CSE Case Law Update
July 1-3, 2010

STATE SUPREME COURTS

Gore v. State, 37 So. 3d 1178 (Miss. July 1, 2010).

- ER 403, 404(b) – balancing probative value and prejudicial effect
- Excluding defense witness under ER 608(b)

The defendant was convicted of molesting his 21-month-old granddaughter. On appeal, he challenged the trial court's decision to admit under ER 404(b) evidence of him molesting his daughter seven years prior, and forcing his daughter and son to be naked around him when they were younger. The evidence was admitted to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absences of mistake and accident. The defendant argued undue prejudice required exclusion of the evidence. The court held that the trial court did not abuse its discretion in determining that the probative value was not "substantially outweighed by the prejudicial effect" when the evidence demonstrated the defendant's "pedophilic sexual activities with young and developing females" and the past incidents bore a "substantial resemblance" to each other and the present offense. The defendant also argued that the trial court erred by excluding under ER 608(b) testimony from the defendant's former girlfriend who would testify that she never saw the defendant act inappropriately with his daughter. The court ruled, and state conceded, that the trial court erred in concluding ER 608(b) barred the witness from testifying because the witness went beyond solely impeaching the daughter's character for truthfulness on an extrinsic matter, as contemplated by ER 608(b), and instead went to her memory of specific acts of the defendant. Regardless, the court held that error was harmless as the proffered testimony was not inconsistent with the daughter, who said that the former girlfriend was either asleep or not present when the abuse occurred. Thus, the error did not merit reversal.

Schoenwetter v. State, 35 Fla. L. Weekly Supp. 409 (Fla. July 1, 2010).

- Ineffective assistance of counsel

The court considered multiple claims raised by the defendant when a judge sentenced him to death for killing his friend's father and daughter, and attempting to kill the mother, after the defendant was caught trying to rape the daughter. The court found that his counsel was not deficient for failing to object to the admission in the penalty phase of his spontaneous pretrial statements that he wanted to change his plea to guilty. The court held that the statements were not protected as plea negotiations as there was no expectation to negotiate a plea at the time of the statements. The court also held that his counsel was not required to provide him his Miranda warnings during the statements

despite him being in custody, and his attorneys' strategic decisions during the penalty phase regarding which witnesses and mitigation evidence to present did not rise to ineffective assistance of counsel.

COURTS OF APPEAL

Dickerson v. State, 697 S.E.2d 874 (Ga. Ct. App. July 1, 2010).

- Joinder and severance of charges
- Sufficiency of the evidence – possession element
- Merger of counts for sentencing

The court considered whether severance was required where the defendant was charged under one indictment with multiple counts of aggravated child molestation and aggravated sexual battery for molesting his daughter, and in another indictment with sexual exploitation of children for possessing pornographic images of children, including his daughter. Because some evidence was common to both indictments – possessing pornographic pictures of his daughter helped prove the defendant committed the molestation – and because the evidence in the two indictments was not particularly complicated, the court ruled that the trial court was within its discretion to deny severance. The court also held that there was sufficient evidence of possession where the defendant's wife testified she discovered the CD containing the pornographic images in the couple's house, the CD had the defendant's fingerprint on it, and the state proffered evidence from a computer technician that someone must have deliberately copied the images onto the CD. Lastly, the court held, and the state conceded, that for sentencing purposes the counts of molestation and battery merged where they were based on the same conduct.

Gray v. State, No. SD29810, 2010 Mo. App. LEXIS 938 (Mo. Ct. App. July 6, 2010).

- Ineffective assistance of counsel

The defendant was convicted of sexual exploitation of a child and multiple counts of sodomy and statutory rape. All but the former were reversed in an unrelated appeal. The court now considered whether the defendant's trial counsel was deficient for not moving to sever the charges, and for advising the defendant to waive his right to a jury trial. The defendant argued that DNA evidence that was admissible in the now-reversed sodomy and rape convictions could have prejudiced him in the sexual exploitation conviction. The court found no indication of prejudice, and noted that the finder of fact was a judge who is presumed to not consider irrelevant evidence. The court found that the charges were properly joined based on their similarity and the defendant was fully apprised of his right to a jury trial and made a voluntary, knowing, and intelligent decision to proceed with a bench trial.

State v. Gonzalez, 2010 Wisc. App. LEXIS 509 (Wisc. Ct. App. July 7, 2010).

- Jury instructions – exposing harmful material to a child – knowledge requirement
- Jury instructions – exposing harmful material to a child – accident defense
- Excluding defense witness – sex offender profile evidence (*Richard A.P.* evidence)
- Corroboration rule (corpus delicti)

The defendant was convicted of exposing harmful material to a child after viewing a pornographic video and masturbating while his three-year-old daughter watched. The court considered whether a knowledge requirement needed to be written into part of the jury instructions, so they would read that the defendant "*knowingly* exhibited or played harmful material to a child." The court held that the additional term was unnecessary because the instruction already included playing material *to* a child, which is an affirmative action that inherently requires knowledge the child is present. The court also considered whether the trial court erred by neglecting to give the requested defense instruction that would explain if the material was not knowingly played, it was an accident and constituted a defense. The court again held that knowledge was already an element of the crime, and thus the accident defense was adequately explained in the instructions. The court noted the additional statutory requirement that the defendant have face-to-face contact with the child before or during the viewing further supported its holding. The defendant also argued that the trial court abused its discretion in excluding testimony from a defense psychologist of the defendant's psychological profile, which did not reveal evidence of a sexual disorder. The court ruled that the testimony was irrelevant to the crime of exposing harmful material to a child – where the defendant's sexual interest in children was not at issue – and the witness would only serve to confuse the jury. Lastly, the defendant claimed his confession was the *only* evidence tying him to the crime, and thus was inadmissible under the corroboration rule. The court, however, recognized that Wisconsin law only requires corroboration of a significant fact in the confession, not all aspects of the confession as required in many other states, and the defendant's possession of the pornographic video satisfied that burden.

UNPUBLISHED

Benner v. State, 2010 Tex. App. LEXIS 5348 (Tex. Crim. App. July 7, 2010).

- Search and seizure – Plain view doctrine

The defendant challenged the warrantless seizure of child pornography found in his apartment by two officers who were arresting the defendant on a warrant. One officer had testified that he observed a photograph hanging out of a folder in plain view which displayed a child's genitals. Both officers also saw a pair of child's underwear and a photograph of a clothed young boy in the apartment, and knew the defendant had a history that included possession of child pornography. Despite the trial court's finding

that it did not believe the officer's testimony that the picture in plain view displayed actual genitals, the court nonetheless found that the officer could see "nude body parts of what appeared to be a child." The trial court found, and appellate court agreed, that this, in conjunction with the other evidence in the apartment and the officers' knowledge of the defendant's history, was sufficient to provide probable cause that the defendant was in possession of child pornography. Because the officers had a legitimate right to be in the defendant's apartment and the evidence was in plain sight, no warrant was required.

CSE Case Law Update
July 4-10, 2010

COURTS OF APPEAL

Eubanks v. State, 2010 Tex. App. LEXIS 5399 (Tex. Crim. App. July 8, 2010).

- Sufficiency of the evidence
- Double jeopardy – producing and possessing child pornography

The defendant was convicted of two counts of indecency with a child, sexual performance of a child (producing child pornography), possession of child pornography, and aggravated sexual assault, for molesting and taking pictures of his seven year-old twin granddaughters. The defendant raised many challenges, including that his pictures of the girls, which showed their exposed chests, did not depict "breasts" as contemplated by Texas law, as the seven year-olds' breasts were undeveloped. The court found that the relevant Texas penal code definition provided that "any portion of the female breast below the top of the areola" qualified under the statute, and thus it was immaterial whether the subject was fully developed. The defendant also contended that double jeopardy prevented him from being punished for both producing and possessing pornographic pictures of his granddaughters, as possession was a lesser-included of production. The court found otherwise, and held that each statute required proof of a fact that the other did not: proving production did not require possession and proving possession did not require any production.

People v. Bell, 932 N.E.2d 625 (Ill. App. Ct. July 9, 2010).

- Search and seizure – authority to consent

The defendant, convicted of possession of child pornography, challenged the warrantless search of his computer where his ex-girlfriend gave consent to search. The court considered whether the girlfriend had actual authority to consent, which stems not from the laws of property ownership but from mutual use of the property. The computer was located in the defendant's home and he had broken up with his girlfriend the day of the search. Prior to the girlfriend providing consent, the defendant had stacked all of her belongings in the front entryway, but she had not yet moved out of the residence and she

still had access to the home, including the computer. As a result, the court found the girlfriend had actual authority to consent and the search was held valid.

UNPUBLISHED

People v. Hayes, 2010 Cal. App. Unpub. LEXIS 5391 (Cal. Ct. App. July 9, 2010).

- Jury instructions – committing a lewd act upon a child – location touched

The defendant was convicted of committing a lewd act upon a child, and argued that the jury was improperly instructed that the "touching need not be done in a lewd or sexual manner." The jury was instructed that the act must be committed "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of the defendant. The court recognized prior precedent that any touching of an underage child is "lewd and lascivious" when it is committed for the purpose of sexual arousal, regardless of whether the touching was on bare skin or "private parts" of the victim. Accordingly, the court held that the jury need not be instructed on where on the victim's body the touching must occur.

State v. Doecks, 2010 N.J. Super. Unpub. LEXIS 1543 (N.J. Super. Ct. App. Div. July 13, 2010).

- Search and seizure – voluntary consent

The court considered whether the defendant's consent for police to search the trunk of his vehicle was voluntary when he initially declined and was told that if he did not consent, the police would simply obtain a search warrant, delaying the process. The court held that such information was not coercive, but instead provided the defendant with truthful and relevant information for him to make a knowing and voluntary decision on whether to consent to the search or maintain his refusal.

CSE Case Law Update
July 11-17, 2010

STATE SUPREME COURTS

State v. Magallanez, 235 P.3d 460 (Kan. July 16, 2010).

- Prosecutorial misconduct
- Jury instructions – 404(b) "shotgun" limiting instruction
- Rape shield – victim's prior sex acts used as impeachment
- Cumulative error

The court found multiple points of error in the defendant's numerous convictions arising from three child sexual abuse cases tried together. The court found that the prosecutor had committed misconduct during closing argument by commenting on the credibility of the child victims by claiming that "you trust children until you have a reason not to. We assume that. We assume we have taught them correctly." The court found this comment did not relate to the evidence while it improperly served to bolster the credibility of the child victims. The prosecutor also committed misconduct by diluting his burden of proof by stating "[i]t's a standard that when you believe he's guilty you've passed beyond a reasonable doubt." Belief alone, the court held, does not necessarily equate to proof beyond a reasonable doubt. The court also found it was error for the trial court to provide the jury with a 404(b) "shotgun" instruction, which allowed it to consider the evidence for all of the 404(b) avenues – motive, opportunity, intent, preparation, plan, knowledge, or identity – when the evidence was only admitted to show plan, knowledge, and preparation. In addition, the court also found it was error for the trial court to not admit the full contents of a letter written by one victim to the defendant in which she disclosed that she had lied to him about being a virgin because she did not want him to know the truth. The court found that the letter was not protected by the rape shield because it went to the victim's credibility and whether she lied about a sexual encounter, as the defendant claimed occurred in the present case. Lastly, the court found that all of the aforementioned errors, while not necessarily requiring reversal when viewed in isolation, constituted cumulative error and required reversal of all of the defendant's convictions.

UNPUBLISHED

Scott v. State, 2010 Ind. App. Unpub. LEXIS 980 (Ind. Ct. App. July 16, 2010).

- Sentencing – balancing mitigating and aggravating factors for enhancement

The defendant pleaded guilty to child molestation, a class A felony carrying an "advisory" – but not "presumptive" post-*Blakely* – sentence of 30 years. The lower court imposed a sentence of 40 years, based on following judicially-determined factors: criminal history, recent parole violation, and defendant needing rehabilitative treatment that can be best provided by a penal facility. On appeal, the defendant challenged the latter circumstance, as well as the fact that the judge did not find a mitigating factor based on him accepting responsibility for the offense by pleading guilty. The court stated that the lower court did not provide a specific or individualized reason why the defendant required correctional treatment in excess of the presumptive term as required, and thus abused its discretion. The court also noted the lower court should have assigned some weight to the mitigating circumstance that the defendant pleaded guilty and expressed some remorse; however this factor was partially vitiated by the fact the defendant pled on the day of trial and blamed the offense on drugs and alcohol. The court then rebalanced the appropriate factors and found that the 40-year sentence was still warranted.

July 18-24, 2010

STATE SUPREME COURTS

State v. Sandberg, 235 P.3d 476 (Kan. July 23, 2010).

- Due process – rule of lenity – identical offense sentencing doctrine

The court considered whether the defendant, convicted of soliciting a child under 14 to commit an unlawful sex act, should be sentenced to the lesser punishment associated with the same offense for child victims under 16, based on the identical offense sentencing doctrine. This doctrine provides that if two offenses have identical elements but different penalty provisions, a defendant convicted of either crime may only be sentenced under the lesser penalty provision. The defendant argued that because the age ranges in the varying degrees of the offense overlap, the doctrine should apply. The court declined to extend the doctrine to situations involving different degrees of the same offense, recognizing that the statutes' penalties and applicability were clear, and the prosecutor cannot be forced to charge the lesser degree offense simply because the defendant committed both offenses.

People v. Hill, 486 Mich. 658 (Mich. July 23, 2010).

- Statutory construction – burning a CD as "making" material

The defendant was convicted of "producing or making child sexually abusive material" for burning thousands of copies of child pornography to compact discs. The Michigan legislature had created different tiers for offenses related to child sexually abusive material under MCL 750.145c – making or producing the material was subject to 20 years in prison, while possessing such material was subject to four years. The defendant argued that burning a compact disc with child pornography did not constitute "making" the material as the legislature intended, and only constituted the lesser crime of possession. Consulting a dictionary and "considering the statute as a whole," the court agreed. It held that burning images to a compact disc for personal use did not constitute "making," and the defendant could only be guilty of possession.

COURTS OF APPEAL

Pontius v. State, 930 N.E.2d 1212 (Ind. Ct. App. July 20, 2010).

- Double jeopardy
- Ineffective assistance of counsel

The defendant was convicted of five counts of possession of child pornography. Two of the counts stemmed from possession of the same video, stored on separate computers, and the defendant raised a double jeopardy challenge. The could held that a single image

of child pornography, downloaded at separate times and deliberately stored on separate computers at separate residences, constituted two separate crimes and did not violate double jeopardy. The relevant Indiana statute criminalized possession of the images in the singular (i.e., "a picture"), and the court noted that "the more images circulated of a child, the more that child is exploited" and the more profitable the child pornography industry becomes. The defendant also raised ineffective assistance of counsel, based on the representation that his trial counsel did not view the videos in question. The court found no prejudice, as the defendant failed to show how his attorney could have been more effective having seen the video.

Ohio v. Gould, 2010 Ohio 3437 (Ohio Ct. App. July 23, 2010)

- Search and seizure – abandonment of property

The court considered whether the warrantless search of the defendant's hard drive was constitutional based on the detective's testimony that he believed the hard drive to be abandoned. The detective testified that the defendant's mother surrendered the hard drive suspecting it contained child pornography, and the mother claimed that the defendant was missing and had abandoned it. The mother testified that in actuality she had only obtained the hard drive from her son's residence two weeks before she handed it to police, and her son never expressed his intent to abandon the property. The court held that abandonment is not to be presumed, and the detective could have made more attempts to determine the hard drive was indeed abandoned, or could have obtained a search warrant. The court also rejected the claim that since the mother took the property, the prohibitions against governmental searches in the Fourth Amendment were not implicated. The court claimed that only the police examined the hard drive, not the mother, and that is when the unconstitutional search occurred.

UNPUBLISHED

State v. Pait, 2010 N.C. App. LEXIS 1283 (N.C. Ct. App. July 20, 2010).

- Cruel and unusual punishment – "Satellite based monitoring"

The court discussed the constitutionality of the state's "satellite based monitoring" requirement that may attach after if a defendant is required to register for a sex offense. The court stated that it had previously found the monitoring scheme to be civil and regulatory, not criminal, and as a result it did not violate the Eighth Amendment (as applied through the Fourteenth Amendment). The defendant raised several other constitutional arguments regarding the monitoring scheme, but none were properly preserved and thus none were considered.

State v. Intersimone, 2010 N.J. Super. Unpub. LEXIS 1673 (N.J. Super. Ct. App. Div. July 21, 2010).

- Sentence calculation – out of state statute comparability – "disseminating indecent material to minors" and luring

The defendant attempted sexual assault and attempted luring, and raised five issues on appeal, four of which were dismissed by the court without substantive discussion. The court did consider whether the defendant's sentence and parole ineligibility period were improperly calculated. The court found, without substantive analysis, that the defendant's prior conviction of disseminating indecent material to minors in New York bears a "substantial resemblance" to New Jersey's luring statute, and thus properly supported the increased parole requirement. The court also found that the trial judge's findings for aggravated factors were supported by the record.

CSE Case Law Update
July 25-31, 2010

STATE SUPREME COURTS

People v. Flick, 2010 Mich. LEXIS 1630 (Mich. July 27, 2010).

- Possession – actual and constructive

In a consolidated appeal, the defendants had been convicted of knowingly possessing child sexually abusive material for viewing child pornography. When their computers were searched, the only child pornography retrieved had been stored in temporary internet files used for storing images while browsing, and not downloaded elsewhere on the hard drive. The defendants argued "possession" is not satisfied by merely viewing images of child pornography online. The court held that the term "possess" as used in the statute includes both actual and constructive possession. The court found that, by intentionally accessing and viewing the depictions, each defendant knowingly had the power and intention to exercise dominion and control over that depiction, and thus had constructive possession.

State v. Nadeau, 1 A.3d 445 (Me. July 29, 2010).

- Search and seizure – Consent
- Search and seizure – Inevitable discovery
- M.R. Crim. P. 41(d) – Requirement to return warrant and file inventory – Remedy
- Miranda warnings – Custody analysis

The defendant challenged the warrantless search and seizure of his computer and flash drive. An audio recording of the interaction between the police and defendant revealed that the defendant voluntarily relinquished the flash drive, but never consented to the

actual computer being taken. The court held that consent provided a basis for the seizure of the flash drive, and the consent extended to the search of the flash drive, as it was nearly certain it would be searched. The court held that the initial search and seizure of the defendant's computer was unlawful based on a lack of consent, but it applied the inevitable discovery exception because (a) the computer could have been lawfully seized with a search warrant based on information independent of the flash drive, (b) a search warrant for the computer was inevitable, and in fact one was sought by the police after the seizure, and (c) applying the inevitable discovery would neither provide an incentive for police misconduct nor significantly weaken Fourth Amendment protections. Also, M.R. Crim. P. 41(d) requires that warrants be executed, returned, and filed within 10 days of issuance. The court considered the remedy for a clear violation of that rule – the computer was not searched and warrant not returned for six months after issuance. The court noted the complexity and length of time required for a forensic examination of a computer, and the court found that law enforcement's actions did not constitute "persistent official disregard" and the delay resulted in no prejudice. As such, the court found it was a "ministerial violation" and declined to apply the exclusionary rule. Lastly, the defendant argued that he was "in custody" for the purposes of requiring *Miranda* warnings when the police first contacted him and obtained admissions. Using an objective person standard and analyzing the totality of the circumstances, the court found that a reasonable person would not feel he was "in custody" where the police first asked permission to enter the defendant's residence, repeatedly instructed him he was neither under arrest nor going to jail, and the interview was short and non-confrontational.

COURTS OF APPEAL

State v. Nero, 122 Conn. App. 763 (Conn. App. Ct. July 27 2010).

- Sufficiency of the evidence
- Entrapment

The defendant was convicted of attempted sexual assault, attempt to commit risk of injury to a child, and attempt to entice a minor by computer to engage in sexual activity, for attempting to lure a purported 15-year-old girl over the internet, played by a police detective, to have sexual relations with him at a prearranged meeting place. The defendant challenged the sufficiency of the evidence, arguing that the girl at one time (jokingly) indicated she was 18, the picture sent to him was of a girl who was (in actuality) 17, and he did not arrive at the meeting place with a condom. The court found that a reasonable interpretation of the evidence supported the conviction, as the defendant's own words indicated his belief that the girl was 15 and his intent to have sexual relations. The court also held that engaging in conversations displaying an intent to meet with and have sexual relations with a 15 year-old, and then driving to a pre-arranged location, constitutes a substantial step towards sexual assault. The defendant also claimed that the prosecution failed to disprove his entrapment defense beyond a reasonable doubt. The court, applying its state's subjective standard for entrapment, found that the defendant possessed the requisite predisposition when he had initiated

contact with the screen name "xocheerleaderxo," had immediate apprehension about getting into trouble with the police once he learned she was 15, had pushed the conversation to sex on several occasions, and had tried to arrange to meet her from the beginning.

State v. Norris, 236 P.3d 225 (Wash. Ct. App. July 27, 2010).

- Discovery obligations – Adam Walsh Act and the supremacy clause

The defendant appealed the trial court's denial of his pretrial motion to dismiss 13 felony charges relating to sexual offenses against minors. At issue was whether the State was obligated to make copies of child pornography evidence for the defense. The court considered whether § 3509(m) of the Adam Walsh Act, as applied through the supremacy clause, prohibited the State from making copies for the defense of the child pornography at issue, which was otherwise required by a state court rule. The court noted that its analysis begins with the assumption that Congress did not intend to displace state law absent clear and manifest congressional intent to do so. Having found none, the court held that the Adam Walsh Act does not preempt state court rules of discovery in state criminal proceedings, and the State was thus required to make copies for the defense. The State also argued that it no longer had possession of the evidence – that it was currently in the possession of the federal government – but the court summarily dismissed this argument as the State had maintained actual possession of the evidence at several times.

State v. Hess, 2010 Ohio 3692 (Ohio Ct. App. July 29, 2010).

- Hearsay – prior consistent statement – harmless error
- Sufficiency of the evidence – dissemination of material harmful to juveniles

The defendant was convicted of gross sexual imposition and dissemination of material harmful to juveniles. The defendant argued that the trial court erred in allowing the State to introduce statements made by the victim as prior consistent statements. The victim's mother testified that her child told her that he and the defendant had watched a movie and the defendant had touched him inappropriately. Because the testimony was hearsay and not offered to rebut a charge of recent fabrication, it was error for the trial court to admit it. However, the court found that the error was harmless, as the defendant himself had admitted to allowing the child to engage in sexual contact with him, and provided a similar description in his custodial interview. The defendant also challenged the sufficiency of the evidence for the dissemination of material harmful to a juvenile conviction, on the basis that the material at issue – a pornographic movie – was never provided to the jury. Instead, two witnesses described portions of the video. The court held that testimonial descriptions of the movie were sufficient, and it need not be actually presented to the jury.

State v. Dec, 2010 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. July 30, 2010).

- Merger of offenses

The defendant pleaded guilty to 41 counts of sexual exploitation of a minor for possessing thousands of pictures of child pornography. The defendant argued that the counts should have merged into one, as the statute provided for stiffer penalties for those with more than 50 or more than 100 photos. The court, looking to the language of the statute at issue, noted that the legislature provided that a person "may" be charged in a single count to enhance the class of felony. Thus, with the legislature's language being discretionary, the court held that the prosecution was not required to charge the defendant under a single count.

UNPUBLISHED

State v. Voeller, 2010 Wisc. App. LEXIS 594 (Wisc. Ct. App. July 28, 2010)

- Other bad acts evidence (ER 404(b)) – essential element of crime

The State appealed a pretrial order denying its request to introduce other acts evidence against the defendant, who was charged with stalking. The proffered evidence consisted of testimony from the victim's daughters that the defendant had tried to sexually assault them. The court noted that to prove stalking the State must show that the defendant's conduct would have caused a reasonable person in the victim's position to suffer serious emotional distress or fear of bodily injury. Because the prior bad acts went directly to that essential element – the victim's state of mind – the court held that the evidence was relevant and admissible for that limited purpose. The court held that the prior bad acts were admissible whether true or false, so long as they could cause the victim to reasonably fear bodily harm to herself or her daughters when the defendant began stalking her.

State v. Fink, 2010 Del. Super. LEXIS 320 (Del. Super. Ct. July 30, 2010).

- Failure to raise objections in guilty plea
- *Brady* requirements – duty of State to advise defendant of adverse case law
- Double jeopardy

The defendant pleaded guilty to unlawfully dealing in child pornography and subsequently challenged his conviction, arguing a *Brady* violation and double jeopardy. The court held that the arguments were barred because the defendant failed to raise them prior to his guilty plea, and he could not show a colorable constitutional error that resulted in a miscarriage of justice. The defendant argued that the State did not disclose to him a potentially adverse case, which is analogous to a *Brady* violation. The court

disagreed with the analogy, citing that there is no authority holding that a published opinion can constitute "evidence" within the meaning of *Brady*, and the court found that the defendant had equal access to the case regardless. The defendant also raised a double jeopardy claim, arguing that the plea was invalid because his single act could have resulted in a finding of guilt under two separate statutes. The court quickly dismissed the argument, as it was not properly raised and the defendant was only charged under one of the statutes.

State v. Peterson, 235 P.3d 1267 (Kan. Ct. App. July 30, 2010).

- Due process – Requirement to adhere to terms of plea agreement

The defendant pleaded no contest to one count of attempted sexual exploitation of a child. As a part of the plea, and assuming there were no "factual misstatements" in the presentation, the State agreed to "stand silent, and will not take any position" on the defendant's request for a probation alternative sentence. At sentencing, however, the prosecutor challenged the defense expert's understanding of the facts, and it was discovered that the defendant grossly understated the details of the offense to the expert. The prosecutor then told the judge that the expert's testimony showed the defendant was not being honest and "that should be considered by the [sentencing] court." That court held that the prosecutor was not required to stand silent in the face of factual misstatements and did not violate the plea agreement.