act does not expressly use the phrase "full and fair disclosure," that concept is implicit in CSA, and an expert properly so testified. CRE 404(b) does not apply when other acts are admitted as directly relevant to elements of the charged offense. *Here:* Evidence of National Association of Securities Dealers complaint and decree, which barred defendant from associating with NASD members, was properly admitted in securities fraud trial, because the information in the complaint, and the sanction imposed by the NASD, were material information that should have been disclosed to Colorado investors.

People v. Campbell, 58 P.3d 1148 (Colo. App. 2002). In a securities fraud case, jury instructions defining "investment contract" and "material fact" should be reformulated to conform to standards set forth in Goss v. Clutch Exchange, 701 P.2d 33 (Colo. 1985) and Joseph v. Viatica Management, LLC, 55 P.3d 264 (Colo. App. 2002).

People v. Rivera, 56 P.3d 1155 (Colo. App. 2002). Under securities fraud statute, People need not prove that defendant knew the instrument sold constituted a security as defined. Evidence was sufficient to support securities fraud and conspiracy to commit securities fraud where defendant withheld information about her and her co-conspirator's criminal history, bad business dealings, and business-funds transfer to a personal bank account.

SERIOUS BODILY INJURY

People v. Duncan, 2023 COA 122. "Protracted" in the SBI definition means "prolonged, continued, or extended" but doesn't mean permanent. Under that definition, there was sufficient evidence to support defendant's conviction for second degree assault where the damage he caused to the victim's eardrum also caused her to lose some of her hearing for 5 months. COA rejected defendant's argument that the statutory SBI definition is facially unconstitutionally vague, finding no plain error; COA didn't review defendant's unpreserved as-applied challenge.

SEXUAL ASSAULT (ADULTS): §18-3-401, ET SEQ.

Generally

People v. Ehlebracht, 2020 COA 132. As a matter of first impression, prohibition against imposition of both prison and probation sentences in a single case, *Allman*, did not apply to sentences imposed under Sex Offender Lifetime Supervision Act (SOLSA); facts in record supported trial court's conclusion that defendant established a relationship with his victim primarily for the purpose of sexual victimization; trial court's erroneous characterization of defendant's prior convictions did not undermine court's conclusion that defendant be designated a SVP; trial court's use of the word "inference" served only to convey its finding that defendant created a relationship with victim for the purpose of sexual victimization. The use of the word "primarily" under the relationship criterion of the SVP statute indicates that the legislature did not intend for a trial court's SVP designation to hinge on a finding that defendant specifically intended to establish or promote the relationship for the purposes of sexual victimization. *Here:* even though court's findings did not detail events giving rise to the offense, where the arrest warrant affidavit and the presentence investigation report stated that defendant was 29-years-old when he met the 14-year-old victim on a social media application, during their online conversation, defendant expressed no concern with the victim stating she was 15-years-old, and defendant convinced victim to go to his apartment late at night to drink and get high but told her to try to look as old as possible.

People v. Sabell, 2018 COA 85. Unlawful sexual contact is lesser included offense of sexual assault so defendant's convictions which were based on the same act must merge.

Page v. People, 2017 CO 88. Unlawful sexual contact is a lesser-included offense of sexual assault. Overruled People v. Loyas, 259 P.3d 505 (Colo. App. 2010).

People v. Marko, 2015 COA 139, aff'd other grounds, 2018 CO 97. Because the attempted sexual assault convictions were not based on evidence separate from the completed sexual assaults, the attempt convictions merged into the completed sexual assaults. Defendant's two convictions for sexual assault, based on acts of anal and vaginal penetration, were multiplicitous, as there was no evidence of a break in time or intervening event or movement of defendant or victim that separated the different sexual acts, nor was there evidence that the acts occurred at different locations, or "any other suggestion of a fresh impulse or opportunity to renew the intent to inflict a new assault."

People v. Lancaster, 2015 COA 93. Evidence of a victim's prior or subsequent sexual conduct is presumptively irrelevant in criminal trials. Evidence of a victim's history of false reporting may be admissible, but lack of prosecution of a prior allegation does not amount to a history of false reporting.

People v. Pernell, 2014 COA 157, aff'd other grounds, 2018 CO 13. In sexual assault case, neither witness nor prosecutor is barred from using term "rape" simply because term no longer appears in criminal statutes. Consistent with CRE 701, there is no error when witness uses term "rape" as convenient shorthand term for act of forcible, nonconsensual intercourse; use of term does not invade province of jury or undermine defendant's presumption of innocence, nor is it unfairly prejudicial. Prosecutor does not err in using term "rape" in opening statement/closing argument; prosecutor may reference/comment on evidence in terms used by witnesses.

People v. Osorio-Bahena, 2013 COA 55. Evidence of a victim's mental capacity may be relevant to rebut the inference that victim could not describe the sexual acts at issue unless defendant had committed the alleged acts. Where 22-year-old victim had mental capacity of a 5-year old, the trial court should have considered his mental capacity, and not just his age, in deciding whether his prior sexual activity was relevant to show "precocious sexual knowledge." The trial court's finding that victim's prior sexual knowledge was relevant to show an alternative for victim's "precocious" sexual knowledge did not require prosecution to open the door before such evidence was admissible.

Lewis v. People, 261 P.3d 480 (Colo. 2011). The elevation of second degree kidnapping convictions to F2 because of same sexual assault for which defendant was separately sentenced did not violate defendant's Sixth Amendment right to have any fact increasing his penalty beyond statutory maximum submitted to jury and proved beyond reasonable doubt. Because Colorado statutes specifically authorize separate convictions and punishments for kidnapping (enhanced by sexual assault) and sexual assault, such punishments can "never run afoul of constitutional jeopardy protections," even if those offenses would be the "same" for federal double jeopardy purposes. Even if the USSC eventually concludes that sentence enhancers are elements of offenses for double jeopardy, such determination should not affect sentencing for multiple offenses in Colorado.

People v. Hicks, 262 P.3d 916 (Colo. App. 2011). There is no longer a time limit for the prosecution of sexual assaults committed after 7/1/91, where (1) defendant's identity is determined in whole or in part by his or her DNA, and (2) the offense is reported to a law enforcement agency within 10 years after the commission of the offense.

Clark v. People, 232 P.3d 1287 (Colo. 2010). There is no special sufficiency of the evidence test when defendant is identified by his DNA found at the crime scene as the perpetrator of a sexual assault; evidence should be analyzed under the substantial evidence test, and not under a more stringent test requiring the reviewing court to determine whether the evidence tends to reasonably exclude hypotheses that the DNA was deposited at a time other than that of the crime. *Here*: there was sufficient evidence where: defendant's semen was found in the victim's bedroom where the sexual assault took place, on a sweatshirt used by the perpetrator to cover the victim's head during the sexual assault; victim purchased the sweatshirt only two days before the sexual assault; defendant generally matched the victim's description of the perpetrator; and defendant had a unique opportunity to commit the assault due to his knowledge of the victim's home and of her son's developmental disability, which rendered the four-year-old child unable to convey what he observed even though he was present in the room during the assault.

People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006). Trial court did not err in giving supplemental jury instructions on statutory terms "physical force" and "physical violence" based on definitions in Black's Law Dictionary because Colorado statutory law did not define those terms, the definitions given were not inaccurate, and the definitions could not have been interpreted in improper ways. In defining the term "consent" as used in the offense of unlawful sexual contact, trial court did not err in giving a supplemental jury instruction based on language from §18-3-401(1.5) and §18-1-505(3)(d). Defendants convicted of unlawful sexual contact (actual application of physical force or physical violence) are not eligible for sentences to probation.

People v. Ramirez, 140 P.3d 169 (Colo. App. 2005). Sexual assault does not merge with second degree kidnapping enhanced by the fact that kidnapping victim was sexually assaulted. *Apprendi* and its progeny do not require a different result.

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). Where, in violation of §18-3-408, trial court neglects to submit an instruction regarding gender bias in a sexual assault prosecution, and defendant neglects to submit such an instruction or object to its omission, plain error standard of review applies. *Here*: defendant feared unfair treatment due to his homosexuality; trial court did not commit plain error in failing to give the instruction against gender bias because: (a) defendant's argument erroneously equates gender bias with bias against homosexuals (and there is no reason to believe the jury would have confused the two concepts); and (b) defendant's concern was adequately addressed by court's instruction that the jury should not allow prejudice to influence its decision.

Causes Submission of the Victim: §18-3-402(1)(a)

Garcia v. People, 2019 CO 64. Any instructional error was not plain despite the failure to explicitly tell the jury that the "knowingly" element applied to the "caused submission" element of the attempted sexual assault offense. The elemental instruction effectively communicated "knowingly" due to the fact that a defendant must cause submission "by means of sufficient consequence reasonably calculated to cause submission against the person's will." The circumstances set forth in §18-3-402(4), elevating sexual assault to a class three felony, do not require proof of a mens rea to convict the defendant because they are analogous to penalty provisions.

People v. Komar, 2015 COA 171M. The phrase "causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will" in §18-3-402(1)(a) is not unconstitutionally vague on its face. It is also not unconstitutional as applied where defendant argued that he and victim were both intoxicated, making it difficult to determine the distinction between "consensual and nonconsensual yielding." Because current sexual assault statute "contains essentially the same language and is a current codification of the statute applicable in" People v. Smith, 638 P.2d 1 (Colo. 1981), *Smith's* reasoning and holding "that the language 'by any means of sufficient consequences reasonably calculated to cause submission' is not unconstitutionally vague" applies to §18-3-402(1)(a). [W]hile threats of a serious nature are illustrative of means reasonably calculated to cause nonconsensual submission, the statute's use of the broader term 'any means' does not invalidate the statute so long as a jury must conclude that the conduct in question 'was objectively of sufficient consequence to effect the prohibited result.'" §18-3-402 contextualizes the relevant conduct prohibited under subsection (1) by contrasting it to the conduct described in subsection (4). Subsection (4) applies to sexual assault committed when the submission is caused by the actual application of physical force or physical violence or by threats of imminent death, serious bodily injury, extreme pain, or kidnapping, and it classifies these offenses as F3s. If the actor does not use one of the means described in subsection (4), but nonetheless effects a sexual assault by causing submission of victim by any other means of sufficient consequence reasonably calculated to cause submission, the offense is a F4. §18-3-402(2) and §18-3-402(4) "give context to each other, and a reasonable person is put on notice that a class 4 sexual assault is committed when causing submission by 'means of sufficient consequence.'" To prevail on an as-applied vagueness challenge, defendant 'must show that the statute does not with sufficient clarity, prohibit the conduct against which it is enforced.'" For sexual assault under §18-3-402(1)(a), the mens rea 'knowingly' applies to the conduct causing submission of the victim.

People v. Marko, 2015 COA 139, aff'd other grounds, 2018 CO 97. Sufficient evidence supported the conviction where defendant knocked victim unconscious before they had sex, which established that he employed means of sufficient consequence reasonably calculated to cause submission against the victim's will. It was not necessary to show that victim was unconscious at the time of penetration. Because the attempted

sexual assault convictions were not based on evidence separate from the completed sexual assaults, the attempt convictions merged into the completed sexual assaults. Defendant's two convictions for sexual assault, based on acts of anal and vaginal penetration, were multiplicitous, as there was no evidence of a break in time or intervening event or movement of defendant or victim that separated the different sexual acts, nor was there evidence that the acts occurred at different locations, or "any other suggestion of a fresh impulse or opportunity to renew the intent to inflict a new assault."

People v. Martinez, 36 P.3d 154 (Colo. App. 2001). Combination of defendant's authoritative voice and intimidating actions could be viewed objectively to be likely to cause victim to submit against her will. Defendant's intimidating and coercive actions were more extensive than those in *Derrera* and satisfied the substantial step requirement of attempted second-degree sexual assault.

Incapable of Appraising Nature of Conduct: §18-3-402(1)(b)

People v. Bertrand, 2014 COA 142. In a sexual assault, it was error to instruct that a sleeping victim "*is* incapable of appraising the nature of her conduct." Instead, *Platt* held that "a sleeping victim *may* be incapable of appraising the nature of her conduct." The given instruction relieved jury of its duty to determine an essential element of the crime and was tantamount to a directed verdict.

People v. Garcia, 2012 COA 79. Evidence was sufficient to support verdict that victim was incapable of appraising her conduct due to taking of pill; although she voluntarily took the pill, she did not expect or know that the pill would render her unconscious and disoriented.

People ex rel. J.R., 216 P.3d 1220 (Colo. App. 2009). Evidence was sufficient that a juvenile committed sexual assault on a victim unable to appraise the nature of her conduct and physically helpless where the victim was intoxicated, testified to experiencing pain in her vaginal area, the SANE observed vaginal tearing and bruising, and the juvenile had said to another young man, "[Y]ou're next" to another person, implying that he could have sexual intercourse with the victim next.

Platt v. People, 201 P.3d 545 (Colo. 2009). Sex assault committed against a sleeping or partially sleeping victim may be charged under either §18-3-402(1)(b) - incapable of appraising the nature of her conduct, or §18-3-402(1)(h) - physically helpless victim depending on the evidence; §18-3-402(1)(b) is not limited to situations in which the victim suffers from a "mental disease or defect;" and no jury instruction regarding consent is required under subsection (1)(b) based on Dunton v. People, 898 P.2d 571 (Colo. 1995).

Submits Erroneously Because Believes Spouse: §18-3-402(1)(c)

Victim Less Than 15 & Defendant 4 Years Older: §18-3-402(1)(d)

People v. Gholston, 26 P.3d 1 (Colo. App. 2000). Sexual abuse occurred over several years; defendant was charged/convicted of second-degree sexual assault under §18-3-403(1)(e) (victim less than 15), and under old and new versions of the statute proscribing SAOC-POT. Under "strict elements test," statutory elements - but not sentence enhancers - are used to determine whether offenses merge. Pre-7/1/90: Since "position of trust" is an enhancer, the elements of second-degree sexual assault are identical to the elements of sexual assault on a child; convictions for second-degree sexual assault merge into the convictions for SAOC. Post-7/1/90: Since "position of trust" is an element, the offense is distinct from second-degree sexual assault; no merger. However, because the convictions were based on identical evidence, consecutive sentences must be made concurrent.

Victim 15-17 Years Old & Defendant 10 Years Older: §18-3-402(1)(e)

Purporting to Offer a Medical Service: §18-3-402(1)(g)

McCoy v. People, 2019 CO 44. §18-3-404(1)(g) governs doctors and others who are, or hold themselves out to be, health treatment providers of any kind and who examine, treat, or purport to examine or treat victims for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices. §18-3-404(1)(g) is neither facially overbroad nor unconstitutionally vague.

Victim Physically Helpless: §18-3-402(1)(h)

People ex rel. J.R., 216 P.3d 1220 (Colo. App. 2009). Evidence was sufficient that a juvenile committed sexual assault on a victim unable to appraise the nature of her conduct and physically helpless where the victim was intoxicated, testified to experiencing pain in her vaginal area, the SANE observed vaginal tearing and bruising, and the juvenile had said to another young man, "[Y]ou're next" to another person, implying that he could have sexual intercourse with the victim next.

Platt v. People, 201 P.3d 545 (Colo. 2009). A sexual assault committed against a sleeping or partially sleeping victim may be charged under either §18-3-402(1)(b) "incapable of appraising the nature of her conduct" or §18-3-402(1)(h) "physically helpless victim" depending on the evidence.

People v. Klausner, 74 P.3d 421 (Colo. App. 2003). Under §18-3-401(3), sexual assault on an adult becomes first-degree sexual assault when the victim is "physically helpless." *Here*: evidence that victim's Alzheimer's disease rendered her physically "unable to indicate willingness to act" was sufficient to support the jury's conclusion that victim was "physically helpless," despite existence of some evidence to the contrary. Sexual assault on an at-risk adult, §18-6.5-103(7), is not listed as one of the offenses that subjects defendant to indeterminate sentence under SOLSA. To prove the offense, prosecution must prove that sexual assault occurred; because sexual assault requires an indeterminate sentence, conviction for sexual assault on an at-risk adult does also.

Additional Circumstances as Sentence Enhancers: §18-3-402(4), (5)

People v. Abdulla, 2020 COA 109. Whipping the victim with a belt for the purpose of sexual arousal, gratification, or abuse, could constitute "touching of the victim's intimate parts" sufficient to establish sexual contact under §18-3-401(4)(a).

Garcia v. People, 2019 CO 64. The force sentence enhancer in §18-3-402(4) does not have a mens rea requirement.

Tumentsereg v. People, 247 P.3d 1015 (Colo. 2011). "Physically aiding or abetting" as used in §18-3-402(5)(a)(I) necessarily implies physical action in assisting with the commission of the sexual assault, but nothing in the statutory language limits that physical aiding or abetting to physical action directed against the victim, as distinguished from physical action directed against a rescue attempt. *Here:* no plain error occurred in omission of word "physically" from jury instruction requiring that the defendant "physically aided and abetted" the sexual assault principal, because the only evidence that the defendant aided or abetted the principal assailant in committing sexual assault was evidence that he did so either by physically interfering with the rescue attempt or by physically restraining the victim.

People v. Keene, 226 P.3d 1140 (Colo. App. 2009). Evidence that defendant's body weight caused the victim to submit against his or her will is sufficient to establish probable cause to believe that defendant applied the physical force required under §18-3-402(4)(a).

People v. Baker, 178 P.3d 1225 (Colo. App. 2007). Evidence that defendant threatened victim after the assault that he would hurt her and her family if she reported it was insufficient to establish the sentence enhancing factor in §18-3-402(4)(c) that defendant caused the victim's submission by threatening future retaliation.

People v. Santana-Medrano, 165 P.3d 804 (Colo. App. 2006). The circumstances set forth in §18-3-402(4), elevating sexual assault to a F4, do not require proof of a mens rea to convict because they are analogous to penalty provisions. Follows Whitaker v. People, 48 P.3d 555 (Colo. 2002).

People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004). For sexual assault – deadly weapon under §18-3-402(5)(a), it is sufficient to instruct jury that it must find that "defendant was armed with a deadly weapon," and "used a deadly weapon to cause submission." Jury need not determine whether submission was obtained by "the actual application of physical force or physical violence," or by "means of sufficient consequence reasonably calculated to cause submission," or both, and that a deadly weapon was used. If a deadly weapon was used to cause submission, that is sufficient.

UNLAWFUL SEXUAL CONTACT: §18-3-404

People v. Sabell, 2018 COA 85. Unlawful sexual contact is lesser included offense of sexual assault so defendant's convictions which were based on the same act must merge.

Page v. People, 2017 CO 88. Applying *Reyna-Abarca's* statutory elements to test to hold that unlawful sexual contact merges with sexual assault. The elements of unlawful sexual contact (knowingly touching victim's intimate parts with sexual purpose and knowing victim does not consent) are a subset of the elements of sexual assault by means of penetration. Overruled People v. Loyas, 259 P.3d 505 (Colo. App. 2010).

People v. McCoy, 2015 COA 76. §18-3-404(1)(g) (unlawful sexual contact) is neither facially overbroad or void for vagueness.

People v. Torrez, 316 P.3d 25 (Colo. App. 2013). §18-1.3-1004(5)(a), which requires that convictions arising out of the same incident as a sex offense be sentenced consecutively, and §18-1-408(3), which requires convictions supported by identical evidence be sentenced concurrently, do not conflict and can be construed harmoniously; where convictions are supported by identical evidence they must be sentenced concurrently, even if they arose out of the same incident as a sex offense. Defendant's waiver of factual basis for his guilty pleas did not waive his right to be sentenced concurrently under §18-1-408(3) where other information in record supported inference that convictions were based on identical evidence. *Here*: concurrent sentences were required for some of defendant's convictions because (1) charging document referred to the sex offenses as arising out of same incident, (2) prosecutor's sentencing argument described some of offenses as based on identical evidence, (3) two of offenses obviously concerned a single, discrete event: sexual contact that led to the birth of a child, (4) trial court and prosecutor both stated at sentencing they believed some of the convictions were based on identical evidence, and (5) prosecution, on appeal, did not directly address question of whether there was no reasonable inference that offenses were based on identical evidence. Remand for resentencing was not required where trial court erroneously imposed consecutive instead of concurrent sentences, but defendant did not request resentencing and trial court clearly expressed its intention to impose maximum sentence permitted. Case remanded only for correction of the mittimus to reflect concurrent sentences.

People v. Baker, 178 P.3d 1225 (Colo. App. 2007). A sexual assault conviction does not merge into a second-degree kidnapping conviction, even when the kidnapping conviction is enhanced under §18-3-302(3)(a) based on the person kidnapped being a victim of a sexual offense. CSC's decision in *Henderson*, is still good law on this point, even after *Apprendi*.

People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006). Defendants convicted of unlawful sexual contact (actual application of physical force or physical violence) are not eligible for sentences to probation.

People v. Martinez, 36 P.3d 154 (Colo. App. 2001). Offenses of second-degree sexual assault by penetration and second-degree sexual assault by intrusion are separate and distinct and require proof of different facts; even

though some of the evidence supporting them was part of a "common fund," court did not err in imposing consecutive sentences.

SEXUAL ASSAULT ON A CHILD, POSITION OF TRUST & PATTERN: §18-3-405, §18-3-405.5 [14]

Salah v. People, 2024 CO 54. CSC rejects defendant's argument that a biological connection alone is dispositive of whether a probationer has a constitutional right to familial association in this context. Like most other courts that have addressed the parameters of sex offender probation conditions when a probationer asserts a right to familial association, the CSC holds that whether a probation condition implicates a probationer's constitutional right to familial association with an extended relative depends, as a threshold matter, on whether the probationer demonstrates the nature of their relationship with the family member. This threshold showing is necessary so that a trial court reviewing a claim of familial association can determine where on the spectrum of protection the relationship falls. *Here:* defendant didn't present any evidence at his sentencing or his revocation hearing demonstrating the nature of his relationship with his nephew. Consequently, the trial court didn't err by prohibiting defendant from contacting or living with his nephew or by failing to make specific findings identifying the compelling circumstances that justified the imposition of these restrictions.

People v. Johnson, 2024 CO 32. The CSC rejects the COA reading of the word "attempt" in the enticement of a child statute, §18-3-305(1), as referring to the inchoate crime of "attempt" defined in §18-2-101(1). Instead, trial courts should interpret "attempt" under §18-3-305(1) in accordance with its plain meaning. *Here:* defendant uttered sexually tinged words to a child standing on a sidewalk while defendant was in a vehicle; defendant's words and actions, taken together and viewed in the light most favorable to the prosecution, constituted sufficient evidence for a reasonable person to conclude that defendant attempted to invite or persuade the victim to enter his vehicle with the intent to commit unlawful sexual contact upon her.

People v. Shannon, 2024 COA 41. Trial court did not err by declining to hold a *Shreck* hearing for a blind expert's testimony about child sexual assault victim dynamics – delayed disclosure, different details disclosed to different people, behavior of child victims, grooming, child memory issues. No *Shreck* hearing warranted. *Here:* defendant's main objection was the trial court never found the expert's testimony relevant. The COA disagreed and found the expert's testimony about these issues fit the facts and theories of the case, the expert had previously testified in about 300 cases in Colorado on these and closely related issues, a fact of which the district court was aware. And the helpfulness and admissibility of such testimony in a case such as this is amply supported by Colorado case law.

People v. Salazar, 2023 COA 102. Addressing a novel issue in Colorado, the COA concludes that the culpable mental state of "knowingly" does not apply to the position of trust element in a SAOC-POT offense.

People v. Collins, 2021 COA 18. In a child sex assault trial, the trial court allowed a child victim to have a court facility dog at her feet while she testified; defendant argued this violated his confrontation right because the dog's presence mitigated the child victim's discomfort about naming him as her abuser in court, lessening her testimony's reliability. COA held the confrontation right doesn't carry with it a right to impose discomfort on an accusing witness.

People v. McEntee, 2019 COA 139. Phrase "another person" as used in §18-3-404(1.5)(unlawful sexual contact on a child) does not require the participation of an additional person beyond victim and defendant.

People v. Ross, 2019 COA 79. The offense of soliciting a child for prostitution, §18-7-402, is a specific intent crime. In this context of this offense, §18-7-407 prevents defendant from raising a defense that he believed the

[14] Check the sentencing section in the Lookit Legal Topics for SVP and SOLSA specific cases.

prostitute was of legal age, but it does not relieve the prosecution of its obligation to prove that the defendant's specific intent was to solicit for child prostitution. Where defendant is charged with soliciting for child prostitution, the trial court may properly instruct on the lesser offense of soliciting another for prostitution where there is a rational basis for acquitting of the charged offense and convicting of the included offense.

People v. Hodge, 2018 COA 155. A child victim cannot consent to a use of force in the commission of a SAOC. COA reinstated three force aggravators for three SAOC charges. The PH evidence was sufficient to infer that defendant facilitated the sexual contact through the use of restraints, and the fourteen-year old victim could not consent to the use of restraints as part of a sexual act.

People v. Ramirez, 2018 COA 129. The majority concluded that semen is not an "intimate part" as defined by statute. Therefore, although the defendant in this case ejaculated on a child's hands, the majority concluded that he did not commit a sexual assault. Put another way, there was no "sexual contact" because defendant did not touch the victim with his penis and did not touch her "intimate parts." According to the majority, under Colorado law it is not SAOC to ejaculate onto a child, provided that it is not onto an "intimate part" and defendant does not touch the victim with his penis. The dissent found that, under the facts of this case at least, semen is part of the "external genitalia" and therefore an "intimate part." It also pointed out that the majority's decision creates an absurd result that violates the legislative intent of the SAOC statute.

People v. Sparks, 2018 COA 1. In sex assault on a child cases, where the defendant alleges that the child initiated the sexual contact, the prosecution need *not* prove that the defendant caused the child-victim to be "subservient or subordinate" or that the child initiated the sexual contact at the defendant's order, request, or directive.

People v. Heredia-Cobos, 2017 COA 130. Where the defense challenged the victim's credibility by suggesting that the victim was coached by family members to make the sexual assault allegations, the defense opened the door to the forensic interviewer's expert testimony about coaching and whether the victim gave any indications of being coached in her interview.

People v. Henley, 2017 COA 76. The "erotic nudity" provision in Colorado's sexual exploitation of a child statute (§18-6-403), considers whether the charged images, viewed objectively, "taken" or "created" for sexual purposes. *Here:* there was insufficient evidence that the charged images, depicting nude children in non-sexual settings, objectively constituted "erotic nudity" of a child.

Marsh v. People, 2017 CO 10M. Although when §18-6-403(3)(b.5)(possession of sexually exploitative material statute) was added to Colorado's child pornography statute in 1988, access to the internet was not yet ubiquitous, the legislative declaration emphasized that the harm in possessing child pornography recurs every time someone views it. To hold that viewing child pornography online does not constitute possession would ignore today's technological realities and the purpose of the statute. CSC rejects the argument that the statute does not criminalize the viewing of child pornography online even when the seeker does not manipulate or save the images because navigation to and within child pornography websites promotes the exploitation of children.

People v. Nardine, 2016 COA 85. §18-6.5-103(7)(c) provides that "[a]ny person who commits unlawful sexual contact, as such crime is described in §18-3-404 . . . , and the victim is . . . an at-risk juvenile, commits a class 6 felony." The terms of §18-6.5-103(7)(c) are clear and unambiguous. The statute does not require a "knowingly" mens rea as to the victim's at-risk juvenile status.

People v. Harding, 2016 CO 30. The jCOA holds that it was error to preclude evidence of the victim's sexual activity under the Rape Shield Statute because it provided a motive to fabricate was affirmed by operation of law pursuant to CRE 35(e).

People ex rel T.B., 2016 COA 14. Under plain language of the sexual exploitation statute, §18-6-403, perpetrator's age is irrelevant; the statute applies to juvenile offenders whose actions fulfill the elements of this offense.

People v. Miranda, 2014 COA 102. Evidence of grooming a victim to sexualize and desensitize the relationship is admissible res gestae evidence, even if it is separated by months or years from the charged incidents.

People v. Heywood, 2014 COA 99, overruled other grounds, McCoy v. People, 2019 CO 44. "[If a statute does not define a commonly used term, a court may refer to dictionary definitions to determine the ordinary meaning." Here, "importune" means to press or urge with frequent or unreasonable requests or troublesome persistence; to beg, urge, or solicit persistently or troublesomely; and to make immoral or lewd advances toward another. "Invite" means to offer an incentive or inducement to; to request the presence or participation of; [to] solicit the company of; and to send a formal invitation to. And "entice" means to draw on by arousing hope or desire and to draw into evil ways. "These definitions show that §18-3-405.4(1)(b) is unambiguous." The statutory requirement that the actor importune, invite or entice the viewer through communication supports the interpretation that §18-3-405.4(1)(b) requires more than merely allowing a person to continue viewing the actor's intimate parts, since communication means the act or action of imparting or transmitting. "[U]nlike statutes that create ongoing offenses, such as possession of contraband or stolen property, §18-3- 405.4(1)(b) prohibits an invitation, which is a discrete event." Defendant was not required to coerce or persuade three young girls to enter his apartment in order to be found guilty of child enticement; evidence that he asked the three girls to enter was sufficient to establish that he "invited" them into his apartment.

People v. Aryee, 2014 COA 94. Sufficient and substantial evidence of the victim's age was presented to sustain the defendant's convictions. The victim was born in a war-torn region of Africa and lacked a formal birth certificate. However, the victim and her adoptive mother both testified as to the victim's birthdate, and other witnesses testified that the victim's behaviors and appearance were consistent with her purported age. Finally, during his interrogation, the defendant acknowledged that he believed the victim was fifteen at the time he raped her.

People v. Pifer, 2014 COA 93. Bed sheet placed between the defendant's hands and the victim's clothing did not negate the "touching" element underlying the defendant's conviction for SAOC.

People v. Bridges, 2014 COA 65. A forensic interviewer may not render an opinion that a child sexual assault victim was or was not coached.

People v. Conyac, 2014 COA 8M. While a child victim's prior sexual knowledge may be relevant and have probative value, Colorado case law does not assume or presume that a child victim is sexually naïve or that her "precocious knowledge" is always relevant and admissible. *Here:* the victim was 11 and 12 at the time of the assaults and 13 at the time of trial. She would have had access to her middle school peers, social media, television, and music that would have contributed to her knowledge of sexual matters. The evidence was properly excluded because: (a) the prosecutor did not raise the issue of "precocious sexual knowledge" or argue that KT was sexually naïve and that her experience with defendant was the only source of her ability to describe the sexual abuse; (b) neither defense counsel nor the prosecutor asked questions about sexual innocence or similar issues during voir dire; and (c) the victim was old enough to know about sexual matters regardless of her experience with defendant. Also, the DHS records that referenced a prior sexual assault case involving this victim were properly excluded because the records did not demonstrate that the victim understood the consequences of a sexual abuse allegation because she had not made an outcry of sexual abuse, her father was never removed from the home as a result of the case, and the victim did not suffer any consequences as a result of the prior allegations.

People v. Osorio-Bahena, 2013 COA 55. Where 22-year-old victim had the mental capacity of a five-year old, the trial court should have considered his mental capacity, and not just his age, in deciding whether his prior sexual activity was relevant to show "precocious sexual knowledge." In addition, the trial court's finding that the victim's prior sexual knowledge was relevant to show an alternative for the victim's "precocious" sexual knowledge did not require the prosecution to open the door before such evidence was admissible.

People v. Houser, 2013 COA 11. Where the criminality of conduct depends on a child being younger than 18, and the child is at least 15, §18-1-503.5(1) allows a defendant to raise an affirmative defense that he reasonably believed the child to be eighteen or older. However, under §18-7-407, defendant may not raise a reasonable-belief defense to the crime of patronizing a prostituted child. The COA ruled that the more specific provision controls and, therefore, §18-7-407 prevents defendant from offering a reasonable-belief- in-age defense to a charge of patronizing a prostituted child.

Pierson v. People, 2012 CO 47. Rape shield statute, §18-3-407(1)(b), is limited to evidence of "sexual intercourse." Evidence that a child victim was sexually assaulted by someone other than defendant may be admissible under subsection 2(e) of the rape shield statute to rebut the inference that the child's precocious sexual knowledge was gained from defendant. To be admissible, defendant must show that the child's sexual knowledge is precocious (likely through expert testimony), and that the other abuse is sufficiently similar to the child's allegations against defendant as to rebut the inference that the child was abused by defendant. Here: evidence that the child victim's cousin touched her vagina was properly excluded under this exception because it was not evidence of sexual intercourse.

People v. Rowe, 2012 COA 90. When defendant downloads child pornography onto his computer through a peer-to-peer file sharing program and leaves it indexed in a "shared folder" it amounts to offering sexually exploitative material under §18-6-403(3)(b).

People v. Douglas, 2012 COA 57. A person may commit enticement of a child under a complicity theory with an undercover police officer posing as a willing adult intermediary. A person may commit enticement of a child where he invites or encourages a child to have a sexual encounter in a room in the child's own home.

People v. Vecellio, 2012 COA 40. A defendant may be convicted of enticement regardless of whether the victim is "real," provided defendant believed the victim was under fifteen years of age and the other statutory elements are met.

People v. Herrera, 2012 COA 13. Photographs of child victims taken around the time the sexual abuse began, at the celebration of their first communion, were relevant to illustrate their ages and appearances at that time and were not unfairly prejudicial.

People v. Simon, 266 P.3d 1099 (Colo. 2011); Tillery v. People, 266 P.3d 1099 (Colo. 2011). The plain language of §18-3-405(2)(d) and §18-3-405.3(2)(b) clearly permits each separately charged incident of sexual assault on a child, or sexual assault on a child by one in a position of trust, to be elevated from an F4 to a F3 felony, where each incident is committed as part of an overall pattern of sexual abuse between the defendant and his victim. This does not violate double jeopardy (multiple punishments) under either the U.S. or the Colorado Constitution.

Pellman v. People, 252 P.3d 1122 (Colo. 2011). Defendant was convicted of SAOC-POT and argued that he was not in "position of trust" at the time of unlawful sexual contact. CSC held that the definition of "position of trust" adopted by the legislature in §18-3-401(3.5) is a broad one, and the examples listed in the definition are only illustrative. Nothing in the language suggests that a defendant must be performing a specific supervisory task at the time the unlawful sexual contact occurs. The special access to the child that a defendant has gained through occupying a position of trust may continue even where a defendant is not acting pursuant to a discrete

supervisory task. A defendant may assume a position of trust through an ongoing and continuous supervisory relationship with the victim, so long as the unlawful sexual contact occurred while this supervisory relationship existed. *Here:* there was sufficient evidence of that defendant was in a position of trust, since he had assumed a continuous and ongoing supervisory role in his capacity as a church youth volunteer and family friend, and the unlawful contact occurred while he occupied that role.

People v. Sowell, 327 P.3d 273 (Colo. App. 2011). Amendment to sex offender registration statute eliminating the possibility of petitioning for removal from the sex offender registry for persons convicted of SAOC/POT applies to defendant notwithstanding that he committed his crime before the amendment was enacted. Defendant failed to show that he detrimentally relied on this provision of the original statute when he entered his plea agreement, and thus he was not entitled to relief.

People v. Greer, 262 P.3d 920 (Colo. App. 2011). Under double jeopardy, SAOC incidents are distinct if: separate criminal acts occurred at different times, were separated by intervening events, resulted from separate volitional events based on a "fresh impulse," were temporally distinct, involved moving or repositioning the victim, involved penetration of different orifices, or involved more than one victim. Separate convictions for SAOC and SAOC-PATT did not violate double jeopardy. Although the various touchings occurred over a relatively short period of time, the evidence demonstrated that there a temporal break between each touching, and each resulted from separate volitional acts.

People v. Day, 230 P.3d 1194 (Colo. 2010). In Rule 21proceeding, the CSC reversed a SAOC-PATT conviction, holding that, where defendant was convicted of only two attempted sexual assaults and there was no evidence of any additional completed assaults, the pattern enhancer did not apply. The dissent argued that these were merely inconsistent verdicts that should all be given effect.

People v. Mantos, 250 P.3d 586 (Colo. App. 2009). Downloading and saving sexually exploitative material in a share-capable computer file does not constitute the felony offense of sexual exploitation of a child as defined in §18-6-403(3)(b). *Here*: the COA looked at the terms "prepares" and "arranges for" in the statute and found that: (1) the trial court misconstrued the meaning of the word "prepares" to encompass possession with the potential to distribute sexually exploitative material and submitted the case to the jury on this erroneous legal theory; and (2) the term "arranges for" does not encompass either arranging for the distribution of material or arranging to obtain material. Because the prosecution did not argue any of the other terms listed in the statute, no evidence supported a conviction under the statute.

People v. Summers, 208 P.3d 251 (Colo. 2009). A 2002 amendment to the SAOC statute extended the statute of limitations for prosecutions of this offense to ten years after the victim reaches the age of 18. Although the text of the statute indicated that this change was to apply to all cases that could have been prosecuted at the time of the change, the enacting clause in the new law limited its applicability to offenses committed on or after the date the bill became law. CSC held that, where a statute contains conflicting statutes of limitations and the court cannot determine the legislative intent behind the statute, the rule of lenity applies. The statute of limitations in effect at the time the offense was committed controls. Overruled People v. Boston, 214 P.3d 507 (Colo. App. 2009).

People v. Cook, 197 P.3d 269 (Colo. App. 2008). CRE 608(a)(1) prohibits a witness from testifying or expressing an opinion that a witness is telling the truth on a specific occasion. *Here:* the investigating officer, in response to a jury question, said she found the victim credible. The prosecutor then questioned the witness about the statement that she found the witness to be credible. The court found this to be plain error. Definition of "sexual contact" includes the situation where the defendant intimidates the victim into touching her own genitals. *Here:* defendant intimidated children into masturbating in front of him. Court held this was a "constructive touching" that was sufficient to meet the definition of sexual contact. Therefore, the child's

statements were properly admitted under §13-25-129 because they described acts of sexual contact. Trial court was not required to give a CRE 404(b) limiting instruction when the defendant's other acts (child pornography) were admitted into evidence because the other acts were evidence of the pattern of sexual abuse. The two enticement of a child convictions do not merge because one was based on the enticement of the child by an adult (subsection a), and the other was based on the dissemination of that material (subsection b). Since the two subsections were based on different acts with different culpable mental states, the trial court properly denied the merger request. The trial court's finding that defendant was a SVP was supported by the record. The risk assessment and the evidence at trial sufficiently established that the defendant took steps to change the focus of his relationship with the two children to facilitate his commission of the sexual assaults.

People v. MacLeod, 176 P.3d 75 (Colo. 2008). The rape shield statute, §18-3-407, applies to evidence of a victim's or witness's prior or subsequent sexual conduct; reputation or opinion evidence about the witness's sexual conduct; or evidence that a witness has a history of false reporting of sexual assaults, no matter the purpose for which the proponent intends to introduce the evidence at trial. *Here*, defense insinuated that the victim's mother had influenced the child's report because the mother had been molested as a child. The trial court allowed the defense to cross-examine the mother in detail with regard to that history, both at a pretrial hearing and at trial. CSC disapproved, holding that the defense should have been required to comply with the provisions of the rape shield state before any such questioning was allowed. Even where the trial court has determined at in camera hearing that proffered rape shield evidence is material and relevant, the evidence is then admissible only at trial, and not at any other public hearing.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). When a child witness is involved, some displays of emotion in front of the jury are inevitable, particularly in sexual assault cases. Where defendant does not point to any specific prejudice resulting from the (crying) display, and a review of the record reveals none, the conviction will not be disturbed. Court acted within its discretion in allowing the child victim's teenaged sister to escort her to the witness stand and to sit silently next to her while she testified. Teenaged sister was not a witness, child victim had tried to testify and had to leave the courtroom because she was too afraid to continue, sister was not identified by the court, and court gave instruction to the jury not to draw inferences from her presence.

People v. Johnson, 167 P.3d 207 (Colo. App. 2007). In this DA appeal, the People challenged a trial court order dismissing ten counts of SAOC-POT. COA affirmed, holding that the plain language of the SOAC-POT statute requires that the perpetrator must have been in a position of trust with regard to the victim at the time of the offense. *Here:* that element was not satisfied where defendant was the victim's driver's education instructor for a short period of time and then had sexual contact with the victim several months after the class had terminated. But see Pellman v. People, 252 P.3d 1122 (Colo. 2011).

People v. Ramirez, 155 P.3d 371 (Colo. 2007). The offense of SAOC does not include a requirement of specific intent, reaffirming People v. Vigil, 127 P.3d 916 (Colo. 2006). Jury instruction that SAOC requires only a "knowingly" mental state was not error.

People v. Martinez, 165 P.3d 907 (Colo. App. 2007). COA found sufficient evidence to support a conviction for possession of sexually exploitive materials. Defendant's use of the "family" living room computer on which the pornographic images of children were found circumstantially demonstrated defendant's knowing possession of those images.

Vensor v. People, 151 P.3d 1274 (Colo. 2007). Under SOLSA**,** the minimum term of the inderterminate sentence is limited to twice the maximum term in the presumptive range for the class of felony of which defendant is convicted. The maximum term of the indeterminate sentence must be life. Trial court properly

allowed testimony at a sentencing hearing in SAOC case by the parents of victims named in the counts dismissed as part of the plea agreement**.**

People v. Mintz, 165 P.3d 829 (Colo. App. 2007). The phrase "sexual penetration or sexual intrusion…or…sexual contact" as it appears in the aggravated incest statute is unlimited and encompasses all possible ways to commit sexual contact. Thus, it is equivalent to the phrase "sexual contact" as that phrase was analyzed in *Woellhaf.*

People v. Renander, 151 P.3d 657 (Colo. App. 2006). Defendant was charged with 47 counts for sexual exploitation of a child based on possession of child pornography. The charges were based on each specific image of the child(ren). At a pretrial hearing, the trial court ordered the prosecutor to rearrange the charges so there was only one charge per child, regardless of the number of images that pertained to that child (resulting in the loss of 11 of the original charges). The DA appealed under §16-12-102 and CAR 4(b)(3). COA holds that the statute explicitly allows for the prosecution of possession of each image.

People v. Vigil, 127 P.3d 916 (Colo. 2006). SAOC is a general intent crime to which intoxication is not a defense.

People v. Rockwell, 125 P.3d 410 (Colo. 2005). A factual basis for unlawful sexual behavior can be established by: (1) statements made by defendant; (2) facts or fact-finding stipulated to by defendant; or (3) facts found by the jury. A "factual basis" consists of those facts which establish that an offense has been committed. To establish a satisfactory factual basis as required by the discretionary parole provisions, a trial judge must be able to fairly conclude that defendant would be convicted of an unlawful sexual behavior offense if he chose to stand trial. The imposition of offense specific treatment does not establish a factual basis for unlawful sexual behavior that would require discretionary parole. *Here:* where defendant admitted only to the elements of the offense in pleading guilty, and those elements did not include unlawful sexual behavior, the factual basis for the guilty plea did not include unlawful sexual behavior. The factual basis is limited to the elements of the offense.

People v. Grady, 126 P.3d 218 (Colo. App. 2005). The statute defining sexual exploitation of a child, §18-6-403, is neither unconstitutionally vague nor overbroad. In order to convict under the statute, the People must prove that a person knowingly took sexually explicit photographs of a child and that the content of those photographs, viewed objectively, would lead to sexual gratification or stimulation of a reasonable viewer. *Here*: the trial court erred in adopting a subjective test to define "erotic nudity" as referring only to the sexual gratification of the creator of the material and instructing the jury according to that definition.

Woellhaf v. People, 105 P.3d 209 (Colo. 2005). The unit of prosecution of SAOC, §18-3-405, and SAOC-POT, §18-3-405.3, is "any sexual contact." In analyzing whether a defendant's course of sexual conduct constitutes factually distinct acts, and therefore, factually distinct offenses of SAOC and SAOC-POT, a court must analyze whether the contacts occurred at different locations, were the product of new volitional departures, or were separated by intervening events. *Here:* given that defendant's multiple convictions of SAOC and SAOC-POT were based on four different types of sexual contact, rubbing lotion on child's vagina, digital penetration of vagina, penile penetration of vagina, and ejaculation on child's stomach, and not on separate incidents of sexual assault, multiple punishments violated double jeopardy, where record was silent with regard to when, where, or how sexual contacts transpired, and thus devoid of evidence from which factually distinct offenses could be discerned

Quintano v. People, 105 P.3d 585 (Colo. 2005). In punishing the crime of SAOC, the legislature only authorized a single punishment for all discrete acts of touching that occur within a single incident of SAOC; each act of touching cannot suffice as a separate offense.

People v. Bobrik, 87 P.3d 865 (Colo. App. 2003). §18-1.3-406(1)(a) requires consecutive sentences for multiple COVs arising out of the same incident. *Here:* defendant pled guilty to several sex offenses, and to a COV count associated with those offenses; "same incident" requirement of COV statute refers to events that are not "separated by time or an intervening event;" the record permitted an inference that the sexual act underlying each particular count was separate and distinct from the sexual acts underlying other counts; therefore the acts together did not arise out of the same incident. although sentence for each separate offense was properly enhanced as COV, court erred in determining that enhanced sentences had to run consecutively. Statutes defining SAOC and its pattern enhancer permit the existence of more than one pattern for a single victim. *Here*: trial court erred in applying "pattern" enhancement to sentences for SAOC-POT (and therefore making the latter into crimes of violence) because "pattern" enhancement for SAOC-POT was enacted after the offenses to which defendant pleaded guilty were committed.

People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003); People v. Strean, 74 P.3d 387 (Colo. App. 2002). The Sex Offender Lifetime Supervision Act is constitutional: (1) The Act's provisions for release on parole satisfy the requirements of procedural due process; (2) the Act satisfies substantive due process; a conviction alone is sufficient to impose a sentence under the Act; (3) the Act satisfies equal protection; sex offenders and non-sex offenders may be subject to different sentencing schemes; (4) defendant's sentence (12 years to life) does not constitute cruel and unusual punishment; (5) the Act does not violate the separation of powers doctrine by vesting the power to grant parole in the parole board; and (6) the Act does not violate the right against self-incrimination by requiring the defendant to participate in treatment; the right is waived with regard to the present conviction and requiring disclosures in treatment does not violate the right.

People v. St. James, 75 P.3d 1122 (Colo. App. 2002). Under §18-6-403(3) (a), defendant may be prosecuted for sexual exploitation of a child if he/she photographs a child engaged in sexually explicit conduct. It is inconsequential whether the film is ever developed. The critical question is whether, when defendant photographed the child, he/she did so for the purpose of making a visual depiction of explicit sexual conduct.

People v. Brown, 70 P.3d 489 (Colo. App. 2002). SAOC-PATT requires the prosecution prove a sexual assault incident that was committed within 10 years prior to the sex offenses charged in the information. The prosecution alleged only two incidents of sexual assault. Thus, the trial court erred as a matter of law in entering a "pattern" conviction on count 1 where there was no prior incident alleged. Instead, defendant stands convicted of a class 4 felony, SAOC (count 1), and a class 3 felony, SAOC-PATT (count 2).

People v. Vinson, 42 P.3d 86 (Colo. App. 2002). Ejaculating semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing the "sexual contact" element of sexual assault on a child statutes. *Here:* defendant masturbated and ejaculated semen onto the jeans covering his teenage stepdaughter's buttocks while he thought she was napping on her bed.

People v. Honeysette, 53 P.3d 714 (Colo. App. 2002). Victim's testimony that defendant molested her on more than 40 separate occasions within the time period alleged in the information, and her description of the nature of the abuse in great detail, was sufficient to support the jury's finding of a "pattern of sexual abuse."

People v. Duncan, 33 P.3d 1180 (Colo. App. 2001). The child sexual assault by one in a position of trust statute defines the phrase "position of trust" in terms such that persons of common intelligence can readily understand its meaning and application, and therefore, is not unconstitutionally vague.

People v. Gagnon, 997 P.2d 1278 (Colo. App. 1999). Where the photos taken by the defendant displayed a substantial portion of the girl victim's breasts, and the photos were clearly for the purpose of sexual gratification, defendant's conduct was proscribed by §18-6-403, defining sexual exploitation of a child. The sexually suggestive poses themselves, the fact that defendant also asked the child to pose in even more explicit

poses, and the fact that the photos were found among a collection of adult pornography, were sufficient evidence that defendant's purpose in taking the photos was for sexual gratification, as required for conviction of sexual exploitation of a child.

SEXUAL EXPLOITATION/SEXUALLY EXPLOITATIVE MATERIALS: §18-6-403

People v. Bott 2020 CO 86. The unit of prosecution for possession of sexually exploitative material under §18-6-403 is any number of items exceeding twenty. In other words, each act of possession is a single crime.

People ex rel. T.B., 2019 CO 53. Before legislature added age-specific provisions in 2017, sexual exploitation statute, §18-6-403, applied to all perpetrators regardless of their age. *Here:* the pre-amendment version applied so court properly adjudicated juvenile delinquent for possessing images of other juveniles exchanged through "sexting."

People v. Robles-Sierra, 2018 COA 28. Prosecution's theories about publishing/distributing child pornography were legally sufficient; term publish has many dictionary definitions, and the inclusion of that in child exploitation statute includes all of those definitions; term distribute also has many definitions; defendant's use of peer-to-peer file sharing software constituted publishing and distributing.

People v. Henley, 2017 COA 76. The "erotic nudity" provision in the sexual exploitation of a child statute (§18-6-403), considers whether the charged images, viewed objectively, "taken" or "created" for sexual purposes. *Here:* there was insufficient evidence that the charged images, depicting nude children in non-sexual settings, objectively constituted "erotic nudity" of a child.

Marsh v. People, 2017 CO 10. Under possession of sexually exploitative material statute, prosecution can prove its case in part based on presence of cache images even without proof that defendant is aware of computer's automatic caching function; viewing images online amounts to possession, and because a cache image is automatically downloaded when an image is viewed online, cache images can constitute evidence that defendant knowingly possessed the images when he viewed them online. *Here:* jury could have found defendant knowingly possessed the images found in his cache on a number of different grounds establishing that he had previously knowingly sought out child pornography.

People ex rel. TB, 2016 COA 151. Evidence was sufficient to convict juvenile of sexual exploitation §18-6-403 because perpetrator's age is irrelevant; this statute applies to juveniles whose actions fulfill elements of offense.

People v. Walker, 2014 CO 6. Prosecution is not required to separately charge indeterminate sentencing under §18-1.3-1004(4)(a)(II) for sexual exploitation counts.

People v. Rowe, 2012 COA 90. When defendant downloads child pornography onto his computer through a peer-to-peer file sharing program and leaves it indexed in a "shared folder" it amounts to offering sexually exploitative material under §18-6-403(3)(b).

People v. Douglas, 2012 COA 57. In order to be guilty of a crime as a complicitor, there must be evidence that the crime was actually committed. *Here:* defendant could not have been convicted of internet luring of a child and internet sexual exploitation of a child under a complicity theory because there was no evidence that the undercover officer with whom defendant communicated actually committed the crimes at issue.

People v. Brown, 313 P.3d 608 (Colo. App. 2011). Evidence was sufficient to establish that alleged child pornography depicted real children; images appeared to depict real children, and there was no evidence suggesting images were faked.

People v. Rabes, 258 P.3d 937 (Colo. App. 2010). Each sexually exploitive image of a child constitutes a discrete act of victimization of the child. Because prosecution presented multiple and distinct images involving defendant and child victim, no error in imposing consecutive sentences.

People v. Mantos, 250 P.3d 586 (Colo. App. 2009). Downloading and saving sexually exploitative material in a share-capable computer file does not constitute the felony offense of sexual exploitation of a child as defined in §18-6-403(3)(b). *Here*: COA looked at the terms "prepares" and "arranges for" in the statute and found that: (1) the trial court misconstrued the meaning of the word "prepares" to encompass possession with the potential to distribute sexually exploitative material and submitted the case to the jury on this erroneous legal theory; and (2) the term "arranges for" does not encompass either arranging for the distribution of material or arranging to obtain material. Evidence insufficient to support sexual exploitation of a child §18-6-403(3)(b) under terms "prepares or arranges for" that prosecution argued at trial; because prosecution never argued any other terms (from list in statute) no evidence supported conviction under the statute and conviction vacated.

People v. Renander, 151 P.3d 657 (Colo. App. 2006). Defendant was charged with 47 counts for sexual exploitation of a child based on possession of child pornography. The charges were based on each specific image of the child(ren). At a pretrial hearing, the trial court ordered the prosecutor to rearrange the charges so there was only one charge per child, regardless of the number of images that pertained to that child (resulting in the loss of 11 of the original charges). The DA appealed under §16-12-102 and CAR 4(b)(3). The statute explicitly allows for the prosecution of possession of each image.

People v. Grady, 126 P.3d 218 (Colo. App. 2005). The statute defining sexual exploitation of a child, §18-6-403, is neither unconstitutionally vague nor overbroad. In order to convict under the statute, the People must prove that a person knowingly took sexually explicit photographs of a child and that the content of those photographs, viewed objectively, would lead to sexual gratification or stimulation of a reasonable viewer. *Here*: the trial court erred in adopting a subjective test to define "erotic nudity" as referring only to the sexual gratification of the creator of the material and instructing the jury according to that definition.

People v. Shepard, 98 P.3d 905 (Colo. App. 2004). Where DA presented a factual basis for 2 separate incidents of exploitation of child victim, defendant's double jeopardy rights were not violated when court imposed consecutive sentences for the incidents.

People v. Campbell, 94 P.3d 1186 (Colo. App. 2004). Child sexual exploitation statute, §18-6-403(3)(a), prohibits "caus[ing], induc[ing], encit[ing], or permit[ting] a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material." *Here*: statute is not unconstitutionally overbroad under the holding in Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002). Unlike the federal statute examined in *Free Speech Coalition*, the Colorado statute prohibits only the use of real children (defined under the statute as persons under 18) in the production of pornography. Under sexual assault statute, §18-3-402(1 (e), a 15-year-old can legally consent to sex with a person not more than 10 years older than he or she is. In contrast, under the child sexual exploitation statute, §18-6-403(1), a person under 18 "is incapable of giving informed consent to the use of his or her body for a sexual purpose." Equal protection violation as applied to defendant who is convicted of child sexual exploitation for photographing a 15-year-old engaged in consensual sexual activity with a 19-year-old. The legislature could rationally conclude that there is a harm connected with making sexually exploitative materials of minors that is independent of any harm occasioned by the particular sex act being photographed.

People v. Verbrugge, 74 P.3d 429 (Colo. App. 2003). In light of the purpose of Crim.P. 16 to ensure a fair trial, §18-6-403(3) (b), sexual exploitation of a child, does not apply to duplication of photographs for use by defense counsel in preparation for trial when the court has taken adequate precautions to limit their use. *Here*: the court

prohibited defense counsel from disseminating or copying or leaving the material in defendant's possession and required that at the conclusion of the case the photographs be returned to the court for destruction.

People v. St. James, 75 P.3d 1122 (Colo. App. 2002). Under §18-6-403(3) (a), defendant may be prosecuted for sexual exploitation of a child if he/she photographs a child engaged in sexually explicit conduct. It is inconsequential whether the film is ever developed. The critical question is whether, when defendant photographed the child, he or she did so for the purpose of making a visual depiction of explicit sexual conduct.

People v. Gagnon, 997 P.2d 1278 (Colo. App. 1999). Where the photos taken by defendant displayed a substantial portion of the girl victim's breasts, and the photos were clearly for the purpose of sexual gratification, defendant's conduct was proscribed by §18-6-403, defining sexual exploitation of a child. The sexually suggestive poses themselves, the fact that defendant also asked the child to pose in even more explicit poses, and the fact that the photos were found among a collection of adult pornography, were sufficient evidence that defendant's purpose in taking the photos was for sexual gratification, as required for conviction of sexual exploitation of a child.

SEX OFFENDER REGISTRATION (CSORA): §18-3-412.5, §16-22-101, ET SEQ.

People v. Warren, 2024 COA 60. The Sex Offender Registration Act dictates that certain individuals are subject to lifetime registration and may not petition to discontinue such registration under §16-22-113(3). In 2018, §16-22-113(2.5)(a) was amended to state that "notwithstanding any provision of this section to the contrary, a registrant . . . may file a petition to discontinue registration if the registrant suffers from a severe physical or intellectual disability to the extent that he or she is permanently incapacitated and does not present an unreasonable risk to public safety." The legislature's use of such a plain, broad "notwithstanding" clause clearly signals their intention that the provisions of subsection (2.5)(a) "override conflicting provisions of any other section" and that includes subsection (3) which otherwise limits who may petition for deregistration. *Here:* defendant was convicted of first-degree sexual assault which normally would prevent a request to deregister. Because defendant made his request under (2,5)(a) and attached his mental health records outlining his intellectual disabilities, and the People objected to his petition, the trial court erred by not conducting a hearing under §16-22-113(2.5)(g).

Moore v. 4th Judicial District Attorney, 2024 COA 48. Petition for Removal from Sex Offender Registry, §16-22-113(3), provides that certain persons are not eligible for removal from the sex offender registry. §16-22-113(3)(c) provides that such persons include "[a]ny adult who has more than one conviction as an adult for unlawful sexual behavior or any other offense, the underlying factual basis of which is unlawful sexual behavior pursuant to §16-22-103(2), in this state or any other jurisdiction." In turn, §16-22-103(2)(a) requires any person convicted of unlawful sexual behavior "on and after July 1, 1994," to register as a sex offender. The COA considered whether §16-22-113(3)(c)'s reference to §16-22-103(2) means that §16-22-113(3)(c) applies only to "prior" convictions for unlawful sexual behavior entered on and after July 1, 1994 – it held §16-22-113(3)(c) does not impose such a time limitation. *Here:* because defendant had two prior convictions for unlawful sexual behavior in 1987 and 1999, §16-22-113(3)(c) rendered him ineligible for removal from the registry.

Dorsey v. People, 2023 CO 51. The CSC holds that the legislature intended to designate the recidivist provision of the statute describing the crime of failure to register as a sex offender, §18-3-412.5(2)(a), a sentence enhancer, which may be proved to a judge by a preponderance of the evidence, not an element of the offense, which must be proved to a jury beyond a reasonable doubt. The court further holds that allowing a judge to elevate a conviction for failure to register from a F6 to a F5, based on a prior conviction for failure to register, doesn't violate a defendant's right to a jury trial under either the Sixth Amendment or article II, sections 23 and 25 of the Colorado Constitution.

People In Int. of T.B., 2021 CO 59. Statute mandating lifetime sex offender registration for offenders with multiple juvenile adjudications was not intentionally punitive; mandatory sex offender registration for offenders with multiple juvenile adjudications constituted punishment for Eighth Amendment purposes; as a matter of first impression, the statute violated prohibition against cruel and unusual punishment. Overruled People in Interest of C.M.D., 2018 COA 172, People in Interest of J.O., 2015 COA 119; People in Interest of J.T., 13 P.3d 321 (Colo. App. 2000).

McCulley v. People, 2020 CO 40. Defendant who successfully completed his DJ&S imposed when he pled guilty plea to second-degree sexual assault, and who, more than ten years earlier, was released from the 60-day term of incarceration and two years of probation imposed on his guilty plea to misdemeanor sex offense, was no longer "[a]ny adult who has more than one conviction for unlawful sexual behavior," and thus was not statutorily disqualified from petitioning to discontinue requirement that he register as sex offender; court had to give effect to fact that the statutory phrase "[a]ny adult who has more than one conviction for unlawful sexual behavior" was written in the present tense, and that defendant's successful completion of the deferred judgment and sentence meant that his guilty plea to the sexual assault charge was withdrawn and that the sexual assault charge was dismissed.

People v. Wilson, 2017 COA 89. "Knowledge" does not require a technical understanding of the relevant statutes, but rather only the factual circumstances that make the conduct illegal. Misunderstanding the registration requirement is not a defense. Under §16-22-108, simply changing residences does not supersede the 5-day registration requirement imposed upon release of the offender. *Here:* trial court properly did not instruct on the affirmative defense of uncontrollable circumstances because there was no evidence to support the defense where defendant did not register simply because he was homeless.

People v. Allman, 2012 COA 212. Defendant can be found guilty of failure to register as a sex offender when he lives out of a non-fixed address, such as his car. "Residence" may include a temporary shelter, and the act does not limit residence to traditional structures such as a house or apartment. A person establishes a residence with the intent to make any place or dwelling his residence, including a motor vehicle even if not parked in a fixed location. Registering the car's description and license plate would have fulfilled the registration requirements.

People v. Carbajal, 2012 COA 107. Sex offender registration is not an element of defendant's sentence. The purpose of registration is not to punish defendant, but to protect the community and to aid law enforcement officials in investigating future sex crimes. A person required to register as a sex offender due to being placed on a DJ&S may petition to discontinue registration after successful completion of the DJ&S. However, successful completion of the DJ&S does not automatically relieve defendant from the duty to register, but merely provides a right to petition the court to discontinue registration. The determination of whether to grant a petition to discontinue sex offender registration is within the discretion of the trial court. *Here*: trial court relied on the sex offender's failure to complete certain conditions of his DJ&S in denying a petition to discontinue registration. The court abused its discretion since, once the DJ&S was dismissed, the offender no longer had an obligation to complete those conditions. Trial court could not properly deny a petition to discontinue sex offender registration following successful completion of a DJ&S based solely on a conviction for criminal trespass which did not have an underlying factual basis involving unlawful sexual behavior.

People v. Brooks, 2012 COA 52. If defendant is required to register as a sex offender because he committed an offense in another state/jurisdiction that would constitute an unlawful sexual offense in Colorado, the out-of-state conviction must be compared element by element with the Colorado offense. *Here:* defendant was convicted in Texas of indecency with a child by exposure, and was prosecuted in Colorado for failing to register as a sex offender. The prosecution argued that he was required to register because his Texas conviction, if

committed in Colorado, would have constituted the "unlawful sexual offense" of indecent exposure. Because Colorado's indecent exposure statute contained an element missing from the Texas statute at issue here, defendant was not subject to registration in Colorado and thus, by extension, could not be convicted of failing to register in Colorado.

People v. Poage, 272 P.3d 1113 (Colo. App. 2011). §18-3-412.5(1)(a)-(k) each create and define an offense, such that the conditions described in each subsection are elements that must be proved in order for defendant to be convicted. Subsection (1)(i) requires a registrant to file a registration cancellation form only upon ceasing to reside in a jurisdiction entirely. *Here*: because there was no evidence of where defendant resided after he ceased to reside at a particular address in the jurisdiction, evidence was insufficient to establish that he was required to file a registration cancellation form.

People v. Griffin, 397 P.3d 1086 (Colo. App. 2011). Under §18-3-412.5, the phrase "establish a residency" requires a physical presence or occupancy. *Here:* although definition for residence under CSORA in §16-22-102(5.7) states that a residence includes a place that is "intended to be used" for habitation, there was insufficient evidence to support a finding that defendant ever lived in Adams County even though he stated his intent to move there.[15]

People v. Sowell, 327 P.3d 273 (Colo. App. 2011). Amendment to sex offender registration statute eliminating the possibility of petitioning for removal from the sex offender registry for persons convicted of SAOC/POT applies to defendant even though he committed his crime before the amendment was enacted. Defendant failed to show that he detrimentally relied on this provision of the original statute when he entered his plea agreement, and thus he was not entitled to relief.

People v. Perry, 252 P.3d 45 (Colo. App. 2010). Under the sex offender registration statutes, an offender who successfully completes a DJ&S for sexual assault on a child and obtains a dismissal of the charge may petition for removal from the sex offender registry. An offender who is serving a DJ&S would have a "conviction" that would prelude removal from the registry; but once it is completed and the case dismissed, the offender would no longer have such a "conviction." The phrase "is convicted" in §16-22-112(3)(b)(II) of the sex offender registration laws includes a person who has received a DJ&S, but such a person stands "convicted" only until the successful completion of the deferred judgment and sentence and dismissal of the case.

People v. Mayo, 181 P.3d 1207 (Colo. App. 2008). Petitioner was properly required to register as a sex offender where he had been subject to civil commitment in Illinois after being indicted for SAOC. Illinois's civil commitment is the equivalent of a DJ&S under Colorado's sex offender registration laws given: (1) the structure of the Illinois civil commitment proceedings; (2) the attendant burden of proof of beyond a reasonable doubt; (3) the retention of the criminal charge during service of the commitment; (4) the supervisory requirements attaching to such a commitment; and (5) Illinois's registration requirement for such committed persons. The Illinois civil commitment is the functional equivalent of "conviction" or "convicted" as those terms are defined in §16-22-102(3).

People v. Lopez, 140 P.3d 106 (Colo. App. 2005). Failure to register as a sex offender is a continuing offense; offenders are under a continuing obligation to register; where the evidence did not establish that he failed to register on the date charged, evidence that demonstrated that he failed to register at subsequent times was

[15] Cert was granted in this case (Case #11SC0351) but because defendant died before the CSC could hear the case, the COA's judgment vacating defendant's conviction stands.

sufficient to support a conviction, although it constituted a variance from the actual charge; offense includes a mental state of knowingly.

People v. Duncan, 109 P.3d 1044 (Colo. App. 2004). While there was evidence that defendant failed to register as a sex offender on his birthday, there was insufficient evidence that he also failed to register on the first business day after his birthday, as required by §18-3-412.5(3)(a)(I).

SOLICITATION OF PROSTITUTION

People v. Williamson, 249 P.3d 801 (Colo. 2011). Evidence of past acts of solicitation of prostitution, even when no sexual contact or intercourse has occurred, is "sexual conduct" and protected under rape shield, §18-3-407.

TAX OFFENSES: §39-21-118

People v. Rea, 7 P.3d 995 (Colo. App. 1999). Conviction for failure to pay sales taxes does not require proof that defendant knew his failure to pay was a crime; it is sufficient for prosecution to show that defendant knew he had a duty to pay sales taxes and he knowingly failed to pay.

THEFT OFFENSES: §18-4-401 ET. SEQ.

People v. Bock, 19CA2184. In an UNPUBLISHED case, the COA held that the constructive amendment to the theft complaint did not amount to plain error because defendant had sufficient notice of the change based on the DA's bill of particulars and the DA's burden of proof was not lessened. *Here:* the DA charged defendant with four counts of aggregated theft, each representing multiple takings against the same victim under a single criminal impulse. The jury instructions for the same counts, however, didn't include language tracking the single-criminal-impulse requirement, but instead concerned multiple thefts committed within a six-month period. §18-4-401(1)(a) isn't interchangeable with subsection (4)(b), and whichever provision the People's complaint was based upon, it wasn't subsection (4)(a). Therefore, the constructive amendment occurred when the People tendered, and the court gave, jury instructions tracking the language of §18-4-401(4)(a). *[Cert Accepted (9/5/23) in case #23SC97: (1) Whether the constructive amendment in the theft instruction constituted structural error, or, alternatively, plain, reversible error. (AAG Patrick Withers)]*

People v. Vidauri, 2021 CO 25. To prove deception as element of theft by deception, prosecution must prove that defendant made a "misrepresentation," which is a false representation of a past or present fact, and that the victim parted with something of value in reliance upon defendant's misrepresentation. A "total amount approach," treating total amount of medical assistance benefits obtained by deception as amount stolen, rather than the "overpayment approach," requiring prosecution to net out amount for which defendant would have been eligible, applied in determining value of medical assistance benefits that defendant received by false reporting of household income, for purposes of determining classification of theft offense as a felony; eligibility did not equate with entitlement, and fraud investigator testified that eligibility determinations were based on numerous factors, many of which frequently changed. *Here:* all medical assistance benefits defendant received by false reporting of household income were obtained by deception, for purposes of determining classification of theft offense as a felony, where defendant never accurately reported her self-reported income, meaning that Department of Human Services could not have properly determined her financial eligibility and that she was never entitled to, nor had any property interest in, any amount of benefits.

People in the Interest of B.D., 2020 CO 87. The at-risk victim statute, which imposes greater penalties when a theft happens in presence of an at-risk victim, is a sentence enhancer rather than an element of an offense.

Halaseh v. People, 2020 CO 35M. As a matter of constitutional limitation, a criminal verdict may not be directed for the State nor a criminal conviction entered for an offense not authorized by the jury's verdict, no

matter how overwhelming the evidence. Consistent with constitutional limitations, a lesser offense can be considered necessarily implied in a jury verdict finding a criminal defendant guilty of a greater offense only to the extent that it can be determined from the jury's verdict alone that each of its elements has already been charged and found by the jury beyond a reasonable doubt. *Here:* COA could not direct trial court to vacate defendant's conviction of one count of F3 theft and replace it with convictions of four counts of F4 theft, based on its determination that theft statute did not permit all 37 acts of theft with which defendant was charged to be aggregated to support the single F3 count but did allow them to be aggregated into four groups each supporting a F4 count; convictions of the F4 offenses were not implied in the jury verdict convicting defendant of the F3 offense, as jury was never instructed on the additional statutory element necessary for aggregating the multiple acts of theft.

People v. Cali, 2020 CO 20. A trial court lacks the authority to apply amendatory legislation to a defendant's judgment of conviction after that judgment becomes final. *Here:* defendant, who was convicted of theft offenses, was not entitled to benefit of amendments to theft statute that passed and became law during pendency of defendant's appeal, on defendant's petition for post-conviction relief, where defendant did not file his petition for post-conviction relief until after date that conviction became final through issuance of COA mandate.

People v. Lawrence, 2019 COA 84. When defendant is entitled to resentencing under *Stellabotte*, jury's value finding covers multiple new sentencing ranges, and the value of the stolen property was disputed at trial, remedy is to reverse theft conviction and on remand prosecutor can either: (1) elect to have court enter a conviction for the lowest penalty classification supported by the original verdict, or (2) retry defendant for a higher penalty classification of theft.

People v. Jaeb, 2018 COA 179. Affidavit attesting to value of a stolen object does not fall under hearsay exception found in §18-4-414; this exception is limited to "price indicators." §18-4-414(2) does not provide a hearsay catchall exception whenever the value of a stolen item is at issue. Where theft is established by the evidence, but the amount stolen is not proven by competent evidence of value, proper remedy is to remand to enter judgment on the lowest-class theft offense.

People v. Lopez, 2018 COA 119. §18-6.5-103(5), enhances theft penalties when any element or portion of the offense is committed in the presence of an at-risk person. "Portion of the offense" means "conduct taken in furtherance of the crime that occurs in temporal proximity to an element of the offense and is physically close to the victim." *Here:* immediately after taking possession of the gun, defendant was in the same room with victim and spoke with him before leaving with the gun; defendant committed at least a portion of the theft within victim's presence.

People v. Patton, 2018 CO 67; People v. Stellabotte, 2018 CO 66. 2013 amendments to classifications for theft apply retrospectively because, under *Thomas* and §18-1-410(1)(f)(1), ameliorative changes in the law apply to prior offenses unless the statute is expressly prospective in operation.

People v. Thompson, 2018 COA 83. Evidence was sufficient to support theft conviction because it showed defendant obtained victims' money through deception and that he intended to permanently deprive them of it; victims testified that they had agreed their money was to be used for development project; and an investigator testified that defendant instead used the funds to pay his own attorney's fees, improve the house his wife continued to occupy at the time of trial, and for other personal expenses.

People v. Ramos, 2017 COA 100. Plain language of §18-4-401(4)(a) requires jury to find that defendant committed every theft charged in an aggregated theft count; a single act of theft is a lesser-included offense of "aggravated theft."

People v. Hebert, 2016 COA 126. Pursuant to §18-6.5-103.5(1), trial court granted prosecution's request to take a deposition from an at-risk victim who was very ill; victim died before trial, and deposition was admitted at trial. Defendant's right to confrontation was satisfied because she had an opportunity to cross-examine victim via Skype and the procedure was necessary to protect victim's health and ensure the reliability of the victim's testimony.

People v. Vigil, 2015 COA 88. Owner's testimony that he would pay $1,000 for his truck constituted competent evidence of market value and sufficient evidence to find that value of truck was worth at least $1,000.

People v. Payne, 2014 COA 81. Prosecution did not present sufficient evidence to support theft ($1000-$20,000) conviction because the only evidence of reasonable market value of stolen TV was that it "cost" $1400; victim's testimony about the value of his or her property must relate to property's value at the time of crime; but because victim also testified that two other stolen items were "worth" over $500, evidence supported conviction for lesser misdemeanor theft (over $500 but less than $1000).

People v. Rhea, 2014 COA 60. Multiplicitous theft counts can go to jury over defendant's objection so long as double jeopardy issues are resolved through post-verdict merger; multiplicitous charging itself did not violate defendant's due process rights (by resulting in compromise verdict or by allowing different evidence to be presented).

People v. Stell, 2013 COA 149. Trial court erred in dismissing multiple counts of an indictment on ground that general power of attorney exercised by defendant gave him authority to do whatever he wanted with his father's finances, including converting everything to his own use. In Colorado, that power must be exercised in conjunction with Uniform Power of Attorney Act, which imposes fiduciary responsibilities that holder act for grantor's benefit; dismissed counts were reinstated.

People v. Henson, 2013 COA 36. For theft restitution determination, "fair market value" (FMV) is the price at which a willing buyer and willing seller "with knowledge of all the relevant facts" would agree to exchange the property or interest at issue. When seller is a thief, and buyer plans to resell the item, FMV should be determined by objective means, such as an appraisal.

People v. Samson, 2012 COA 167. To establish elements under §18-4-401(1)(a), prosecution is not required to prove precise value of thing taken to establish theft, although it must plead and prove that value to determine the theft's classification level. Because completed crime of theft does not require proof of defendant's knowledge of value of the goods taken, a conspiracy to commit theft does not require prosecution to prove an agreement to take goods valued at a particular amount of money.

People v. Simpson, 2012 COA 156. Defendant is entitled to PH whenever he is charged with a F1, F2, or F3. In theft, value of the property – whether an element or an enhancer – is part of the offense charged within meaning of PH statute. Trial court can grant PH even after defendant has entered a plea.

People v. Randell, 2012 COA 108. Roberts, which held that language in theft aggregation statute (§18-1-401(4)) required aggregation of thefts committed within 6-month period, also applies to charges of theft by receiving. Identical language in the theft by receiving statute must be interpreted consistently with *Roberts*.

Lucero v. People, 2012 CO 7. Where defendant is convicted on multiple theft counts for occurrences that should have been aggregated into a single count under former §18-4-401(4) and *Roberts*, sentences on the extra convictions are vacated as illegal, even though *Roberts* was decided 8 years after convictions entered, and double jeopardy violation was not preserved.

People v. Gibbons, 397 P.3d 1100 (Colo. App. 2011), aff'd other grounds, 328 P.3d 95 (Colo. 2014). Evidence was sufficient to show defendant's mens rea for theft by receiving because his false or implausible statements

were indicative of a guilty state of mind; jury was not required to draw an "inference upon an inference" because evidence supported 2 independent inferences: (1) he fabricated his story about the stolen vehicles; and (2) by his fabrication, he intended to prevent detection that the vehicles had been stolen.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). Kelly Blue Book valuation is admissible under §18-4-414(2) and CRE 803(17) to prove value of stolen item. Officer need not be qualified as expert to provide valuation testimony concerning stolen item based on the Blue Book. Argument that officer did not testify sufficiently to the data he entered into Blue Book's website to find value of stolen item, goes only to weight and not admissibility of the valuation. Evidence is not insufficient, and it is not plain error, where evidence does not address stolen vehicle's value in Colorado (where it was stolen) as opposed to its value in California (where it was recovered).

People v. Vigil, 251 P.3d 442 (Colo. App. 2010). Trial court did not err in failing to require jury to unanimously agree on theory supporting theft. Legislature's amendment responding to *Roberts* and disavowing any intent to create a mandatory unit of prosecution for thefts committed within 6-month period, did not apply retroactively. Where timing of discrete thefts allows for alternate groupings in multiple 6-month time periods, DA may choose which units of prosecution to charge. COA, however, has no such discretion and in order to maximize duplicitous theft verdicts, it must select grouping maintaining the most convictions and resulting in longest sentence.

People v. Gardner, 250 P.3d 1262 (Colo. App. 2010). Former §18-4-401(4), reflects legislature's unit of prosecution for theft, and requires that all thefts committed by same person within 6-month period be joined and prosecuted as single felony, unless jeopardy has previously attached regarding one of theft charges at issue. (But see H.B. 09-1334, passed in response to *Roberts* and indicating different legislative intent). *Here:* it was error to impose separate convictions/sentences for2 theft charges when they contained identical language and occurred within 6-month period; a third charge exceeded 6-month "unit of prosecution," and a separate conviction/sentence was appropriate.

People v. Crawford, 230 P.3d 1232 (Colo. App. 2009). Values of things received and disposed of may be aggregated under subsections (2) through (5) of the theft by receiving statute. Where acts are committed pursuant to a single criminal impulse, they may be combined into one count and need not be prosecuted under 6-month provision of theft by receiving statute. *Here:* defendant's acts of disposing of stolen items were properly considered part of single criminal impulse where: all the stolen property belonged to same victim, was stolen in one incident, was subject to one police investigation, and was described in same testimony at trial; evidence supported inference that defendant received property at the same time; and defendant conceded she pawned or sold several of the items in order to recoup bond money she posted for her boyfriend, the suspected thief of the items.

People v. Jamison, 220 P.3d 992 (Colo. App. 2009). Prosecution must prove value of the stolen items beyond a reasonable doubt; there must be some basis other than pure speculation for determination of the value of stolen items, such as evidence of their current value and condition. While evidence of market value is necessary to sustain a theft conviction, face value of some items, such as cash and coins, provides sufficient evidence of the value of those items. *Here*: where victim testified only about what items were missing from her home and where they were originally located, evidence was insufficient to sustain defendant's conviction for theft of between $500-$15,000; no evidence of the value of most of the items stolen, except for pawn shop receipt showing sale of "DVD" for $60, and forged check written for $160. Because the evidence of value only established total amount of $220, defendant could only be convicted of M2 theft. Where a conviction for an offense is invalidated on grounds of insufficient evidence, but the evidence is sufficient to uphold a conviction on a lesser included offense, the appropriate remedy is to remand the case with directions to enter judgment and

sentence on the lesser included offense. Although the value of the property taken is a sentence enhancer rather than an element of the crime of theft; sentence enhancers must be pled, proven, and found beyond a reasonable doubt by a jury, so the same remedy should apply.

Roberts v. People, 203 P.3d 513 (Colo. 2009). Theft statute does not create a separate and continuing crime of "theft by deception." Rather, theft by deception is simply one of the alternate ways in which theft can be accomplished. Aggregate provision in §18-4-401(4), permits any thefts committed by same person in 6-month period to be joined as one felony offense, and no other theft committed by that same person in the same time frame can support a separate theft conviction.

People v. Moore, 226 P.3d 1076 (Colo. App. 2009). Evidence establishing value for theft by receiving - $15,000 or more was insufficient because victims' valuations were based on speculation, purchase prices from years ago, guesses, and estimates.

People v. Pearman, 209 P.3d 1144 (Colo. App. 2008). Under §18-4-414(1), evidence of retail value may include, but is not limited to proof of "fixed labels and tags, signs, shelf tags, and notices." *Here:* loss prevention officer's testimony that he determined the value of the items by looking at their price tags and adding up the prices listed on those tags was properly allowed. Hearsay exception in §18-4-414(2) is not limited to circumstances where the proof of value is based on sale price of similar property.

People v. Manier, 197 P.3d 254 (Colo. App. 2008). Although "knowingly" in first-degree aggravated motor vehicle theft, §18-4-409(2), does not necessarily apply to all 8 aggravators, it does apply to (2)(h)'s display-of-fictitious-license-plates aggravator because in another statute, legislature declared that display of unauthorized license plates is not unlawful unless it is done knowingly. *Here*: trial court erred in responding to jury question that defendant did not have to know that license plates displayed on stolen truck did not belong to it.

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). There was no evidentiary basis for instruction on theft as lesser included offense of robbery, since evidence established defendant shot victim as a means of retaining possession of victim's money.

Auman v. People, 109 P.3d 647 (Colo. 2005). Theft jury instruction must state defendant had to knowledge that he lacked authority to take the thing in question.

People v. McKinney, 99 P.3d 1038 (Colo. 2004). Theft from at-risk adult is a penalty-enhanced form of general theft and not a separate offense; at-risk statute specifically provides that its purpose is to prescribe greater penalties for theft against at-risk adult and does not define crime and list its elements but, rather, refers to general theft statute's definition of the crime, and, thus, proof of factors in at-risk statute need not be met for a defendant to be found guilty of general theft, but a jury finding of the additional at-risk factors enhances the penalty for the general theft crime.

People v. Marquez, 107 P.3d 993 (Colo. App. 2004). Defendant was properly convicted of aggravated motor vehicle theft under (2)(d), which requires that he "used the motor vehicle in the commission of a crime other than a traffic offense." Court found (1) vehicular homicide is not a traffic offense, and (2) defendant can "knowingly" use stolen vehicle in commission of a "reckless" crime.

People v. Sharp, 104 P.3d 252 (Colo. App. 2004). Evidence was sufficient to support theft for use of hotel room without paying; evidence demonstrated that defendant used hotel room with intent to permanently deprive hotel of compensation for her stay.

People v. Witek, 97 P.3d 240 (Colo. App. 2004). Defendant is guilty of theft even though theft proceeds were given to another; theft conviction stands where intended use of stolen property is inconsistent with owner's use or benefit and victim parted with something of value in reliance on defendant's representation.

People v. Zuniga, 80 P.3d 965 (Colo. App. 2003). Theft by receiving based on a person's retention of stolen property is a continuing offense; statute of limitations does not begin to run until the person no longer possesses the property.

People v. Devine, 74 P.3d 440 (Colo. App. 2003). Under §18-4-401(1), theft occurs when defendant knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception. Deception made upon the probate court in an effort to commit theft from victim's estate satisfies requirements; victim is the probate estate, which is capable of being deceived through deception of the probate court, since that is the only entity entitled to decide if the estate could part with any of the estate property.

People v. Meads, 58 P.3d 1137 (Colo. App. 2002). Second-degree aggravated motor vehicle theft is not a lesser-included offense of theft because each has an element that the other does not; "intent to permanently deprive" element of theft refers to defendant's mental state at the time of the taking of victim's property, regardless of whether victim later recovers the property.

People v. Nix, 42 P.3d 41 (Colo. App. 2001). Regulation requiring that housing be a "principal residence" to qualify for benefits was void for vagueness when applied to theft statute, §18-4-401(1); local housing authority had not defined "principal residence," and a person of ordinary intelligence could not be expected to readily understand its application in these circumstances. *Here:* where food stamp regulation required only that recipient "maintain a residence" in the county of receipt, evidence that defendant rented an apartment in that county (albeit with public funds) showed compliance with regulation, even if he primarily stayed in another apartment in a different county; evidence was insufficient to convict him of theft by deception for his receipt of food stamps.

TRESPASS, TAMPERING & CRIMINAL MISCHIEF: §18-8-610, §18-4-501 ET. SEQ.

People v. Snelling, 2022 COA 116**.** The majority disagreed with another division's recent decision in *People v. Whiteaker*, 2022 COA 84 and held first degree trespassing is a lesser included of second degree burglary under *Reyna-Abarca*'s clarified test. Judge Gomez specially concurred to say she wouldn't reach this issue because they (correctly) reversed the burglary conviction on an instructional issue and it was not clear the merger issue would arise on remand.

People v. Gillis, 2020 COA 68. In a double-jeopardy analysis, when determining whether a course of conduct constituted a single offense or multiple offenses, courts consider the following non-exhaustive list of factors: (1) whether the acts occurred at different times and were separated by intervening events; (2) whether there were separate volitional acts or new volitional departures in the defendant's course of conduct; and (3) factors such as temporal proximity, the location of the victim, for example, if the victim was moved, the defendant's intent as indicated by his or her conduct and utterances, and the number of victims. First degree criminal trespass is a lesser included offense of first degree burglary. *Here:* defendant's conduct in entering victim's apartment could not be sufficiently differentiated to support convictions both for first-degree burglary and lesser-included offense of first-degree criminal trespass, and trial court erred in failing to merge convictions as matter of double jeopardy.

People v. Rieger, 2019 COA 14. An electronically stored photograph qualifies as "physical evidence" for purposes of §18-8-610 (tampering with physical evidence). *Here:* a duplicate of the electronically stored photograph was "physical evidence," and evidence presented at PH was sufficient to establish probable cause; dismissal order was reversed, and case remanded with directions to reinstate the case for further proceedings.

People v. Welborne, 2018 COA 127. Criminal mischief is a lesser included offense of first-degree arson where both offenses are based on the same conduct.

People v. Rock, 2017 CO 84. Second-degree trespass is a lesser included offense of second-degree burglary.

People v. Brooks, 2017 COA 80, vacated other grounds, 2019 CO 75M. Evidence of tampering with a witness is sufficient even though the witness did not receive the communication because the concept of attempt is built into the statute. *Here*: the crime was complete when defendant wrote the tampering letters, concealed them from jail staff, and asked another inmate to deliver them to the victim.

People v. Johnson, 2015 COA 54. Where victim's car interior/tires were slashed with knife, in a manner similar to defendant's attack on victim one month later, there was sufficient evidence to support defendant's convictions as perpetrator of trespass/mischief offenses because: (1) evidence showed defendant rented a car on both occasions and each time had driven it the amount of miles it would have taken to travel from his home to victim's residence, and back; and (2) defendant had motive to harass victim, as he believed victim was attempting to interfere in his relationship with his new girlfriend and was encouraging his girlfriend to pursue sexual assault charges against him.

People v. Rhodus, 2012 COA 127. An "entry" for criminal trespass of motor vehicle requires an intrusion into the protected area of the motor vehicle; evidence must establish defendant passed the line of the threshold into protected area of vehicle.

People v. Atencio, 140 P.3d 73 (Colo. App. 2005). In §18-8-610, "removes" does not limit tampering to situations where evidence is removed from crime scene and "physical evidence" is not limited to evidence discovered by authorities; focus for tampering is whether defendant was aware at the time he removed evidence that it might be subject to an official proceeding, not whether the authorities were aware of a potential proceeding at the time the evidence was removed.

People v. Griffith, 58 P.3d 1111 (Colo. App. 2002). Third-degree criminal trespass is not a lesser-included offense of attempted first-degree criminal trespass because an unlawful entry upon the premises is a necessary element of third-degree criminal trespass but not of attempted first-degree criminal trespass.

People v. Rodriguez, 43 P.3d 641 (Colo. App. 2001). Since first-degree criminal trespass of dwelling does not require an intent to commit an ulterior crime, information need not charge an ulterior crime (unlike first-degree criminal trespass of motor vehicle).

TRESPASS PUBLIC BUILDING: §18-9-110

People v. Hill, 2025 COA 12. In first-degree criminal trespass, if a person secures permission to enter a dwelling by means of ruse, trickery, or deception, the person enters "unlawfully" for purposes of first-degree criminal trespass, §18-4-502(1)(a), C.R.S. 2024.

Whiteaker v. People, 2024 CO 25. First degree criminal trespass of a dwelling is a lesser-included offense of second-degree burglary. The CSC confirmed that when a defendant is convicted of both a greater offense and a lesser-included offense in violation of double jeopardy, the remedy on appeal is automatic reversal of the judgment of conviction as to the lesser-included offense and merger of the two offenses, such that only the greater remains. The CSC acknowledged its opinion is in tension with *Scott* and traditional obviousness analysis but decided not to follow it. CSC also stated it was not adding to structural error but creating a new category of reversal for double jeopardy sentencing errors specifically (confined to these types of errors). Explicitly overruled People v. Garcia, 940 P.2d 357 (Colo. 1997).

People v. Rediger, 2018 CO 32. Term "public employee" as used in §18-9-110 (interference in public buildings) means a person who works in the service of a governmental entity under an express or implied contract of hire, under which the governmental entity has the right to control the details of the person's work performance.

People v. Moore, 2013 COA 86. §18-9-110(2) prohibits impeding only the officials or employees of a public entity in a public building; it does not prohibit impeding an independent contractor hired to perform a governmental function in the building. *Here*: employee of a security company hired by the city to screen visitors to the Denver City and County Building was not a public employee.

UNAUTHORIZED USE FINANCIAL TRANSACTION DEVICE: §18-5-702

People v. Hudson, 21CA0749. In this UNPUBLISHED opinion, the COA reversed defendant's conviction because the prosecution presented insufficient evidence to show defendant possessed a financial device because it did not prove beyond a reasonable doubt that the device in question could be used to obtain a thing of value. *Here:* officer testified that there was no evidence that defendant knew the two people whose debit cards he had in his possession; no evidence indicating whether either card was active or capable of being used, or whether there was any money in either account; and no information about the status of either card. *[Cert Accepted (9/3/24) in case #23SC942: (1) Whether the court of appeals erred by holding that to prove criminal possession of a financial device, the prosecution must separately prove that an enumerated financial device is capable of use at the time of possession (SAAG Megan Rasband)].*

People v. Reed, 2013 COA 113. In order for prosecution to prove criminal possession of a financial device, it had to prove defendant possessed something that could be used to "obtain cash, credit, property, services or any other thing of value or to make financial payments" at the time of possession. *Here*: where stolen gift card could not have been used to obtain anything of value since the available funds were exhausted, prosecution failed to prove gift card constituted a financial device.

People v. Novitskiy, 81 P.3d 1070 (Colo. App. 2003). Under §18-5-702 (unauthorized use of a financial transaction device) requires that defendant, in fact, obtain possession or use of cash, credit, property, or services through the unauthorized use of a financial transaction device.

VEHICULAR ASSAULT, HOMICIDE, & ELUDING: §18-3-205, §18-3-106, §18-9-116.5

People v. Sloan, 2024 COA 52. It was plain error where the language in the enhancer instruction referring to an "accident . . . resulting in death," rather than "vehicular eluding that results in . . . death to another person," misstated the key phrase in §18-9-116.5(2)(a). For the sentence enhancer to apply, the jury had to find, among other facts, that (1) defendant was engaged in vehicular eluding at the time of the accident and (2) the victims' deaths resulted from the eluding. This error in the instruction misdirected the jurors' attention to the ramifications of the accident, rather than to whether the victims' deaths resulted from the act of eluding.

People v. Kirby, 2024 COA 20. As a matter of first impression, applying the statutory elements test articulated in *Reyna-Abarca* and *Chapman*, both reckless manslaughter, §18-3-104(1)(a), and careless driving resulting in death, §42-4-1402(1), are lesser-included-offenses of reckless vehicular homicide, §18-3-106(1)(a) under the statutory elements test and §18-1-408(5)(a).

People v. Kennedy, 2023 COA 83. Because vehicular homicide under §18-3-106(1)(b)(I) is not grave or serious in every potential factual scenario, it should not be considered a per se grave or serious offense for purposes of proportionality review. This division disagrees with another division of this court that reached the opposite conclusion, albeit before *Wells-Yates*. Disagrees with *People v. Strock*, 252 P.3d 1148 (Colo. App. 2010). *[Cert Accepted (8/5/24) in case #23SC847: (1) Whether vehicular homicide-DUI, §18-3-106(1)(b)(I), is a per se grave or serious offense for purposes of proportionality review; (2) Whether the COA erroneously ruled that the maximum sentence in the aggravated range, for a defendant with no prior felony convictions, did not give rise to an inference of gross disproportionality (SAAG Melissa Allen)]*

People v. Tarr, 2022 COA 23. By enacting the vehicular homicide statute, the General Assembly did not intend to bar murder prosecutions of drivers who cause the death of another while behind the wheel; as applied to defendant, second degree murder statute and vehicular homicide (DUI) statute did not criminalize same conduct, and convictions under both did not violate equal protection; and there was sufficient evidence to find defendant acted knowingly when he sped into intersection, as required for his conviction for second degree murder. People v. Tarr, 2022 COA 23, rev'd other grounds, 2024 CO 37.

People v. Caime, 2021 COA 134. COA holds, as a matter of first impression, that vehicular assault (reckless driving) is not a per se grave or serious offense for purposes of conducting a proportionality review.

People v. Dominguez, 2019 COA 78. Trial court does not commit plain error by failing to merge convictions for greater and lesser-included offenses where the evidence shows two separate and temporally distinct instances of prohibited conduct. *Here:* evidence showed first incident of reckless driving and a second, distinct, incident of defendant recklessly eluding the police.

People v. Ackerman, 2015 CO 27. Where police were in process of preparing a search warrant when they learned that unconscious/injured defendant was being taken for medical procedures that could alter his blood-alcohol content, warrantless blood draw was justified by exigent circumstances.

People v. Gingles, 2014 COA 163. Consistent with *McMinn*, defendant may be charged with multiple counts of vehicular eluding arising from single criminal episode when he has performed discrete acts of eluding one or more peace officers, each constituting a new volitional departure in defendant's course of conduct.

People v. Schaufele, 2014 CO 43. When considering admissibility of results of a warrantless involuntary blood draw, trial court must follow Missouri v. McNeely, 133 S.Ct. 1552 (2013), which instructs court to consider totality of circumstances in assessing exigency; CSC declined to adopt a modified rule proposed by Chief Justice Roberts in *McNeely* concurring/dissenting opinion (plurality opinion interpreting a plurality opinion).

People v. McMinn, 2013 COA 94. Under §18-9-116.5(1) and §42-4-1413, defendant may be charged with multiple offenses of vehicular eluding/eluding a police officer arising from a single criminal episode when he has performed discrete acts of eluding one or more peace officers, each constituting a new volitional departure in defendant's course of conduct.

People v. Poindexter, 2013 COA 93. Vehicular eluding requires that defendant recklessly operate a motor vehicle. *Here:* there was sufficient evidence where defendant bolted out of parking so fast that his car "bottomed out," and sent sparks flying; defendant drove car at 30mph-40mph in a 25mph residential area; defendant "bailed out" of car while it was still moving, leaving rear passenger inside; and after defendant jumped out of the car, it crashed into a fence and snowplow blade.

People v. Zweygardt, 2012 COA 119. Vehicular assault - reckless) (VAR) does not necessarily establish all the elements of careless driving (disagreeing with 3 other cases): VAR requires "operating or driving" a motor vehicle, while careless driving requires only "driving"; appearance of disjunctive "operate or drive" in VAR signifies legislative intent that VAR includes ways of committing the offense other than "driving"- "operate" has been interpreted more broadly than "drive," such that an actor can "operate" a motor vehicle without "driving" it; criminal code's definition of "motor vehicle," applicable to VAR, is much broader than traffic code's definition of "motor vehicle" applicable to careless driving; careless driving is not a lesser included offense within VAR under §18-1-405(5)(c). Convictions for negligent homicide/careless driving resulting in death, both for a single victim, do not merge, because each offense contains an element the other does not. Convictions for VAR/careless driving resulting in death, both for a single victim, do not merge, because careless driving is not a lesser included offense within VAR.

People v. Smith, 254 P.3d 1158 (Colo. 2011). Colorado's express consent statute does not require officers to request a driver's consent to conduct a constitutional involuntary blood draw.

People v. Strock, 252 P.3d 1148 (Colo. App. 2010). Prosecutor misstated law regarding proximate cause in vehicular homicide case by saying "even if 10 phantom cars collided with [defendant's] vehicle" before he crashed, killing his passenger, defendant would still be the proximate cause of victim's death. No plain error because there was ample evidence defendant's driving while intoxicated was proximate cause of victim's death and jury was instructed properly re: proximate cause. Disagrees with People v. Kennedy, 2023 COA 83 *[Cert Accepted (8/5/24) in case #23SC847: (1) Whether vehicular homicide-DUI, §18-3-106(1)(b)(I), is a per se grave or serious offense for purposes of proportionality review; (2) Whether the COA erroneously ruled that the maximum sentence in the aggravated range, for a defendant with no prior felony convictions, did not give rise to an inference of gross disproportionality (SAAG Melissa Allen)]*

People v. Reynolds, 252 P.3d 1128 (Colo. 2010). Evidence that defendant swerved in front of first driver and engaged his brakes, which resulted in that driver losing control, crossing the median, and colliding with second driver's car was sufficient to support defendant's conviction for vehicular homicide of second driver, whose death was a natural and probable consequence of defendant's conduct. It was foreseeable defendant's conduct in swerving in front of first driver and engaging his brakes would result in collision between first and second driver travelling in opposite direction on a divided highway, and death of second driver. The foreseeability limitation applied to civil liability for negligence does not apply to criminal liability for homicide. Evidence was sufficient to support extreme indifference murder of 2 drivers in road rage incident, notwithstanding the fact that his conduct was specifically directed at one of the drivers.

People v. Martinez, 179 P.3d 23 (Colo. App. 2007). Court did not abuse its discretion in ordering defendant serve his 6-year sentence for vehicular eluding consecutive to a ten-year sentence imposed in another case. Unlike the first-time felon in *Edwards*, defendant here had 6 prior felony convictions which arose from separate cases.

People v. Prieto, 124 P.3d 842 (Colo. App. 2005). Defendant's conduct constituted felony murder and vehicular homicide, including penalty enhancer mandated by fact that defendant was fleeing commission of a felony at the time of vehicular homicide, §18-1.3-401(8)(g). Conviction/sentencing under more severe felony murder does not violate equal protection because felony murder and vehicular homicide do not proscribe identical conduct; offenses are distinguished by culpable mental state, degree of causation, predicate offenses involved, and requirement that actor operate a motor vehicle for vehicle homicide. Legislature has not precluded conviction/punishment under felony murder by enacting allegedly more specific fleeing-from-a-felony penalty enhancer for vehicular homicide, §18-1.3-401(8)(g); penalty provision bears none of the indicia of a specific statute intended to preempt prosecution under more general statute.

People v. Marquez, 107 P.3d 993 (Colo. App. 2004). Reckless vehicular homicide is not a lesser-included offense of aggravated motor vehicle theft under §18-4-409(2)(d) because (1) it is not a lower class of offense; and (2) it does not pass the "strict elements" test for merger of lesser offenses.

People v. Sherwood, 5 P.3d 956 (Colo. App. 2000). Vehicular eluding does not require that elusive conduct occur simultaneously with reckless behavior. *Here*: evidence sufficiently established recklessness where defendant with .213 blood alcohol level forced oncoming traffic off the road and squeezed by patrol cars that were surrounding him during a rolling roadblock.

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998). In prosecution for vehicular homicide, courts should instruct jury using general definition of "reckless" under §18-1-501. Here: trial court correctly refused to use definition that applies to reckless driving under motor vehicle code, §42-4-1401.

People v. Pena, 962 P.2d 285 (Colo. App. 1997). Under the statutory elements test, reckless driving is a lesser-included offense of vehicular eluding.

People v. Avila, 944 P.2d 673 (Colo. App. 1997). Under strict elements test, reckless vehicular homicide is not a lesser-included offense of vehicular eluding; the "results in death" portion of the offense is an enhancer for eluding, not an element.

People v. Clary, 950 P.2d 654 (Colo. App. 1997). Defendant claimed a reckless driving conviction merged into convictions for vehicular assault and vehicular homicide under §18-1-408(5)(c) (i.e., offenses that differ only in degree of injury or culpability). COA held those offenses involve harm to different persons, property, and public interests, and there is no merger.

VIOLATION BAIL BONDS: §16-4-101, ET SEQ.

People v. Donald, 2020 CO 24. Inference stacking is one factor that a court may consider in determining whether the evidence presented satisfied the prevailing substantial evidence test for evidence sufficiency. Here: evidence was sufficient to support a finding that defendant had actual knowledge of the bond condition prohibiting him from leaving state without permission, and thus supported conviction for violation of bail bond; bondsperson testified that she filled out and signed defendant's appearance bond, that her employer posted bond on defendant's behalf, that defendant would have signed paperwork with deputies at jail, and that a person would be released without signing paperwork only on accident by jail, State introduced a copy of defendant's signed bond paperwork, paperwork was only one page long with the condition about not leaving state under bolded text stating "Additional Conditions," and defense counsel conceded that defendant signed paperwork.

People v. Serra, 2015 COA 130. Legislature's intent in enacting violation of bail bonds conditions and violation of a protection order was to proscribe conduct that would endanger witnesses or victims. *Here:* sufficient evidence supported defendant's convictions for violation of bail bonds conditions/violation of a protective order where victim testified that defendant situated himself mere feet away, stared at her for 10-15 seconds and smirked at her.

People v. Rickman, 178 P.3d 1202 (Colo. 2008). Where bond condition barring defendant from possessing weapons was neither mandated by statute nor imposed by trial court, and because trial court could not delegate the discretion to impose such a condition to pretrial services, the pretrial services program exceeded its statutory authority by imposing such a condition. Because §16-4-103(2)(c) prohibited defendant from committing a felony while at liberty on bail bond, pretrial services program did not exceed its statutory authority by including that prohibition as a condition of defendant's bond.

VIOLATION OF A RESTRAINING/CUSTODY ORDER: §18-6-803.5, §18-3-304

People v. Yoder, 2016 COA 50. Defendant argued that district court lacked statutory authority to impose conditions in a mandatory protection order prohibiting him from possessing or using drugs or driving without a valid driver's license. COA disagreed, and interpreted language of §18-1-1001 to allow for such conditions: (1) first two sentences of §18-1-1001(3) provide broad authority for trial courts to modify protection orders and apply generally to every MPO issued in a Title 18 case; and (2) specific conditions pertaining to DV cases and certain Victims' Rights Act cases are referenced in subsection (3), not as a restriction of the broad authority of the trial court, but rather to set out what conditions are subject to special procedural requirements of §18-1-1001(5) and (6).

People v. Sterns, 2013 COA 66. Dismissal of some charges, in the context of a plea of guilty to others, is not the dismissal of a "case" or "final disposition of the action" under §18-1-1001(b). *Here:* when trial court dismissed the charge involving defendant's daughter pursuant to his plea, it did not dispose of the action against defendant and it maintained authority to include defendant's daughter in mandatory protection order.

People v. Scialabba, 55 P.3d 207 (Colo. App. 2002). There was no direct evidence that defendant knew about the restraining order when he wrote a letter to the victim. However, defendant's subsequent attempt to conceal his contact with victim provided proof of his knowledge sufficient to support a conviction for violation of a restraining order.

People v. Coleby, 34 P.3d 422 (Colo. 2001). Culpable mental state of "knowingly" applies to all elements of violation of a restraining order, under §18-6-803.5; this includes the conduct elements, as well as the element of notice.

People v. Sorrendino, 37 P.3d 501 (Colo. App. 2001). An award of "temporary care and control" to one parent is a "custody order" within the meaning of §18-3-304(2), defining the offense of violation of a custody order.

WILLFUL DESTRUCTION/POSSESSION WILDLIFE: §33-6-111, ET SEQ.

People in the Interest of M.C., 2012 COA 64. Willful destruction of wildlife statute describes 3 independent ways of committing willful destruction of wildlife. The statute is not unconstitutionally vague as a person of common intelligence has sufficient notice that subsection (II) could apply to his or her abandonment of wildlife taken by another person. Plain language of statute does not require engaging in an additional act before abandonment of the animal. One does not have to have been the initial taker of wildlife to abandon that wildlife and violate the statute.

People v. Gordon, 160 P.3d 284 (Colo. App. 2007). The "except as otherwise provided" phrases in Willful Destruction of Wildlife and Illegal Possession of Wildlife statutes do not include hunting licenses; a valid hunting license, in and of itself, does not authorize a person to take and abandon or unlawfully possess wildlife; when a person fails to tag wildlife in violation of §33-6-111(3) or wastes edible game wildlife in violation of §33-6-119(2), a hunting license does not authorize possession of the wildlife.

People v. Lawrence, 55 P.3d 155 (Colo. App. 2001), abrogated by, Crawford v. Washington, 541 U.S. 36 (2004). Willful destruction of wildlife sets forth two distinct but related offenses: (1) to kill any wildlife with the specific intent to take only certain enumerated body parts and then to abandon the remainder of the carcass (a specific intent crime); and (2) to knowingly kill and abandon any wildlife (a general intent crime).

WITNESS TAMPERING, BRIBERY, INTIMIDATION & RETALIATION: §18-8-703, ET SEQ.

People v. Brooks, 2017 COA 80, aff'd other grounds, 2019 CO 75M. Evidence of tampering with a witness is sufficient even though witness did not receive the communication because the concept of attempt is built into the statute. *Here*: crime was complete when defendant wrote the tampering letters, concealed them from jail staff, and asked another inmate to deliver them to the victim.

People v. Johnson, 2017 COA 11. Retaliation against a victim/witness, §18-8-706, may only be committed against victims/witnesses in criminal cases, not civil ones.

People v. Nozolino, 2014 COA 95. Witness tampering statute was enacted to address possible interference with and barriers to the administration of justice; purpose of statute is to criminalize conduct that threatens the veracity and cooperation of witnesses to an official proceeding or otherwise subverts the administration of justice." Coercion is not an element of witness tampering. Witness tampering statute is not unconstitutional, as applied to defendant's actions, and does not violate First Amendment, because, unlike "public leafleting and commentary," which have been identified as "classic forms of speech," defendant's "actions were not directed to the general public, did not occur in a public forum, and did not address issues of general public concern. Rather, his pre-printed statement was targeted at specific individuals, distributed privately, and concerned matters of self-interest. The pre-printed statement informing "the witnesses that if compelled to testify 'you have a constitutional right to not answer any (or all) questions posed to you' and that the witness could withhold

testimony by 'stat[ing] that you wish to exert your constitutional rights to remain silent and not incriminate yourself by not answering the question," could not be interpreted as "lawful persuasion," because "nothing in the record suggests [the witnesses] had a personal privilege not to testify if under valid subpoena." The statute creating the offense of disrupting a lawful assembly "is aimed at punishing 'actual disruption' and imports a conduct component by requiring that a defendant 'significantly' disrupt a meeting or assembly. . . . Thus, the offense of disrupting a lawful assembly requires conduct that effectively impairs, interferes with, or obstructs a meeting in a 'consequential, significant or considerable manner.'"

People v. McIntier, 134 P.3d 467 (Colo. App. 2005). Inmate serving time for drug offense was charged with retaliation against a witness when inmate sent letter to DA describing a graphic "fantasy" about committing violent acts against a prosecution witness and her family. Language in the letter was sufficient to constitute a "threat" because it stated that the inmate might choose to act on the fantasy, and the inmate sent the letter to the district attorney, causing him apprehension and concern. Threat was sufficiently "directed to" the witness because the threat must only be "made against" the witness and need not be directly communicated to or received by the witness. Evidence was sufficient to prove that the inmate's conscious objective was to threaten the witness with specific intent to retaliate; trial court properly found the inmate's testimony incredible that the letter was an attempt to stay in prison and not be paroled.

People v. Cunefare, 102 P.3d 302 (Colo. 2004). Evidence of tampering with a witness, §18-8-707(1)(a), was sufficient where defendant asked victim to send a letter to DA recanting her DV allegations, and when she refused, he sent a letter forged with victim's signature asking DA to drop the charges; victim was not subject to legal process, and she had not given a sworn statement. This section of statute does not require that victim/witness be legally summoned to an official proceeding. Nor does it require that defendant interfere with "actual" testimony, such as a sworn statement; defendant's attempt to induce victim to recant or withhold truthful prospective testimony met statutory requirements.

People v. Yascavage, 101 P.3d 1090 (Colo. 2004). When the prosecution charges the defendant with a violation of §18-8-707(1)(b), it must present evidence that the witness/victim was "legally summoned." Evidence of a legal summons means evidence that there was "some action taken by the official tribunal that obligated the witness to appear at an official proceeding." *Here:* while in custody awaiting trial on harassment-stalking charges, defendant telephoned a friend and said the charges would be dismissed if someone "got to" the victim and she failed to show up for court; victim testified at trial. Evidence of tampering with a witness/victim was insufficient because no evidence victim was legally summoned.

People v. Rester, 36 P.3d 98 (Colo. App. 2001). Trial court properly gave an instruction defining the term "unlawfully" within the meaning of the crime of intimidating a victim even though COLJI 25:16 does not employ such a definition. Statute requires only that the person being intimidated be a victim of a crime; it is not required that the crime result in conviction.

People v. Hickman, 988 P.2d 628 (Colo. 1999). Retaliation against a witness/victim, as prohibited by §18-8-706, even without the word "intentionally," requires a conscious objective to act in a retributive or retaliatory fashion, and therefore it is not unconstitutionally vague. When the term "threat" is properly limited to threats against a person protected by the statute for retributive or retaliatory purposes, neither is the proscription against threats unconstitutionally overbroad. But the term "act of harassment," which is synonymous with "vex," "trouble," or "annoy," includes a substantial amount of protected communications; and therefore it is unconstitutionally overbroad and must be stricken from the statute.

WIRETAPPING & EAVESDROPPING: §18-9-301, ET SEQ.

People v. Richardson, 2014 COA 50. So long as one party to a telephone conversation agrees to interception and/or recording of the conversation, the interception does not violate wiretapping/eavesdropping statutes. Parental presence is not required before a minor, who is not in custody, may validly consent to the interception/recording of a telephone conversation.

People v. Baez-Lopez, 2014 CO 26; People v. Cantu-Bojorquez, 2014 CO 26; People v. Soto-Lopez, 2014 CO 26. §16-15-102(8)(a) requires that wiretap recordings shall be made available to the judge issuing the order and sealed under his directions; provision does not require that the records be delivered to the court or sealed in judge's presence, nor is judge required to place an official seal on the recordings; statute requires law enforcement to employ whatever access-prevention measures judge directs. There is no statutory requirement that judge's sealing directions be in written form. Record must contain evidence of judge's sealing directions; absent a written order, prosecution may introduce other evidence to establish content of the judge's directions, including affidavits and/or testimony from persons with knowledge of that information. *Here:* uncontroverted testimony from prosecutor and case agent demonstrated that the recordings were sealed pursuant to judge's oral directions; requirements of §16-15-102(8)(a) were met.

People v. Gallegos, 251 P.3d 1056 (Colo. 2011). Because the suppression of evidence is governed foremost by constitutional principles, the proper inquiry in a motion to suppress wiretap evidence is not whether a magistrate should have recused himself under rules of judicial conduct, but whether the magistrate manifested the neutrality and detachment demanded by the Fourth Amendment. If a warrant/wiretap application is supported by probable cause, evidence should not be suppressed without proof of actual bias by the issuing magistrate. Actual bias is more than an appearance of impropriety; it is an actual conflict so substantial that the magistrate cannot be considered neutral and detached. Suppression because of alleged violations of wiretap statute is not warranted unless alleged violations are so substantial as to undermine the purpose of the statute or prejudice the defendant.

People v. Lee, 93 P.3d 544 (Colo. App. 2003). Under federal wiretap statutes, defendant's telephone conversations are admissible at trial because he has no reasonable expectation of privacy in jail, especially if he receives notice of the wiretapping.

People v. Shepard, 983 P.2d 1 (Colo. 1999). Using a hatchet, defendant cut the phone line while his daughter was trying to call 911. Wiretapping statute is not overbroad; its reach into this situation is not real and substantial, compared to the wide range of easily identifiable conduct that legislature can properly proscribe - such as clandestine phone tapping and preventing others from reporting crimes. A parent's right to discipline a child is not inviolate; it is subject to regulation and restriction; the logical and natural operation of this statute is not likely to infringe on constitutionally protected rights to familial privacy.

People v. Richardson, 983 P.2d 5 (Colo. 1999). This case follows *Shepard*, adding that the wiretapping statute does not violate equal protection. Recognizing that cordless phone communications can be intercepted easily, even inadvertently, court found that wiretapping of a corded phone is more serious than wiretapping of a cordless phone.

MISCELLANEOUS OFFENSES

People v. In the Interest of A.B., 2016 COA 170. Denver Municipal ordinance of disturbing the peace does not require the disturbance of others under subsection 38-89(b), distinguishing *Flores v. City & County of Denver*, 220 P.2d 373 (Colo. 1950)(requiring that "others in the vicinity [be] disturbed" to violate the disturbing the peace ordinance).

People v. Madison, 176 P.3d 793 (Colo. App. 2007). Where defendant and his father had both executed a statutory power of attorney that granted defendant the power to act in matters concerning "personal and family maintenance" and defendant was living in father's house, taking care of father's property, and was providing care to his father, defendant had assumed the legal duty of caring for his father, maintaining father's standard of living, and providing appropriate custodial care for him.